[2023] JMCA Crim 32

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CRIMINAL APPEAL NO COA2021CR00051

LESLIE WALKER v R

Ms Jacqueline Cummings instructed by Archer, Cummings & Company for the applicant

Janek Forbes and Miss Alice-Ann Gabbidon for the Crown

24 January 2023 and 14 July 2023

Criminal Law – Trial by judge alone – Rape- Consent – Sentencing – Discrepancies and inconsistencies – Credibility – Sexual Offences Act, sections 3(1), 6(1) and (2)

BROOKS P

[1] On 10 June 2021, Mr Leslie Walker, a police officer, was convicted of the offence of rape, following a trial before a judge sitting alone ('the learned judge') in the Circuit Court held at Spanish Town in the parish of Saint Catherine. The learned judge sentenced him, on 16 July 2021, to 15 years' imprisonment, with the stipulation that he would not be eligible for parole until he had served 10 years' imprisonment.

[2] Mr Walker sought leave to appeal his conviction and sentence. On 14 January 2022, a single judge of this court refused his application for leave to appeal his conviction and sentence. Mr Walker has renewed his applications before this court.

[3] His renewed application cannot succeed. It mainly turned on issues related to the credibility of the witnesses for the prosecution. An analysis of the learned judge's assessment of the evidence, which was adduced before her, shows that she properly considered the conflicts in the prosecution's case and was satisfied that it met the standard of proof for criminal cases. In those circumstances, an appellate court will not interfere with the conviction.

The background

The case for the Crown

[4] The case for the Crown is that on 2 February 2016, at approximately 6:40 am, the complainant, who was 15 years old at the time and a grade nine student of Bridgeport High School, was standing at a bus stop in Four West in the parish of Saint Catherine, waiting on transportation to go to school. Mr Walker, whom the complainant knew as a friend of her father, drove up and offered to take her to school. She got into the car, but he took her, instead, to his home in Eight West in the same parish. He went inside his home but she remained in the car. He told her to come into the house and she obeyed.

[5] While in the house, she sat on the settee and Mr Walker, wearing only his underwear, came to where she was. They were the only persons in the house. Mr Walker started touching her breast with his hand. She told him to stop. He then took her into a bedroom. She said nothing to him because she was afraid that he might "do something". He put her on the bed, went on top of her and tried to open her legs. She tried closing her legs but, each time she did, he used his foot to open her legs. The complainant said nothing because she was frightened. The complainant testified that at the time Mr Walker was fat and short while she was "mawga" and approximately 5 feet 2 inches.

[6] Mr Walker then started having sex with her, while she was still clad in her school tunic. After he had sex with her and got up, she went to the front door, but it was locked. Mr Walker went to the bathroom, got dressed, opened the door then returned to his car. The complainant also went into the motor vehicle and Mr Walker drove her to school.

[7] On 25 June 2016, she went to the police station with her parents for an unrelated reason. She returned subsequently to make a report. She was then taken to the Spanish Town Hospital to be medically examined and it was discovered that she was pregnant. She then made a report that Mr Walker had impregnated her. He was arrested and charged. A later DNA test determined that he was not the father of her child.

[8] The complainant's mother, SB, testified that after she was informed that the complainant was pregnant, she asked the complainant who had got her pregnant, but the complainant did not say that it was Mr Walker. SB was challenged in cross-examination to say that in her statement to the police, she said that the complainant had told her that it was Mr Walker who had impregnated her. SB, however, insisted that she did not give the police that information.

[9] The complainant's father, RW, deposed that he knew Mr Walker for approximately five to 10 years. During that time, RW, who was a mechanic, would assist Mr Walker when he brought his motor vehicle, monthly or every two months, to the mechanic shop that RW worked. He stated that some of the times that Mr Walker would visit the shop, the complainant would also be present, since, from she was 14 years old she started visiting the mechanic shop to collect her lunch money. He also said he rented Mr Walker a space on the property where he operated the mechanic shop to operate a seafood restaurant. RW testified that he has been to Mr Walker's home before in Eight West, which was a quad.

The case for the defence

[10] Mr Walker denied the incident entirely. He insisted that he did not know the complainant or ever spoke to her and that he had never had sexual intercourse with her. He stated that although he knew RW for five years, he would only see him if he had a mechanical problem with his motor vehicle. Instead, he advanced that on the relevant day, he went to the Jamaica Police Academy Training School Department of Weapon and Tactical Training ('the Police Academy') at Twickenham Park in the parish of Saint Catherine for firearm requalification. He says he arrived at the Police Academy at

approximately 7:30 am to be seated by 7:45 am and the training ended after 4:00 pm. He stated that at one time he lived in an unfinished house in Eight West, however in February 2016 he lived in Waterford.

[11] Corporal Romano Russell, a firearms instructor at the Department of Weapons and Tactical Training at the National Police College of Jamaica, supported Mr Walker's alibi. Corporal Russell said that on the material day, he was one of Mr Walker's coaches. He further stated that training began at 8:00 am and ended at about 4:30 pm but participants should be present by 7:45 am. He could not speak to the time that Mr Walker arrived there that day. He noted, however, that if a participant does not arrive by 7:45 am, they are denied access to the training. He also noted that participants were not allowed to leave during the training.

The grounds of appeal

[12] Ms Jacqueline Cummings, on behalf of Mr Walker, filed four original grounds, however, only three are relevant:

> "(a) The Learned Trial Judge, the Honourable Mrs Justice C Lawrence Beswick erred on the facts and was wrong in law in arriving at her findings that the offence of rape was committed against the [complainant] by [Mr Walker].
>
> (b) The verdict was unreasonable having regard to all evidence.
>
> (c) Failure of the Learned Trial Judge to make any or any sufficient reference to, or comment on the credibility of the complainant, obvious weaknesses, contradictions, and inconsistencies in the case of the prosecution…."

[13] Ms Cummings sought and was granted leave by this court to argue the following supplemental grounds of appeal:

> "(d) The Learned Trial Judge misdirected herself on the evidence and misunderstood the submissions in the case.

(e) The learned Trial Judge relied on matters that [were] not evidence before the court in coming to her verdict and failed to give any consideration or weight to the DNA evidence in the matter."

[14] The issues arising from those grounds are:

i. Whether there was evidence of lack of consent to ground the offence of rape (ground (a))

ii. Whether the learned judge was palpably wrong on the law and facts (grounds (b), (d) and (e));

iii. Whether the learned judge considered credibility, weaknesses, contradictions and inconsistencies (ground (c)).

[15] The role of this court in circumstances such as these is restricted. It is only where the trial judge is shown to be palpably wrong that this court may intervene. Their Lordships of the Privy Council expounded on this principle in **The Queen v Crawford** [2015] UKPC 44. They said in para. 9:

> "There has been no dispute before the Board as to the proper role of an appellate court when reviewing a decision of a trial judge which amounts to a finding of primary fact based upon his assessment of the credibility and reliability of witnesses whom he has seen and heard. It is well established that an appellate court should recognise the very real disadvantage under which it necessarily operates when considering such a finding only on paper. There are many statements of this principle. It is enough to set out the formulation of it by Lord Sumner in *The Hontestroom* [1927] AC 37 at 47-48:
>
> > 'What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the

> appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute…. **It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case**. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. **If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone**. In *The Julia* (1860) 14 Moo PC 210, 235 Lord Kingsdown says: 'They, who require this Board, under such circumstances to reverse a decision of the court below upon a point of this description undertake a task of great and almost insuperable difficulty…. **We must, in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong**.'
>
> …
>
> The advantage enjoyed by the trial judge applies equally to those comparatively rare criminal cases tried by judge alone, with, of course, appropriate consideration being given to the different standard of proof." (Italics as in original, emphasis supplied)

[16] Additionally, in assessing this matter, the court will have regard to the fact that this was a trial by a judge alone. This means that the learned judge's duty is not as rigid as if this had been a case with a jury. It is only relevant that the trial judge identifies the

important issues in the case, with no doubts, before coming to a verdict of guilty. Wit JCCJ, in para. [29] of **Dioncicio Salazar v The Queen** [2019] CCJ 15 (AJ), espoused the duty as follows:

> "Equally, a judge sitting alone and without a jury is under no duty to 'instruct', 'direct' or 'remind' him or herself concerning every legal principle or the handling of evidence. This is in fact language that belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite different (although certainly not similar to those of an inquisitorial or continental bench trial). As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand."

[17] It is in the context of those principles that this court will exercise its duty of review.

Whether there was evidence of lack of consent to ground the offence of rape (ground (a))

The submissions

[18] Ms Cummings argued that although Mr Walker denies that he raped the complainant, the Crown, to prove its case, must demonstrate, beyond a reasonable doubt that he committed the offence. She posited that the complainant did not testify that she did not consent to sexual intercourse with Mr Walker. Learned counsel advanced that the complainant's evidence is that, after it was revealed that she was pregnant, she informed her parents that Mr Walker had had sex with her and impregnated her, not "raped" her. She argued that the complainant's evidence that she closed her legs and Mr Walker repeatedly opened her legs, without more, only inferred an absence of consent and is not sufficient to find that there was, in fact, an absence of consent.

[19] Mr Forbes, on behalf of the Crown, submitted that from the totality of the complainant's evidence, it was clear that the ingredients of rape were made out. He argued that Mr Walker must have known that the complainant did not consent or was

reckless as to whether there was consent. He added that there was no requirement for the complainant to have used the words "rape" or "force" in her evidence.

The analysis

[20] In this analysis, for convenience only, the learned judge's summation filed 8 December 2021, will be referred to below as "the summation", while the evidence, filed 8 April 2022, will be referred to as "the transcript".

[21] Section 3(1) of the Sexual Offences Act ('the Act') defines rape. It states:

> "A man commits the offence of rape if he has sexual intercourse with a woman–
>
> (a) **without the woman's consent**; and
>
> (b) knowing that the woman does not consent to sexual intercourse or recklessly not caring whether the woman consents or not." (Emphasis supplied)

[22] The Act does not define "consent". It does, however, at section 3(2), stipulate what does not constitute consent:

> "For the purposes of subsection (1), consent shall not be treated as existing where the apparent agreement to sexual intercourse is –
>
> (a) **extorted by physical assault** or threats or **fear of physical assault to the complainant** or to a third person; or
>
> (b) obtained by false and fraudulent representation as to the nature of the act or the identity of the offender." (Emphasis supplied)

The majority in the House of Lords decision of **Director of Public Prosecutions v Morgan** [1976] AC 182 distilled that the intent to commit rape involves the intention to have intercourse without the victim's consent or not caring whether the victim consents or not. The offence of rape cannot be satisfied if the mental element is missing (see page

215). The test is a subjective one. It is sufficient if the offender believes that the complainant consents, whether his basis for so believing is reasonable (see page 237).

[23] In the instant case, the learned judge inferred from the conduct of the complainant and Mr Walker that the complainant did not consent to him having sexual intercourse with her. She started her discourse on consent on page 26, lines 23 to page 27, line 8 of the summation:

> "Another issue that I must decide is that of consent. Did she agree? Her evidence is that the sexual intercourse was against her will. She did not consent. He was fat. According to her, she was 'mawga'. He used his foot to force open her legs to allow his penis to enter and in all of this, the door was locked.
>
> The Prosecution is just inviting me to find that this was against her will, that is, she did not consent…"

[24] The learned judge explored the issue further on page 28, at lines 4-25 of the summation. She also stated that since the complainant was under the age of 16 at the time of the offence, she could not consent:

> "I say her evidence is that the sexual intercourse was against her will; that is to say, it amounts to that. The evidence from the complainant is such that the invitation must clearly be that I must find that it was against her will, that is, not with her consent. And, that evidence includes the fact that, according to her, he was fat and she was 'mawga'; in other words, he could have control over her. He used his foot to force open her legs to allow his penis to enter and in all of this, the door was locked.
>
> The Prosecution is, therefore, inviting me to infer from all of this that the act was against her will, that is, she did not consent. In my view, his actions in locking the door, pushing his foot to separate her legs show that she was not consenting and **he would know that and he did not care if she consented or not.**

> In any event, the evidence shows that the complainant was under the age of 16 and, therefore, incapable of consenting." (Emphasis supplied)

[25] The learned judge, at page 29, lines 10 to 18 of the summation, repeated that, due to her age, the complainant cannot consent. The learned judge added that the complainant's actions indicated that she did not agree to have sexual intercourse with Mr Walker:

> "…Not only was she incapable of consenting because of her age, but she made it clear that she did not want the sexual attention and was not agreeing to it by virtue of her actions.
>
> I accept as true her evidence that she told him to stop touching her breast and that he had forced open her legs in order to insert his penis."

[26] She then determined, at page 29, line 21 to page 30, line 3 of the summation that Mr Walker committed the sexual act without the complainant's consent or recklessly not caring whether she consented or not:

> "I reject the case of the accused and having done so, I have considered all the evidence and I am satisfied, that I am sure, that the accused man placed his penis in the vagina of the complainant without her consent and knowing that she did not consent or recklessly not caring whether she consented or not."

[27] The evidence led by the prosecution, therefore, satisfied the learned judge's jury mind that the complainant did not consent to sexual intercourse with Mr Walker and that he knew that she did not consent or did not care whether she consented. It is important to note at this point that consent did not arise in either the Crown's case or Mr Walker's case. Mr Walker's evidence is that he did not have sexual intercourse with the complainant and so there is no merit in Ms Cummings' alternative argument that the complainant consented to Mr Walker having sexual intercourse with her. He is recorded as saying this at page 91, lines 18 to page 92, line 5 of the transcript:

"Q. She said that you took her in the bedroom and you had sex with her; is that true?

A. That never happened.

Q. She said you had sex with her while she still had on her uniform and she was also seeing her period?

A. That did not happen.

Q. She said you went into the bathroom and she went and sat back in the settee.

A. That did not happen.

Q. She said you then dropped her to school at Bridgeport High School?

A. That did not happen"

[28] During his examination in chief, defence counsel at the trial, asked Mr Walker if he ever had sex with the complainant and he denied it. This is recorded at page 94, lines 13 to 15 of the transcript:

"Q. Did you, at any time, have sex with [the complainant]?

A. No, I did not."

[29] The learned judge, having refused to accept Mr Walker's position, and finding that the sexual act did, in fact, take place, had no evidence that the complainant consented to having sexual intercourse with him.

[30] This ground, therefore, fails.

Whether the learned judge was palpably wrong on the law and facts (grounds (b), (d) and (e))

[31] Ms Cummings raised several areas in which she asserted that the learned judge erred. These are:

a. The DNA evidence and its determination of whether Mr Walker had sexual intercourse with the complainant;

b. Evidence of whether the complainant feared Mr Walker;

c. The learned judge's consideration of the complainant's evidence as being that of Mr Walker;

d. The learned judge's rejection of documentary evidence to support Mr Walker's alibi; and

e. The learned judge's rejection of the evidence as to timelines.

[32] In order to overturn a jury's verdict on the basis that it was unreasonable, it must be demonstrated that the verdict offends the weight of the evidence in such a way that it is unreasonable and cannot be supported (see **R v Joseph Lao** (1973) 12 JLR 1238).

The DNA evidence and its determination of whether Mr Walker had sexual intercourse with the complainant

[33] Ms Cummings submitted that the learned judge failed to appreciate that Mr Walker did not have sexual intercourse with the complainant. Accordingly, she further submitted that Mr Walker could not have raped the complainant. Learned counsel asserted that the results of the DNA test support Mr Walker's position. She recounted that the complainant's evidence is that Mr Walker impregnated her, however, the DNA test results revealed that he was not the father of the complainant's child. Ms Cummings added that the DNA results revealed that, on 25 June 2016, the complainant was 20 weeks pregnant and from 2 February 2016 to 25 June 2016 is 20 weeks. She added that the time period between 2 February 2016 to 4 November 2016, when the baby was born, was nine months. Accordingly, learned counsel submitted that the father of the complainant's baby, who is not Mr Walker, is the person she had sex with on 2 February 2016. She further stated that the learned judge descended into the realm of speculation when she determined that someone other than Mr Walker also had sexual intercourse with the complainant since the evidence did not support that finding.

[34] Mr Forbes argued that for the learned judge's verdict to be overturned, Mr Walker must demonstrate that the verdict was "palpably wrong". He contended that Mr Walker must fail in that quest as the learned judge properly exercised her discretion as it was open to her to find as she did. Mr Forbes accepted that the complainant's account being at odds with the DNA results puts her credibility in issue, but the learned judge considered and resolved that issue. He added that the issue of paternity was not central to the case. He advanced that the central issue was whether the complainant consented to sexual intercourse. Learned counsel conceded that Mr Walker is not the father of the complainant's child. He, however, countered that merely because the inescapable inference is that the complainant could have had sexual intercourse with someone other than Mr Walker does not disprove that Mr Walker had had sexual intercourse with her. He urged this court to consider that a reasonable inference could be drawn that the complainant had had sexual intercourse with Mr Walker as well as someone else.

[35] The learned judge accepted the DNA evidence that Mr Walker is not the father of the complainant's child. The learned judge, however, found that the DNA result was evidence that the complainant had also had sexual intercourse with someone other than Mr Walker. She discussed this on page 23, at lines 5 to 25 of the summation:

> "[One exhibit] was a DNA case summary where the conclusion was that the test done on the samples submitted excluded the accused from being the father of the daughter of the complainant. I accept [that and another exhibit] as reflecting the truth. The accused is not the father of the child of the complainant.
>
> However, that is not the end of the matter. **It is obvious that the complainant had sexual intercourse with someone other than [Mr Walker]. That does not, by itself, however, mean that she did not also have sex with [Mr Walker].** In the face of this evidence I consider even more carefully all the evidence in the case to ensure that I do not pronounce the accused to be guilty unless I'm sure of the evidence of [sic] [Mr Walker].

> **I take judicial notice of the fact that if a person has sexual intercourse with more than one person she can become pregnant for one of them**." (Emphasis supplied)

[36] The learned judge then went on to state that the issue that she had to determine is not paternity, but whether Mr Walker had raped the complainant. She said this on page 24, at lines 2 to 10:

> "[Mr Walker] is not before the Court being declared the father of the child. He is here charged with having sex with the complainant. The issue of fatherhood is not the issue here. That is a matter that should be investigated, but regardless of the outcome of that, the question which I have to determine is whether or not [Mr Walker] had sexual intercourse with the complainant without her consent."

[37] The DNA evidence, therefore, cannot determine whether Mr Walker had had sexual intercourse with the complainant. The learned judge cannot be faulted for her assessment of this issue.

Evidence of whether the complainant feared Mr Walker

[38] Ms Cummings asserted that the learned judge erred in finding that the complainant was afraid of Mr Walker, since the evidence is that the complainant was afraid of how her parents would react, not the fear of Mr Walker.

[39] Mr Forbes posited that although the complainant did not expressly say that she was afraid of Mr Walker, she did indicate that she was afraid when he brought her into the room and touched her breast. In those circumstances, learned counsel argued that a reasonable inference could be drawn that she was afraid of Mr Walker.

[40] The learned judge found that the complainant was afraid that Mr Walker would do something to her. This she said on page 4, at lines 7 to 11 of the summation:

> "He started to touch her breast and she told him to stop touching her breast. He took her into the bedroom and she

says when he did that, she said nothing to him because she was afraid that he might do something to her."

[41] The complainant gave evidence of fear in two respects. Firstly, she said she was afraid Mr Walker might do something and secondly, she indicated that she was afraid to tell anyone because she was afraid of how her parents would react. The former is recorded on page 17, at lines 14 to 21 of the transcript:

"Q. Is there any reason why you didn't say anything to him when he brought you into the bedroom?

A. Yeah, I wasn't – mi did fraid.

Q. Afraid of what?

A. That something might –

Q. I didn't hear you, you are dropping your voice.

That he might what?

A. Might do something."

[42] She spoke of fear once more when she said Mr Walker repeatedly opened her legs while she tried closing them. This evidence is documented on page 18, at lines 10 to 19 of the transcript:

"A. Each try I try close back my legs, him use him foot and open back my foot.

Q. You said anything to him when he was doing this, trying to open your legs?

A. No.

Q. Is there a reason you didn't?

A. Go again.

Q. I ask you if there was a reason you didn't say anything at that time?

A. I was frightened."

[43] The latter evidence of fear, in relation to how her parents would respond, is recorded at page 25, lines 1 to 15 of the transcript:

> "Q. Prior to making the report at Hundred Man - -
>
> Well, the report to Miss Richardson, did you say anything to anyone about Mr. Walker?
>
> A. No.
>
> Q. Is there a reason you didn't?
>
> A. Yes.
>
> Q. What was the reason?
>
> A. I was really afraid to tell anyone and then …
>
> Q. Slow down.
>
> HER LADYSHIP: Can you please repeat that?
>
> THE WITNESS: I was afraid to tell anyone.
>
> Q. And you were going on and you said something else?
>
> A. And I didn't want - - I didn't know how my mother and father would react to the situation."

[44] The learned judge accurately recorded the complainant's evidence that she was afraid that Mr Walker might do something. The learned judge added the words "to her" but that can reasonably be inferred from the circumstances. There was, therefore, sufficient evidence to support the learned judge's finding in this respect.

<u>The learned judge's consideration of the complainant's evidence as being that of Mr Walker</u>

[45] Ms Cummings submitted that the learned judge erred in her assessment of the evidence when she attributed evidence from the complainant in cross examination as being evidence from the defence.

[46] Mr Forbes acknowledged that the learned judge initially attributed aspects of the complainant's evidence to Mr Walker, however learned counsel averred that that mistake did not translate in the summation. Accordingly, he submitted, the judge did not err.

[47] The learned judge, in recounting the evidence during the summation, wrongly attributed evidence, which had been led during cross examination of the complainant, to having come from Mr Walker. Counsel properly brought the error to the learned judge's attention and she accepted the correction and said that it resolved certain questions that she had. This was recorded on page 20, at line 1, to page 21, line 6 of the summation:

> "Considering that he has denied having been in her presence that morning, I ask myself why is he denying that she was having her period and was in uniform.
>
> [DEFENCE COUNSEL]: M'Lady, I'm sorry to cut you, but it was the evidence in cross-examination of the witness.
>
> HER LADYSHIP: Sorry?
>
> [DEFENCE COUNSEL]: It was the evidence in cross-examination of the witness that that came out. This was never asked of Mr. Walker.
>
> HER LADYSHIP: Which witness?
>
> [DEFENCE COUNSEL]: The complainant. It was never asked of Mr. Walker about the uniform and her seeing her period, never came from Mr. Walker at any point, m'Lady. It was actually put to her that she told that to the police in her statement.
>
> HER LADYSHIP: It was never put to Mr Walker that what?
>
> [DEFENCE COUNSEL]: That she was seeing her period or had on her uniform.
>
> [PROSECUTOR]: That is so, m'Lady, I'm not seeing it reflected in my notes and I don't recall putting that to him either.

> HER LADYSHIP: Okay, thank you. Thank you for that. That answers a lot of questions which I was posing because I couldn't understand why Mr. Walker was denying certain things. But thank you both counsel for correcting me in that regard."

[48] Having had her view corrected, the summation does not indicate that the learned judge continued on that erroneous path. It, therefore, cannot be said that the learned judge's error influenced her decision.

The learned judge's rejection of documentary evidence to support Mr Walker's alibi

[49] Ms Cummings argued that the learned judge erred in finding that Mr Walker did not provide any supporting evidence that he attended training at the Police Academy on 2 February 2016, since his witness was prevented from admitting documentary proof into evidence.

[50] Mr Forbes argued that the learned judge did not misdirect herself in failing to accept the documentary evidence. He argued that the proper foundation was not laid to tender the document into evidence. He accepted that it was the prosecutor who objected to the document being tendered into evidence, but said that the objection was correctly made. It was defence counsel, he said, who discontinued the line of questioning and so the learned trial judge cannot be blamed for the absence of the document from the evidence.

[51] Mr Forbes's submissions are correct. In considering this matter it is noted that the learned judge stated that Mr Walker did not provide documentary proof that he attended the Police Academy on the material day. She, however, reminded herself that Mr Walker had no duty to provide such documentation as it is the prosecution that had the obligation to prove guilt. This is revealed on page 21, line 22 to page 22, line 16 of the summation:

> "[Mr Walker] has not provided any written documentation of his attendance on that day at the [Police Academy], though he did provide evidence from an instructor there, with which I shall shortly deal.

> I quickly remind myself that Mr. Walker is not obliged to provide any written documentation. The burden is on the Crown to prove its case. Mr. Walker has no burden whatsoever. His defence, further, is that he did not impregnate her. There is no contest in that regard. That's agreed. Further he did not have sex with her and he does not know why she would call his name. Mr. Walker has testified that he realised that there will be no actual record of his time of arrival [at the Police Academy on the day]. But he relies on Mr. Russell who he knows was there as a coach and could be taken as an impartial witness. He knows that Mr. Russell was there and can testify as to his presence."

[52] The learned judge did not err in that regard, as there was in fact no documentary evidence to support Mr Walker's alibi. The transcript shows that while defence counsel was conducting the examination of chief of Corporal Romano Russell, the witness called in support of Mr Walker's alibi, she attempted to lay the foundation to adduce the documentary evidence but never did. This is recorded at page 105, line 22 to page 106, line 18 of the transcript:

> "Q. Was Mr. Walker there before 7:45 on the 2nd of February, 2016?
>
> A. It is a possibility.
>
> Q. Why you say it is a possibility?
>
> A. Because if you are not there by 7:45, you will not be accepted.
>
> Q. And are the attendees allowed to leave during the training session at any point during the day?
>
> A. No, ma'am.
>
> Q. And the Tactical and Weapons Training lasted…?
>
> HER LADYSHIP: One minute, please. Yes?
>
> Q. The Tactical and Weapons Training lasted until what time in the day?
>
> A. It starts at 7:45 and it ends around 4:30 p.m.

Q. Can you tell us what scores Mr. Walker got that day for Tactical Training?

A. Based on the score sheet that I have here…

[PROSECUTOR]: The relevance, my Lady.

[DEFENCE COUNSEL]: M'Lady, I would ask no more questions."

[53] The learned judge was, therefore, correct in finding that there was no documentary evidence to support Mr Walker's alibi. The issue of whether it was impossible for Mr Walker to have committed the offence and yet attended at the Police Academy before 7:45 am was explored in the evidence and will be assessed next.

The learned judge's rejection of the evidence as to timelines

[54] Ms Cummings submitted that the learned judge failed to appreciate that it would have been impossible for Mr Walker, "to spend 60 minutes having sex with the complainant and then drop her to school at Bridgeport" (para. 35 of her written submissions) and yet arrive at the Police Academy at Twickenham Park before 7:45 am. This, she asserted was necessary, in the context that the learned judge noted that it was possible for both the complainant's version and Mr Walker's version to be true. Nevertheless, Ms Cummings accepted that there was no evidence to support that it was impossible to travel to these locations before 7:45 am.

[55] Mr Forbes contended that the learned judge correctly addressed the issue of alibi and found that the evidence on the travel timelines was unhelpful because it did not address certain conditions that existed on the relevant day. He asserted that the learned judge was correct in rejecting the evidence of those timelines because, had she accepted it, it would cause her to speculate. Learned counsel relied on **Dal Moulton v R** [2021] JMCA Crim 14 in support of those submissions.

[56] Once a defendant raises the issue of alibi, a trial judge is required to apply his or her mind to that issue (see para. [44] of **Dal Moulton v R**). In the instant case, Mr

Walker gave sworn evidence and raised an alibi. The learned judge considered the alibi and reminded herself that there was no burden of proof on Mr Walker and that it was for the Crown to prove its case. She noted however that both the complainant's version and that of Mr Walker could both be true. Her analysis of alibi commenced on page 17, at lines 9 to 22 of the summation:

> "I consider, firstly, the case for the Defence. Firstly the alibi; **I remind myself that there is no burden on Mr. Walker whatsoever to prove that he was elsewhere than at the house described by the complainant. It is the Prosecution who[sic] must prove its case and that proof includes the need to prove that [Mr Walker] committed the offence**.
>
> **In this case, the alibi to my mind, is not inconsistent with the complainant's case because the times of day are so close as to overlap**. It is quite plausible that the complainant can be speaking the truth and also the accused." (Emphasis supplied)

[57] The learned judge went further at page 21, line 7 to page 22, line 6 of the summation:

> "So I move [on to] consider a little more [sic] the alibi. The Defence case, part of the Defence case being alibi. Mr Walker gave evidence that he was at his home getting dressed to go to the Jamaica Police Academy for training and he, in fact, went there from before 8:00 that morning. He had reminded himself of the day in question as to what he had been doing on that day, because he had looked at some old photographs on his phone and he had seen where he had been. So that evidence shows that it was quite by chance that he had happened upon that information as to his whereabouts on that day, which, according to him, would provide him with a record of his attendance.
>
> He has not provided any written documentation of his attendance on that day at the [Police Academy], though he did provide evidence from an instructor there, with which I shall shortly deal.

> **I quickly remind myself that Mr. Walker is not obliged to provide any written documentation. The burden is on the Crown to prove its case. Mr. Walker has no burden whatsoever**." (Emphasis supplied)

[58] The learned judge also rejected the evidence of the complainant's father, RW, as to the time it would take to drive to various places, relevant to the evidence, as being speculative, and that some were not based on the same time of day as the material incident. She found that the evidence on the timelines was unhelpful as there were numerous variables and so RW's evidence could only be treated as estimates, which lacked precision. She also found that that evidence would not account for the variables such as speed and traffic. This she said at page 11, line 19 to page 12, line 5 of the summation:

> "Then [there] were questions concerning time taken to travel between named points. I have heard that evidence but **I do not find it useful in these particular circumstances where estimated times must clearly veer [sic] relation to a multitude of [variables] such as speed, traffic, time of day, route, to mention some.** And the submissions later concerned precise additions of times. **I would not place reliance on those estimated times in order to come to any inescapable conclusion because in my view they can only be imprecise estimates**." (Emphasis supplied)

[59] The learned judge's approach to this issue cannot be impugned. She was correct to have rejected the evidence as to travel timelines. The correctness of her approach is more evident in the light of the fact that RW had not been proved to be an expert in calculating travelling time.

Whether the learned judge considered credibility, weaknesses, contradictions and inconsistencies (ground (c))

The submissions

[60] Ms Cummings urged the court to find that the complainant's credibility is in issue since Mr Walker is not the father of her child and there is no evidence that the complainant

had sexual intercourse with anyone else on 2 February 2016. She argued that the complainant, therefore, lied to her parents and the police that Mr Walker is the father of her child.

[61] Learned counsel contended that the learned judge failed to resolve the inconsistencies. One glaring inconsistency that learned counsel invited the court to consider was the complainant's evidence that she knew Mr Walker for 10 years, from she was six years old and would see him at her father's place of work. Learned counsel highlighted that RW's evidence was that he knew Mr Walker for five to 10 years and that the complainant started going to his place of work when she was 14 years. She also complained that there was a discrepancy between the complainant and RW as to the type of vehicle that Mr Walker drove.

[62] Another inconsistency learned counsel emphasised was that the complainant indicated that her mother asked her if she was having sexual intercourse, but, during cross examination, learned counsel asked the complainant if her mother queried if she was having sexual intercourse after the pregnancy test results came in and she said no.

[63] Additionally, learned counsel advanced that the complainant's evidence was that she did not tell her father that it was Mr Walker who took her virginity and got her pregnant but her father's evidence was that the complainant did inform him that Mr Walker took her virginity and impregnated her.

[64] Learned counsel argued that another area of inconsistency was that the complainant stated that Mr Walker's house was unpainted and unfinished but the complainant's father's evidence is that the house was not unfinished and he could not recall whether it was unpainted. This inconsistency, counsel argued, was material as it raises the question of whether Mr Walker was living in Eight West at the time and whether the complainant went to Mr Walker's house.

[65] Ms Cummings also indicated that there were contradictions between the complainant's evidence and that of her father regarding the type of television that was in Mr Walker's house.

[66] Mr Forbes accepted that inconsistencies arose during the trial. He also accepted that credibility was an important issue in the case. He contended that the learned judge was aware of the inconsistencies in the Crown's case and alive to the issue of the complainant's credibility. Learned counsel submitted that the learned judge did not have to highlight every inconsistency or discrepancy but she did address the major inconsistencies and discrepancies in the light of the credibility of the complainant. He argued that the learned judge was able to see the witnesses and assess their demeanour then determine the evidence that she accepted. Learned counsel reminded this court that it must not lightly disturb a trial judge's findings of fact. He cited **Anthony Gayle v R** [2021] JMCA Crim 30 and **Morris Cargill v R** [2016] JMCA Crim 6 for support of his submissions.

The analysis

[67] It is settled that it is the jury's duty, as the arbiters of fact, to assess the credibility of witnesses and determine which witnesses to believe (see para. [39] of **Levi Levy v R** [2022] JMCA Crim 13). In the present case, the trial was by a judge sitting alone. The learned judge was therefore tasked with the duty of considering matters of credibility by applying her "jury mind". Carey JA in **Regina v Fray Diedrick** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991 gave guidance as to the trial judge's treatment of discrepancies. He made this remark on page 9 as follows:

> "**The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial**. It is expected that he will give some examples of the conflicts of evidence which have occurred in the trial, whether

> they be internal conflicts in the witness' evidence or as between different witnesses." (Emphasis added)

[68] Harris JA in **Steven Grant v R** [2010] JMCA Crim 77 distilled that discrepancies and inconsistencies will arise in cases but that that, without more, does not mean that a case has not been made against an accused. Instead, the contradictory evidence tests a witness' credibility and it is for the jury to determine whether the witness is credible. She made these statements at paras. [68] and [69]:

> "[68] Discrepancies and inconsistencies are not uncommon features in every case. Some are immaterial; others are material. The fact that contradictory statements exist in the evidence adduced by the prosecution, does not mean, without more, that a prima facie case has not been made out against an accused. The existence of contradictory statements gives rise to the test of a witness' credibility. No duty is imposed upon a trial judge to direct a jury to discard the evidence of a witness containing inconsistencies or discrepancies. The aim of proving that a witness has made a contradictory statement is to nullify his evidence before the jury and it is for them to decide whether the witness has been discredited. In **R v Baker and Others** (1972) 12 JLR 902, Smith JA (as he then was) said:
>
> > 'The purpose of proving that a witness has made a previous inconsistent statement is to discredit his evidence in the eyes of the jury and they alone as the judges of fact who must decide whether the witness has been discredited and to what extent. No case has yet altered this position.'
>
> In **Mills v Gomes** (1964) 7 WIR 418 at 440 Wooding C.J. said:
>
> > 'In our view then the direction to be given must have due regard to the facts of each case. No general principle can be enunciated except that it should never be forgotten that in the final analysis questions of fact are to be decided by a jury and not by the presiding judge. The Judge may, and in cases such as we are now considering we think it is his duty to give such directions as will assist the jury in assessing the credit worthiness

> of the evidence given by the witness whose credibility has been attacked but it can be but seldom that the circumstances will warrant his going beyond that. More especially, where a witness has given an explanation how he came to make the inconsistent statement by which his credit is sought to be impeached, it is for the jury to determine whether his evidence is acceptable when set against the inconsistent statement due regard being had to the explanation proffered.'
>
> [69] It must always be borne in mind that discrepancies and inconsistencies in a witness' testimony give rise to the issue of the credibility of that witness. Credibility is anchored on questions of fact. Questions of fact are reserved for the jury's domain as they are pre-eminently the arbiters of the facts. Consequently, it is for them to determine the strength or weakness of a witness' testimony." (Bold as in original, underlining is for emphasis)

[69] A trial judge is also required to weigh the inconsistencies and discrepancies to assess credibility so as to determine whether the discrepancy is material or not but the trial judge should highlight the discrepancies that undermine the prosecution's case (see para. [109] of **Anthony Gayle v R**).

[70] The learned judge highlighted some instances of discrepancies that arose on the evidence and determined the aspects of the evidence that she accepted. The learned judge firstly considered the discrepancy between whether Mr Walker drove a jeep or CRV but did not put much weight on that evidence. She discussed this on page 18, line 23 to page 19, line 23 of the summation:

> "I pause to [recognise] that Counsel for [Mr Walker] invited me to take special note of the evidence of the complainant that the vehicle was a jeep, whereas her father first spoke of a CRV and then said the CRV is a jeep. The submission was that the father's evidence could not be reliable because the CRV is different from a jeep and, further, that his evidence conveniently coincided with an overnight adjournment of the case during which time the complainant, his daughter, spoke to him, the witness, informing him that he was required in Court the next day.

…

> I have considered that submission carefully and I say that I do not put much stow [sic] on the type of vehicle that the [Mr Walker] is alleged to have been driving. My focus is on the substance, although I remind myself that discrepancies and inconsistencies must be considered and a determination must be made as to whether they are fundamental to the case or not. In my view it is not important whether the vehicle was a CRV or a jeep, more so when the description emanates from the mouth of a young child."

[71] The learned judge, at page 24, line 16 to page 25, line 21 of the summation, again addressed the existence of discrepancies:

> "In making that decision [of whether Mr Walker is guilty of any offence], I bear in mind that discrepancies exist. One has been admitted into evidence as an exhibit because the mother of the complainant maintains that maybe the police got it wrong when they recorded her statement, including words that, 'I asked her who got her pregnant and she told me that it was her father's police friend and that his name is Leslie.' Whereas the complainant herself testified that she did, in fact use those words. The words are exhibited.
>
> There are other discrepancies regarding the exact words the complainant said to her parents about her pregnancy. The effect of the discrepancy from the evidence of the mother is that it shows that the mother is saying something different here than what she told the police, but at the same time, the exhibited statement of the mother shows consistency with the evidence from other witnesses.
>
> When the complainant stated to her mother that the accused had impregnated her, she was either lying or was mistaken because the accused is not the father of the child and thus it was not he who impregnated her. The complainant accepts that he is not the father of the child. **However, I accept as true the fundamentals of the evidence concerning the words spoken to her parents, that is, that she said [Mr Walker] had had sex with her**." (Emphasis supplied)

[72] The learned judge dealt with discrepancies generally at page 29, lines 18 to 21 of the summation and described the discrepancies as "minor":

> "…Such discrepancies, as exist, do not go to the root of the case and I regard them as minor failings of being a human being."

[73] The learned judge did not address every discrepancy that arose in the case, but, as Carey JA espoused in **Regina v Fray Diedrick**, the trial judge is not required to itemise every single discrepancy. In the instant case, the learned judge identified some discrepancies but accepted that the important aspects of the evidence are true and that the discrepancies do not impact the foundation of the case. She concluded that despite the discrepancies, in the totality of the evidence, she accepted the Crown's witnesses as being credible. The learned judge cannot be faulted for her position. The discrepancies do not undermine the issue that the learned judge had a duty to resolve. Her duty was to determine whether Mr Walker had raped the complainant and in the totality of the evidence, the discrepancies did not undermine the complainant's evidence in that regard.

Whether the sentence can be impugned

[74] Mr Walker has appealed sentence, however, there are no grounds of appeal relating to sentence. The sentence that the learned judge imposed is the statutory minimum for the offence of rape. The pre-parole period that the learned judge imposed is also the minimum period (see sections 6(1) and (2) of the Act). It, therefore, cannot be said that the sentence is manifestly excessive.

[75] In the circumstances, the learned judge cannot be found to have erred. The court therefore makes the following orders:

1. The application for leave to appeal conviction and sentence is refused.

2. The sentence is to be reckoned as having commenced on 16 July 2021, the date on which it was imposed.