IN THE COURT OF APPEAL OF BELIZE AD 2018

CRIMINAL APPEAL NO 5 OF 2017

ELMER AX Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Samuel L Awich	Justice of Appeal
The Hon Madam Justice Minnet Hafiz-Bertram	Justice of Appeal
The Hon Mr Justice Lennox Campbell	Justice of Appeal

A Sylvester for the appellant.
C Ramirez, Senior Crown Counsel, along with J Chan for the respondent.

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15 March and 11 October 2018.

CAMPBELL JA

Background

[1] The appellant was convicted before Hanomansingh J and a jury, after a trial in the Supreme Court in Dangriga Town, Stann Creek District. The trial commenced on the 27 March, 2017, and continued over a period of five days. The appellant was charged on an indictment that contained seven counts. Count 1 to 4, charged the appellant, with

the offence of Carnal Knowledge of a Female Child, contrary to Section 47(1) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2003. Count 5 to Count 7, charged the appellant with the offence of Carnal Knowledge of a Girl, contrary to Section 47(2)(a) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2003 .

[2] The virtual complainant located the offence of all seven counts as being committed at Independence Village, in Stann Creek District. Counts 1 to 4, alleged that the complainant was then aged thirteen years. In Counts 5 to 6, she was aged fourteen and Count seven, she was then fifteen years old. Specific dates were alleged in respect of each count, seriatim. Count 1 to 4, the 14th and 18th January, 20th May & 13th December, all in 2012. Count 5 to 7, were alleged to have been committed on the dates, 13th January, 16th May and the 21st December 2013, respectively.

[3] At the close of the prosecution's case, the learned trial judge, indicated to Mr Ramirez that no evidence had been adduced in relation to Counts 4 and 6, the respective dates being, the 13th December, 2012 and the 16th May, 2013. The trial judge advised the jury, to return formal verdicts of not guilty, in respect of those counts. The appellant was advised of the dismissal of counts 4 and 6, and was called upon to state a defence in respect of the remaining five counts. The appellant made an unsworn statement.

[4] The jury retired at 10.02 am and returned at 1.27 pm, and entered a majority verdict of guilty on count one, and indicated to the court that they had not reached a verdict on the remaining counts. In respect of those counts, the trial judge ordered that they be adjourned to the "fifth", to allow the prosecution to make a decision in respect of them. On the 4 April, 2017, the accused was sentenced to 12 years imprisonment on count one. There was no indication of a decision being made in respect of the other counts.

[5] The complainant who was born on the 19th March, 1998, was aged eighteen years and a student, when she gave evidence at the trial. She still lived with her mother

at Mango District, in a house with an adjoining bar, operated by her mother. It is common ground that the complainant and the appellant are neighbours. Their respective houses being on directly opposite sides of the road. The evidence of the complainant is that the roadway along which the parties live has a BTL tower.

It is the prosecution's case that there are no other houses, along this roadway, which leads to a Chinese shop.

The trial – Count one

[6] Regarding count one, on which the jury returned a verdict of guilty, the prosecution alleges that on the 14 January, 2012, sometime in the night, the complainant left her room, to use a restroom outside the house. On her way back to the house, she felt someone grabbed her, and turned to see the appellant, whom she knew. She said the appellant, had lived across the road from her house for "*approximately four years*". Prior to that encounter on 14th January, 2012, she had known him as ELMER AX, and that, he lived with his wife and son. The complainant said the appellant threw her to the ground on the very dark side of the house. According to the complainant, the appellant then pulled down her under clothing and had sex with her, despite her struggling against him. When he was finished, he threatened to kill her and her family, if she told anyone. She said he left her on the ground and went home. She said, at the time, she was a virgin. On arriving, in her house, she noticed blood on her legs. She never told anyone because she was afraid of the appellant.

[7] With the exception of Count 5, (13th January, 2013) in all the remaining counts, the complainant alleges that, at varying times, in the afternoon between 3:00 pm and 6:00 pm, on the dates alleged, she was dragged from her bicycle whilst on her way to the shop. The appellant would be in waiting, by an area close to the BTL tower. She said she was dragged from her bicycle and thrown on the ground, where the appellant had sexual intercourse with her, despite her struggling. She never told anyone about the appellant's conduct, she says, because of fear.

[8] The allegations in Count 5, were that, the complainant had taken a shortcut on her way from school, when the appellant came out of the bushes, and took her to an abandoned house, near the bus terminal, and had sexual intercourse with her. After the 21st December, 2013, (Count 7), the last count on the indictment, the complainant says that she decided because of fear of the appellant, not to go out of her house, unless she was accompanied by a relative or friend. Despite her precautions, she would still notice the appellant following her.

[9] From the first offence, that the complainant alleges was committed against her, on the 14th January, 2012, to the last on 21st December, 2013, the complainant had made no complaint to anyone until 23rd June, 2014. On that date, her mother entered her room and found a man, Juan Carlos, under her bed. The mother reported Juan Carlos incident, at the police station. The complainant then reported the appellant to the police *as "the one who abused me"***.** She said if the incident with Juan Carlos had not happened, she never would have reported the appellant to anyone.

[10] In respect of Count 5, the complainant had testified that she was on her way from school on the 13th January, 2013, when she was set upon by the appellant. The learned judge asked questions of the witness, indicating that the date she had alleged that the incident took place, was not a school day, as she had testified, but, a Sunday. The judge in his summation directed the jury, that "*I checked and told her that the 13th January, 2013, was a Sunday, and not a school day, you cannot say on this count that the prosecution had proved to you, so that you feel sure, that the appellant carnally knew* the complainant *on the 13 January, 2013 whilst on the way from school*". The jury returned a majority guilty verdict on Count one, and failed to reach a verdict in respect of the remaining counts.

[11] The appellant filed Notice of Appeal on 19th April, 2017, was granted extension of time, and grounds of appeal, filed 21 February, 2018.

Grounds of Appeal

(i) The learned trial judge having exercised his discretion to give a direction for the need for special caution before acting on the evidence of the complainant erred in failing to give a proper/adequate direction to the Jury (in accordance with section 92(3) (a) of the **Evidence Act)** as to the factual reasons in the given case for the need for such caution (pp131 of the Record).

(ii) The learned trial judge failed to address the jury as to the nature of the Appellants defence in his unsworn statement (p155 of the Record).

(iii) The guilty verdict on count one is unreasonable and inconsistent to the verdicts on Counts 2, 3, 5, and 7.

Appellant's Submissions on the need for special caution.

[12] Counsel for the appellant contended that, the learned trial judge failed to direct the jury adequately/properly for the special need for caution before acting on the sole evidence of the complainant, in accordance with **Section 92(3) of the Evidence Act**. Mr Sylvester submitted that, the conflicting nature of the complainant's evidence, required a strong warning pursuant to that Act. The learned judge's failure to give an adequate/proper direction, was a result of the judge, not giving directions specific to each count, but merely offering explanations generally. Counsel relied on Archbold 2001 ED. At para 4-377, *"the jury should be directed to give separate consideration to each count"*.

[13] According to Mr Sylvester, the judge's direction on the special need for caution, was restricted to the following." There is no other evidence to support the complainant's evidence. The complainant is a very persuasive person. In relation to the count relating to the 13th January, 2013, this was not a school day as complainant stated, but a Sunday."

[14] Counsel submitted, that it had become more "*necessary*", as commended by this Court in ***Antonio Gutierrez vs Regina CRIMINAL APPEAL NO 8 OF 2016***, to point out to the jury, "*those aspects of evidence led that might undermine the credibility or reliability of the witness"*. Counsel further submitted that in ***Gutierrez***, this Court had quoted with approval, the judgment in ***Mark Thompson*** ,in which this Court ,applied the distinction of categories of victims, formulated in **Makanjuola and Easton v R** [1955] 2 Cr. App R. 469. Counsel argued that the failure to bring to the attention of the jury the conflict of the evidence between the complainant ,and Cpl Lauren Lopez, was material and could undermine the credibility or the reliability of the witness as it relates to Count one .

[15] Counsel for the Respondent submitted that, the trial judge specifically gave directions, in respect of count one. He alerted the jury at (pg.131-133) that there was special need for caution, in respect of the 13th January, not being a school day and the virtual complaint not being truthful about the restroom. It was further submitted that Cpl Lopez evidence does not preclude the complaint from using the outside bathroom. Trial judge went to great length and stated so specifically (p131).

Discussion

[16] The application of S.92(3) of the **Evidence Act**, by a trial judge, was recently restated in this court in the matter of ***Antonio Gutierrez v The Queen*****,** delivered on the 27th October, 2017 at par 8, *inter alia*.

> *"This Court has consistently held that the section gives a discretion to a trial judge to determine the cases in which a caution is required. However, in some circumstances it becomes more 'necessary' to point out to the jury those aspects of the evidence led that might undermine the credibility or reliability of the witness*."

[17] Before the coming into force of **Section 92(3) (a) of the Evidence Act** there was an obligation placed on a judge to direct the jury that it would be dangerous to convict

the accused on the uncorroborated evidence of a complainant in a sexual case. This mandatory requirement, was abrogated by S.92(3)(a).

[18] In 2009, this court in **Jimmy Jerry Espat v The Queen**, Criminal Appeal No 3 of 2009 , heard a complaint that the trial judge had failed to give the jury a direction in law based on section 92(3)(a). The Court of Appeal indicated it was guided by the principle enunciated in **R v Makanjuola and R v Easton [1995] 2 Cr App 469.** Carey JA, commented that appellants counsel having failed to show why the circumstances of the case warranted a warning of special caution to the jury, and that the Court,' had not been astute to discover any," said at paragraph 17,

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> "[17] A helpful case in this regard is **Makanjuola** and **E v R [1995] 2 Cr. App. 469** where Taylor LCJ said this:
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> *'Whether, in his discretion a judge should give any warning and, if so, its strength and terms had to depend on the content and manner of the witness's evidence, the circumstances of the case and the issues raised.* ***The judge would often consider that no special warning was required at all.***
>
> *Where, however, the witness has been shown to be unreliable, the judge might consider it necessary to urge caution. In a more extreme case, if the witness was shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning might be thought appropriate and the judge might suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence.'* " (emphasis added)

[19] On the question of corroboration, the evidence of the witness in a case where sexual offence is charged, is to be treated no differently, from that of "*any other witness in whatever type of case*". It is in the sole discretion of the judge, whether any warning, in whatever terms, should be given. The exercise of the judicial discretion will only be impeached on appeal, if it is found to be Wednesbury unreasonable. The authorities are

clear that there is no special formulation for the judge to employ, when dealing with corroboration in his directions to the jury. It has been shown, that the mandatory warning in these cases, had the effect of confusing juries and producing unfairness.

[20] The Board of the Privy Council, in ***Reg v Gilbert*****, [2002] 2 WLR 1498, [2002] UKPC 17** an appeal from the Eastern Caribbean Court of Appeal (Grenada), the defendant had been convicted of attempted rape. At his trial, the virtual complainant, was the only witness, able to speak to the incident. Her friends had separated themselves from her along the stretch of the beach, where the incident occurred, prior to the incident, and only returned after her assailant had fled. The defendant gave an unsworn statement. He appealed to the Eastern Caribbean Appeal Court, that the judge had not given the jury any corroboration direction in relation to the commission of the offence of attempted rape or warn them of any danger of convicting on uncorroborated evidence.

[21] The Eastern Caribbean Appeal Court quashed the conviction on the issue of the lack of corroboration warning. In doing so they applied the learning in ***Pivotte v The Queen*** **(1995) 50 WIR 114**, to the effect that the special caution warning must always be given. The Director of Public Prosecutions was given special leave to appeal to the Privy Council to challenge that decision. The Eastern Caribbean Court of Appeal was of the opinion that, corroboration was outdated in England, and had been abolished there by statute, and there was a pending draft Evidence Bill for Saint Lucia, which would follow the same course. They were however of the opinion, that the corroboration warning, was still a part of, “of our law and cannot be ignored“. Thus they overturned the conviction.

[22] Their Lordships Board, in a judgment delivered by Lord Hobhouse, noted that, the special warning is a rule that is directed at the victims in sexual offences, he said, at paragraph 8, inter alia;

> “It does not apply to the evidence of any other person, only to the evidence of the victim. It potentially applies to male as well as female victims. Its effect is that

in any sexual case the jury must be directed that it is dangerous to convict the defendant upon the uncorroborated evidence of the complainant alone;"

[23] Lord Hobhouse noted that the often used reason given for the special warning, is based on a perceived propensity for girls and women to tell a false story. Their Lordships were of the view, that Pivot, which the lower court had applied, rested on the discredited belief, about girls and women, which was not conducive to fairness nor to safe verdicts. The Board allowed the Crowns appeal, because, it was not a clear and exceptional case, such as would cause an appellate court to interfere with the exercise of a trials judge's discretion to issue a special warning. (See ***R v Makanjuola*** **[1995] 1 WLR 1348**, at p.1351) Their Lordship Board, quoted with approval, Lord Taylor, at page 1351-1352, then went on to say, at paragraph 14:-

> *"Their Lordships consider that this quotation from the judgment of Lord Taylor appropriately gives effect to the purpose for which the rule regarding the corroboration warning in sexual cases existed. The purpose was and still is to give juries the appropriate directions to assist them to arrive at a safe verdict as part of a fair trial. The former rule of practice had not been conducive to achieving that result. It had led to inappropriate and indiscriminate directions being given which confused juries and created unfairness as between the prosecution and the defence and undermined rather than supported the safety of the juries' verdicts*."

[24] In this appeal case, Counsel had indicated the evidential basis on which he relied to support the need for a special caution from the trial judge. The learned trial judge, to my mind has adequately dealt with those areas of the evidence, despite not following, a set-piece direction. He expressly directed the jury, "*I'm going to ask you to treat the evidence of … with caution before accepting it and acting on it. The reason for this is that the only evidence against Elmer Ax in this case, is the evidence of …*" In his summation the learned judge, in reviewing the evidence highlighted several areas in the complainant's evidence, which were most favourable to the defence, as reason for the

exercise of caution, by the jury. Some of these areas were not alluded to in defence counsel's closing address.

[25] The jury was told that the complainant was persuasive, as she had caused the investigating officer to interview neither the accused, nor Juan Carlos. He directed the jury that, that had the interviews been done, it could have resulted in the accused *alibi* being confirmed, and Juan Carlos arrested in his stead, as well as, the virtual complainant being before the court, for giving false information to the police. In respect, to the evidence adduced by the prosecution in relation to Count one, 13th January 2013, the court directed the jury that they cannot be sure because no such school day existed. It is interesting to note the basis of the challenge to the offence alleged on the 13 January, 2013, was a result of questions posed to the complainant by the learned trial judge. The judge directed the jury that the complainant was not being truthful, on the point of an outside bathroom being for use of the household, in light of Cpl Lopez testimony that at the time of her visit, the house had an internal bathroom and the outside bathroom was for patrons of the bar. Cpl Lopez visited the *locus* some two years after the incident, which could have accounted for the inconsistency in the evidence of the complainant and Cpl Lopez.

[26] The judge told the jury, that experience has shown that juveniles make up stories to protect themselves and their love ones. At the time the complainant gave evidence, she was an adult. The doctor had noted that the virtual complainant was shaven, which led the judge to pose the following question for consideration of the jury, "*Do fifteen year-old, nowadays, who are not having consensual sex, shave?*" The judge noted that the report indicated that the complainant told the doctor, that the last time she had sex, a condom was used. The judge reminded the jury, that she told them of that last occasion which provided no opportunity for the use of a condom and no mention was made of the use of a condom. The complainant was not asked about, the use of a condom during her testimony. It is instructive that learned counsel had not identified an area of the evidence which was omitted from the learned judge's summation that would have bolstered the caution given by the judge. The guidance given by this Court in

Mark Thompson v The Queen, 28 June 2002 therefore apt, this court noted (paragraph 12) –

> *"There must be an evidential basis for suggesting that the evidence of the victim is unreliable thus giving reason for such a warning."*

[27] I find counsel's contention that the judge's caution was inadequate, in relation to each count, to be without merit. What is distilled from the authorities is that when the trial judge exercises his discretion to issue a caution to the jury, it will be proper to do so as a part of his normal review of the evidence. It will be appropriate also for the warning to be directed through the comments of the judge. It is not for this court to decide how the warning is to be couched and the gravity to be attached. This is not a clear and exceptional case, therefore this Court would be reluctant to disturb or interfere with the exercise of the judge's discretion.

[28] It must have been clear to the jury, from the manner in which the case was conducted, that the prosecution needed to adduce evidence on each count separately for their determination. At the end of the prosecution's case, the learned judge instructed the jury that the complainant not having mentioned the dates relative to the fourth and sixth count, that they should return a formal verdict of not guilty on those counts. The jury was also advised that in relation to the 13th January 2012, they could not be sure on the evidence adduced. There was an examination of the evidence, in relation to 13th January, (Count 1) In particular, the conflicting evidence between the virtual complainant and Cpl Lopez, on the outside bathroom. The learned trial judge then dealt with the three counts that had very similar allegations, the accused awaiting the virtual complainant to ride by on her bike, whilst standing in the vicinity of the tower. The judges comments on the failure of the complainant to produce the calendar on which she claimed to have recorded dates were relevant to each count. We find no merit in this ground.

Inconsistent verdicts

[29] The applicable principles, to guide a determination for inconsistent verdicts are stated in the English Court of Appeal, in the judgment in **Reginald William Durante,** An alcoholic was convicted of handling a stolen cheque and acquitted of a charge of endeavouring to obtain money on a forged instrument (the same cheque). He appealed his conviction on the ground that, the verdicts of guilty on one count and not guilty on the other, were so inconsistent that the conviction should not be allowed to stand.

[30] In allowing the appeal, the Court of Appeal noted that the appellant admitted acquiring the cheque, which had been stolen. He admitted that having made out the cheque he presented it, but he denied any intention to defraud, claiming he was too drunk to form the requisite intention. The accused had given evidence, which was not challenged, of his drinking heavily throughout the course of the day.

[31] Edmund Davies LJ, who delivered the judgment, said at page 713:-

> *"For our part we are at a loss to understand how any reasonable jury could have returned such verdicts. One hesitates to use the adjective perverse and we do not use it in this particular case. We prefer to use some such adjective as 'inexplicable' or 'irrational.'* "

[32] The facts in *Durante*, concerns the handling and presentment of a cheque, by the same person, at the same time. The inconsistency of the verdicts is partnered by the fact that the verdicts defied a logical explanation. The Court of Appeal, in *Durante* referred with approval, to its earlier decision in **R v Ian Drury** (1971) Cr App 104, delivered in November 1971, in which, the court held that there is no rule that, the "*mere fact*" that a jury has returned inconsistent verdicts, means that the Court of Appeal, is obliged to quash the conviction. However, the Court of Appeal found, ***"one of those cases where the verdicts of the jury on different counts, depending as they do on the same basic ingredients, are so violently at odds"***, that the court regarded the convictions as unsafe. See page 114 of **Drury**. (emphasis added)

[33] In **Durante ,**the Court of Appeal also cited its decision in ***Hunt*** **1968 52 Cr App R 580** and gave its formal approval of a statement made eighteen years earlier, in the case of **R v Stone [1955] Crim LR 120 (13 December 1954)**, where Devlin J (as he then was) said:-

> *"That the burden is upon the appellant to show that verdicts upon different counts are not merely inconsistent but are so inconsistent as to demand interference by an appellate court.*" (see page 714 of Durante)

[34] The appellant must demonstrate a logical inconsistency, which is an essential prerequisite for success. (See **Durante**) An oft – quoted exception, is ***Ciligram*** **1994 Cr L R 861** where a conviction was quashed although there was no logical inconsistency. However a differently constituted court rejected the submission, that where a complainant's credibility is in issue, and her evidence is uncorroborated, a guilty verdict must be regarded as unsafe, because the jury also returned not guilty verdicts in relation to some of the complainant's allegations, if there is nothing that differentiates the evidence on the guilty count and the other counts.

[35] Counsel for the Respondent, relied on the case of **Jerome Daley v R, SCCA No. 43/2010**, a decision of the Court of Appeal, in Jamaica where the appellant was tried on an indictment containing two counts. Both counts were in relation to the same complainant, a girl over the age of 12, but under the age of sixteen years. The allegations in respect of the count one, were that the appellant on a day between the 1st and 31st March 2009, carnally knew and abused the complainant. Count two alleged, a similar offence on the 25th April 2009, which was subsequently amended to, between the 1st March to 4th May 2009. Counsel for the respondent submitted that, as it was for the appellant, to establish that, the jury had not applied their minds properly, to the evidence before them, and having failed to do so, there was nothing to show that, the jury was confused or had adopted the wrong approach. Counsel further submitted that, in the alternative, the verdict reflected a view that could reasonably have been taken by the jury on the facts, and that it has been held on appeal that the fact that other juries

faced with the same evidence may have acquitted or convicted on each count does not necessarily mean that the verdict is unsafe.

[36] Phillips JA, in dismissing the appeal, said at para 42, *inter alia:*

> *"As counsel for the respondent submitted, with which we agree, the jurors who heard the evidence and had seen the demeanour of the witness were entitled to find the accused guilty on count one in spite of all the attendant inconsistencies and memory lapses, and in all the circumstances not guilty on count two. Reasonable doubt obviously could and did arise in respect of count two on the indictment."*

The Court quoted the persuasive judgment in *McCluskey*, that the fact that two verdicts were shown to be logically inconsistent did not make the verdict complained of unsafe, unless the only explanation for the inconsistency was that the jury was confused or adopted the wrong approach. A reasonable explanation was that the jury having convicted of the more serious charge of manslaughter, would have considered the much lesser charge of affray merely academic.

[37] Mr Sylvester, submitted that, the evidence of the complainant on Counts 1, 2 , 3, 5 and 7 were so strikingly similar , that it is incomprehensible why the jury would be sure on count one and have disagreement on the other counts . Counsel relied on **R v Ab** [1997] EWCA Crim 1200, which he submitted provided a reasoned basis as to why the verdicts in AB, could not be regarded as inconsistent. According to Mr Sylvester no such basis exists in the case at bar.

[38] Counsel highlighted, the following similarities in the count in the evidence adduced at trial.

(a) The appellant was alleged to have attacked/pounced upon the complainant in an area where no one is around.

(b) There was a struggle between the appellant and the complainant before he eventually had sexual intercourse with the complainant.

(c) After finishing sex with the complainant, the appellant, put on his clothes and threatened the complainant that he would kill her and her family if she told anyone.

(d) The complainant then put on her clothes and did not tell anyone about the attack.

[39] Mr Sylvester contended that, the decision in AB, is distinguishable from the instant case, the court of appeal in AB, held that the counts in relation to which, a defence witness, had given evidence, were the counts ,on which not guilty verdicts were returned. Therefore there was an explanation for the jury's findings. There was no logical explanation for the case at bar. Further, based on the similarities of the counts, the principle applicable in the *Durante* case is relevant, therefore the appeal should be allowed.

[40] Mr Sylvester further argued, that *Ciligram*, which was referred to in AB, is an exception to the principle, that a logical inconsistency is a necessary prerequisite to a successful challenge of inconsistent verdicts. Circumstances may render the verdicts unsafe. Counsel contrasted the decision in *Ciligram* to that in *Klass*. When a logical explanation for the apparently contradictory verdicts can be inferred, then according to Counsel, the verdicts are not contradictory in the meaning of *Durante*. When an examination of the indictment and the evidence is done and it is clear that no logical explanation exist for the contradictory verdicts, then the verdicts are inconsistent within the meaning of *Durante*.

[41] According to Mr Sylvester, the evidence on all the counts bore four similarities, and the only issue for the jury was whether they believed the act occurred as alleged by the complainant. In those circumstances, the counts on which the verdicts of guilty and the others on which no verdicts were returned, are inconsistent, and no reasonable

jury who applied their minds to the facts could come to that conclusion, therefore the verdict on count one should be set aside.

[42] It is so that there are similarities between Count 1 and the other counts. In Durante, the court was of the view that the **verdicts on the different counts*, depending as they do on the same basic ingredients*** are so opposed as to render them unsafe. The issue is whether the evidence adduced in relation to count 1, depended on the same basic ingredients as in the other counts, to the extent, that the verdicts rendered are inexplicable or irrational.

I cannot agree, with Counsel for the appellant, that the evidence on count 1 is strikingly similar to the evidence on the other counts. It. In Durante, the basic elements of the offences were similar .The accused had on the same day tendered the same cheque, that he admitted to have handled. The issue being whether he could form the requisite intention**.**

In this case the allegations cover a period of two years. The virtual complainant was 13 years old when the allegations in respect of count one was said to have been committed. In respect of count one, the unchallenged evidence is that the complainant was *virgo intacta*. Her evidence was, after the appellant had sex with her, she noticed blood on her legs, when she returned to her room. Naturally, that bit of evidence was peculiar to count one. Is this an incident, that the complainant was likely to recall the date of, or make a note of, as she said she did?

[43] Count 1 is the only count that takes place "*sometime at night"*. All the other allegations, are during daylight hours, the latest being 6:00 pm. The complainant, in respect of count one, gave evidence in greater detail, of words she actually used. She said she shouted, *"No, no, no, no, let me go"*, but the loud music from the adjoining bar was being played. In no other count, is there evidence of her speaking. Count one gives greater details of the accused actions before he penetrated the complainant. There is evidence, from the complainant, "*He kissed my neck and took out my breast"* and the insertion of his finger in her vagina, "*hurt so bad*". This is the only count on which, the

complainant gave evidence of feeling pain, "*I slept in immense pain that night and I felt dirty"*.

[44] The jury heard evidence of two substantially different locations, where the attacks on the complainant took place. The location in count one, was at the home of the complainant. The attack at the home, was the only attack that took place at night. Phillips JA, statement in *Jerome Daley*, of the entitlement of the jurors, having heard the evidence and seen the demeanour of the witnesses to return a verdict of guilty in respect of count one and not guilty in respect of the other counts, is apposite .

[45] The incidents, involving counts, other than count one, took place between two public locations. Location one, is described by the virtual complainant, as "a shortcut", and the other, is situated just off the public road. In relation to the short cut, the jury was directed by the learned trial judge that, they could not be sure, based on the evidence that the prosecution had proven its case. In respect of the other counts, questions were posed as to the number of houses, if any, in that area. The height of the vegetation and the frequency of pedestrian traffic, were different considerations, from those adduced in support of count one. On count one, the issue was, whether there was an outside restroom, that the complainant was obliged to use, as against, the testimony of the officer, that the outside restroom, was for the use of patrons of the bar.

[46] The jury had been directed at the end of the prosecution's case that, the failure to adduce evidence in respect of two dates, had resulted in those counts being dismissed. The jury had also been directed as to the importance of dates when they were directed that, they could not be sure in respect of count 5, because the alleged date, could not be a school day. The inability of the prosecution to support the dates of offences with documentary proof, which the complainant said she had, could have caused reasonable doubts, as to the correctness of those dates Whereas the complainant's own recollection, in respect of count one, which is the date of her first sexual intercourse, made them sure of its accuracy.

[47] The appellant has failed to demonstrate that the verdicts on the counts are not merely inconsistent, but so inconsistent, as to demand the interference by this court that a miscarriage of justice occurred. The appellant has failed to prove a material inconsistency. There are reasonable explanations for the verdicts. The jury ably demonstrated that they understood their duties, by the probing questions they asked. It has not been shown that the jury was confused. This ground also fails.

[48] I am constrained to point out, that although this matter, was conducted and argued, as if the jury's, "*no verdict*", is of similar import and has similar consequences as a not guilty verdict. The records indicate that the jurors, when asked by the marshall, indicated, they could reach a verdict.

> *"Court: Have you agreed on a verdict in the second count?*
>
> *Jury: We can reach a verdict, My Lord.*
>
> *The Court: Third Count?"*

After all the enquiries were exhausted by Marshall.

> *"Court: And what about the other Four Counts put that for the fifth too because you all got to decide whether you'll …"*
>
> *Prosecutor: Yes, My Lord, the ... the some adjournment date will be granted in relation to those, I guess*."

[49] The jury had retired at 10:02 am and returned at 1:27 pm and were divided 7 to 2, in respect of Count one. **The Jamaican Criminal Bench Book**, recommends the following:-

(a) It is advised that when taking the verdict the trial judge should be sensitive to any comments made by the foreman which may suggest that further assistance is required or may be helpful. There is no stage at which the jury cannot be assisted by guidance from the trial judge.

(b) If the division does not allow for a majority verdict to be taken the foreman should be asked if, allowed further time, the jury could arrive at a verdict. Depending on the answer, the judge may consider giving a majority direction.

(c) It is for the judge to decide if or when a majority direction is to be given, although it is good practice to inform the advocates of this intention. Sometimes advocates may ask the Judge when he is likely to give such a direction. The judge is under no obligation to give any indication, although in practice this may be done.

Ground Three: Appellant Defence

[50] It was submitted that the learned trial judge failed in his duty to identify the defence. That the judge did not explain to the jury, what the unsworn statement was in law and therefore how this is to be factored in their deliberations.

[51] In **Alvin Dennison v R SCCA No. 122/2010**, Morrison JA outlines a helpful historical backdrop, to the evolution of the unsworn statement in a criminal trial. Morrison JA noted, that the accused in England, was not entitled to legal representation until 1836, nor to give evidence until 1889. The right to give an unsworn statement developed as a result of *"judicial attempts"* to mitigate the harshness of the criminal law and procedure towards the accused.

[52] The lack of capacity to give evidence, in England, was removed by statute in 1898. However, the right of the defendant to make an unsworn statement from the dock was expressly preserved. Then the pendulum started to swing in the other direction, so by *"the late 1970s and 1980s the right to make an unsworn statement was already regarded in England as ah historical anomaly".* (Per, Lord Steyn in Mills and Others 1995 1 WLR 511). It was finally abolished in England in 1982 (by section 72 of the Criminal Justice Act 1982).

[53] However, the *"the historical anomaly"*, is preserved in Belize, in the Evidence Act 2000, Revised Edition, which provides at S 58:

"58. Every person charged with an offence, and his wife or her husband, as the case may be, shall be a competent witness for the defence at every stage of the proceedings, whether he or she is charged solely or jointly with any other person. Provided that: (f) every person called as a witness in pursuance of this Act shall, unless otherwise directed by the court, give his evidence from the witness box, or other place from which the other witnesses give their evidence.

(g) Nothing in this Act shall affect section 34 of the Indictable Procedure Act, or any right of the person charged to make a statement without being sworn."

[54] The Court has consistently complied with the statutory entitlement of the accused to make and unsworn statement at his trial. In Jack Cabral Jr. v Reg, Criminal Appeal No. 7 of 1977, delivered on 5th November, 1977 (Hogan P., Clifford Inniss, J. Duffus, J.A.), where the Court upheld the DPP submission that the direction on the unsworn statement, must be read in conjunction with general directions that are given to the jury. The trial judge had put the unsworn statement to the jury, and told them in accordance with the case of *Joseph John Coughlan* (1977) 64 Cr. App. R. 11 at p. 17). In which it was stated:-

"That an unsworn statement carried less weight than a statement on oath because it could not be tested by cross examination, but that they must take it into account along with the evidence in the case." (per Shaw J.)

[55] In 1983, Moe CJ, made reference to the historical development of the unsworn statement that he considered, *"half way in value and weight and between a sworn statement and hearsay".* In, **PC 149 T Ramirez v Jacob Olfert**, The Court, referred to **Reg. v. Campbell, 69 Cr. App. R. 221**, Inferior Court Appeal No. 13 of 1983, and approved the following statement from the judgment:-

"A statement from the dock is not, of course, evidence. It is, as many think – the fact that a defendant is still at liberty to make a statement of fact from the dock, invites a jury to consider his version of the facts without taking the oath and without subjecting himself to cross-examination – an anomalous historical

survival from the days before the Criminal Evidence Act 1898 when a person could not give evidence on his own behalf. Whether it is an anomaly or not; the courts have to grapple with it and a statement from the dock unsworn now seems to have taken on in current practice a somewhat shadowy character half-way in value and weight between unsworn evidence and mere hearsay. A jury cannot be told to disregard it altogether. They must be told to give it such weight as they think fit, but it can be properly pointed out to them that it cannot have the same value as sworn evidence which has been tested by cross-examination."

[56] In 1996, the Board of the Privy Council, in an appeal from this Court, in **Linsberth Logan v. The Queen (Belize [19960 UKPC 64 (21 February 1996)** stated that,

"unsworn statement, untested by cross examination, is in principle markedly inferior in quality to sworn evidence and a trial judge is entitled to explain this fact to the jury in accordance with the guidance given by the Board in Director of Public Prosecution v Leary Walker 1974 1 WLR 1090, 1096B-E. Nevertheless it is for the jury to consider what weight they should attach to such an unsworn statement".

[57] Despite the undoubted inferior status to sworn testimony, the accused has a statutory entitlement pursuant to S. 58 of the Evidence Act, to make an unsworn statement. The views of the judge as to the value of the statement, cannot derogate, from the right of the accused to have that statement determined exclusively by the jury as to what weight to afford it. In *Alvin Dennison v R SCCA No. 122/2010*, Morrison JA said at paragraph 51:-

"Carey JA's characteristically trenchant description of the right to make an unsworn statement as a 'vestigial tail' of the law of evidence may well reflect a view shared by many, though certainly by no means, all persons involved in the system of criminal justice in this jurisdiction. But, in our view, for so long as it remains a right available to defendants, it is incumbent on trial judges to direct

juries as to its effect fully in accordance with the authorities. This view of the matter remains unaffected, it seems to us, by Lord Clyde's dismissal of the unsworn statement in Alexander von Starck v R, echoing Lord Steyn in Mills and Others v R, as 'significantly inferior' to oral evidence. As has been seen (at para. [47] above), Lord Griffith expressed a similar view, perhaps less definitively, in Solomon Beckford v R, in his observation that the an sworn statement 'is acknowledged not to carry the weight of sworn or affirmed testimony'. Whether this is so or not from an objective standpoint, the fact remains that (a) as Gordon JA put it in R v Michael Salmon (at page 3), '[i]n our law an accused has a right to make an unsworn statement in his defence'; and '(b) the value of an unsworn statement in a particular case is still purely a jury matter. [52] The rule is no different in cases in which the defendant relies on self-defence."

[58] The Jamaican Court of Appeal recently in **Delroy Laing v R** [2016] JMCA Crim 11, turned its attention to the value and efficacy of the unsworn statement, after a careful examination of the authorities, and its judgment in **Alvin Dennison**, the Court found that the trial judge had, proceeded to tell the jury what value the unsworn statement may have had, which was, as far as he saw it, to cast doubt on whether the appellant may have been acting in lawful self-defence. The Court of Appeal, again emphasised the legal right bestowed on the defendant, to make an unsworn statement. The court reaffirmed , 'that as long , as the right exist' , the judge's views of the weight to be given to that unsworn statement is inconsequential , as it is solely for the jury to determine, the weight to be attached . It is clear, that any anomaly, if any, that may exist due to the statutory right to make the unsworn statement, is a matter for the Legislator, and not the judiciary. McDonald Bishop JA, in delivering the judgment of the Court, said, at paragraph 42:-

*"[42] It is for this reason that the Privy Council in **DPP v Walker** had directed that the jury must be told that it was 'exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight to be attached to it' (emphasis added). It means that despite whatever view a trial*

judge may hold of the evidential quality, value, worth or utility of an unsworn statement, as long as a defendant has that legal right to state his case in that way, it should be left exclusively for the jury's consideration, how they are going to treat it.

[59] The learned trial judge read the unsworn statement. It was argued on behalf of the respondent, that the omission of directions, may well have enured to the benefit of the defendant, because the jury may very well have given it the same weight as evidence. If the intelligent juror, as Carey JA joints out had any questions as to why the accused had not gone in the witness box, to be cross-examine, as the other witnesses had done. He would have found his answers, in the way, the preceding judge conducted the trial. The juror would have been aware that, the unsworn statement of the accused is the exercise of a right given to him in law.

[60] In a decision of this Court, in **Carlton Smith**, counsel for the defence submitted that the trial judge had failed to put to the jury the defence raised and failed to provide a proper direction as to the treatment of an unsworn statement. The learned trial judge had directed the jury, the following terms:

"because the accused did not give evidence, it means that the is no evidence from to undermine, contradict or explain the evidence put forward before you by the prosecution" … the judge further directed the jury,

"You must base your verdict on complete evidence that has been led in this court before you. Don't speculate or guess. You must return your verdict only in light of the evidence put before you by the prosecution In this case."

[61] Carey JA said of those directions, "The directions given by the learned trial judge amounted to a complete negation of what the appellant stated in his unsworn statement and in the end the jury were invited to consider only the evidence presented by the prosecution. We therefore found that the appellant had been deprived of the substance of a fair trial. However, having regard to the overall strength of the prosecution's case, in the interest of justice we ordered a new trial."

[62] This court held that the direction in **Carlton Smith**, amounted to a complete negation of the unsworn statement. The Privy Council in **Ibandez** held, that the direction, "effectively withdrew the appellant's defence", from the jury (at para 33). In **Dennison**, Morrison said, it is unhelpful and unnecessary for the jury to be told that the unsworn statement is not evidence. He noted that the trial judge on four occasions, reminded he jury that the unsworn statement carried less weight than the statement made on oath or affirmation, this in the view of the court was a substitution of the judges view of the statement for that of the jury. The Court held that the accused defence of self defence was not properly and adequately put because of the learned trial judge's repeated qualification of the statement.

[63] In this matter, at the end of the prosecution's case the learned trial judge, had informed the appellant, of his right to make an unsworn statement. He had indicated, the three options opened to the accused, in stating his defence, and the consequences attendant on each choice. Later in his directions, he reminded the jury of these options. The learned trial judge drew no distinction between, the options that the appellant was entitled to assert. Nothing in the trial judges direction diminished the accused unsworn statement. Thus there was fertile ground for, the submission of counsel, that it was open to the jury to attach the same weight to the unsworn statement as to the evidence they had heard. The learned trial judge had read the statement of the appellant to the jury. In the circumstances, it could not be said, that there was a negation of the accused unsworn statement or and effective withdrawal of the defence. There was no unnecessary and unhelpful direction, that the unsworn evidence was not evidence, as, the Jamaican Court of Appeal found in Dennison. Neither did the learned trial judge substitute his view of the unsworn statement for that of the jury, by a repetition of the direction, 'that the unsworn statement carries less weight than a statement made on oath or affirmation'. For these reasons this ground also fails.

Disposition

[64] The appeal is dismissed and the sentence is confirmed.

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AWICH JA

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HAFIZ-BERTRAM JA

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CAMPBELL JA