EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCRAP2010/0004

BETWEEN:

DEREK CORT

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Dame Janice M. Pereira — Chief Justice
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mde. E. Ann Henry, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Patrick Thompson, with him, Ms. Sonjah Smith for the Appellant
Ms. Tiffany Scatliffe for the Respondent

2013: September 16;
2013: December 19.

Criminal appeal – Rape – Evidence of appellant's good character raised only at sentencing stage of trial – Whether trial judge erred in failing to give jury good character direction – Whether trial judge erred in referring to previous witness statement – Whether trial judge misdirected jury on how to deal with recent complaint evidence – Whether trial judge erred in permitting Crown to adduce evidence relating to offence not included on indictment

The appellant and virtual complainant had been involved in an intimate relationship for several months. The virtual complainant ended the relationship in July 2008 much to the dissatisfaction of the appellant, who subsequently tried to get back together with her. The virtual complainant refused to do so, despite the appellant's best efforts.

On the night of 6th August 2008, the virtual complainant entered her apartment and was accosted by the appellant, who had earlier broken in and was lying in wait for her. He was armed with a knife, and he assaulted her, then raped and buggered her. On leaving the

apartment the following morning, he threatened to kill her if she told anyone of the incident. The virtual complainant first recounted what had occurred to a pastor who had given her a lift while she was walking along the road, after he had noticed that she appeared a bit distraught. She later reported the incident to the police and had her injuries examined by doctors who confirmed that they were consistent with the allegations of assault made by her.

The appellant denied the allegations when confronted by police and stated that he had been at home for the entire afternoon and evening on 6th August 2008. He was later charged with the offence of rape, and on 13th May 2010, was convicted and sentenced to 10 years imprisonment. The appellant had no previous convictions, but in the court below, evidence of his good character was not raised by his counsel before the sentencing phase. He appealed to this Court against his conviction, contending that the learned trial judge erred in failing to give the jury a good character direction, had misdirected the jury on how to deal with the recent complaint evidence of one of the prosecution witnesses and had referred in her summation to the prior statements of the witness, and had further erred in permitting the Crown to adduce evidence relating to the offence of buggery which was not included on the indictment.

Held: dismissing the appeal and affirming the appellant's conviction, that:

1. Even if the jury had been given a direction on the appellant's good character by the learned trial judge (in relation to propensity only since he gave no evidence at trial), this would have made no difference to the outcome of the verdict.

   Bally Sheng Balston v The State [2005] UKPC 2 followed; Nigel Brown v The State [2012] UKPC 2 cited; France and Vassell v The Queen [2012] UKPC 28 cited.

2. The learned judge's comments on the evidence of recent complaint of Pastor Ricketts and her referral to his previous witness statements did not undermine the fairness of the trial and were not prejudicial in such a manner that would necessitate that the conviction be quashed.

3. In the present case, the appellant was charged with the more serious offence of rape rather than with both the offences of rape and buggery. Evidence of both however, was brought in an effort to give a full account of what transpired. The fact that the prosecution chose to charge the appellant with only the more serious offence of rape does not make the part of the story relating to the actions which amounted in law to the commission of buggery so prejudicial as to require expunging it from the evidence. Moreover, given the circumstances of this case,

the excision of the evidence showing the commission of the offence of buggery would not have made any difference to the verdict reached by the jury.

JUDGMENT

[1] PEREIRA, C.J.: Derek Cort ("the appellant") was convicted of the rape of a woman ("the VC") contrary to section 117 of the Criminal Code, 1997[1], and was sentenced to 10 years imprisonment. He has appealed against his conviction on three grounds, alleging misdirection by the trial judge. The brief facts of the case are now set out.

Background Facts

[2] The evidence of the VC was that she and the appellant were involved in an intimate relationship for 11 months. As is the case in some relationships, things started off well but at some point turned sour. The VC ended the relationship in July 2008, much to the dissatisfaction of the appellant. The VC testified to the fact that the appellant asked her to get back into a relationship with him but she refused. The appellant however, persistently telephoned the VC even though she was refusing to take his calls. An analysis of the telephone data produced at trial showed that the appellant called the VC 18 times between 21st and 30th July 2008, while the VC called the appellant once during the same period. The data also reflected that between 1st and 9th August 2008, the appellant called the VC 40 times whereas the VC called the appellant 4 times.

[3] The VC's evidence was that on 6th August 2008, after the breakup, she got home from the beach at about 8:00 p.m. When she entered her apartment she turned on the light, walked through her apartment and went into her bathroom. While in the bathroom she took a phone call and while she was on the call she saw a shadow move across the room and then saw the appellant coming towards her

[1] No. 1 of 1997, Laws of the Virgin Islands.

with a brown and gold knife. The appellant lunged at her with the knife and a scuffle ensued as she tried to grab the knife. She asked the appellant how he got into the house and he replied that he had been behind the refrigerator. It was also her evidence that the appellant told her that he came to kill her, that she refused to answer his phone calls and get back into a relationship with him and if he couldn't be with her then no man would.

[4] The VC testified that throughout this ordeal she was very scared. The appellant punched her in the eye, took her from the bathroom into her bedroom and asked her to have sex with him. When she refused, the appellant punched her in the left breast, took some hair grease from the dresser, put it on his penis, threw her onto the bed, pointed the knife towards her side and thrust his penis into her vagina. Throughout the VC screamed and kicked her feet. When he was done, the appellant ordered the VC to lie on her abdomen, then he put some more hair grease on his penis and thrust his penis into her anus, despite her repeatedly asking him not to. The appellant told her that neither of them would sleep that night and he kept her nestled in the corner of her bed for the entire night. At about 5:00 a.m. the appellant again had sex with her against her will. The appellant left her apartment shortly thereafter but not before issuing a threat that if she told anyone what happened he would stab her, cut off her left breast and kill her.

[5] The VC's evidence was that at about 7:00 a.m. on 7th August 2008, some 2 hours after the appellant left, the VC left her house and began walking to work. On her way there she met Pastor Ricketts ("the pastor") who was driving in the vicinity of the Marina. She knew the pastor as on occasion she attended the church where he pastored. The pastor said hello to the VC but she did not answer. Finding this to be rather strange the pastor stopped and noticed that the VC was teary eyed. He asked if she was ok and offered to give her a ride. He asked what was wrong and the VC responded that she could not tell him because her life depended on it. She repeated this several times to the pastor. The pastor assured her that he would not repeat anything she told him, but the VC kept crying and repeating the

earlier concerns which she expressed. The pastor then inquired whether she was raped. After repeating a few more times that she could not repeat it as her life depended on it and crying hysterically, the VC proceeded to explain to the pastor what happened. The pastor advised her to go to the police to report the matter. The VC stated that she could not as she feared for her life and the police would do nothing. The Pastor assured her that all would be well if she made the report.

[6] On 8th August 2008, the VC made a report and gave the police a statement. She was taken to the Iris O'Neal Clinic where she was examined by Dr. Odebajo. The doctor, on examination, found that the VC sustained a laceration to the right palm about 6 cm in length, a laceration to the inner part of the mouth on the lower lip, swelling around the right eye and mild tenderness in the epigastric region. The doctor testified that the injuries sustained were consistent with the allegations of assault made by the VC. The VC was also examined by Dr. Paula Trotman-Hastings on 12th August 2008, 6 days after the incident. Dr. Trotman-Hastings conducted a general examination which confirmed the injuries noted by Dr. Odebajo and also conducted an examination of the VC's genitalia which revealed that there were no bruises or lacerations. Dr. Trotman-Hastings however noted that the time gap between the incident and her examination was sufficient to allow any bruises which may have existed to heal. Further, Dr. Trotman-Hastings noted that if the vaginal tissues or the anus are sufficiently lubricated there would be no bruising irrespective of whether the intercourse was consensual or not. She also noted that a rape victim does not always sustain injuries to the vaginal area.

[7] The appellant, when confronted by the police and told of the allegations made by the VC, denied them and stated that on 6th August 2008, he got home at about 1:00 p.m. and remained home by himself for the entire night. However the witness Lorenzo Peters testified to having seen the appellant at about 7:40 p.m. on 6th August 2008, heading in the direction of the VC's house. He remarked to the appellant "Derek you going on?" which was a common exchange used between himself and the appellant when he wanted to ask whether the appellant was going

to the VC's house. To this the appellant replied "yes". Although in his statement to the police Mr. Peters expressed that he was sure the appellant knew what he meant by "you going on", under cross-examination he confirmed that he was not sure whether the appellant knew what he meant by the phrase.

[8] Another witness, John Alex Charles testified that on 6th August 2010, he was on a telephone call with the VC at about 8:00 p.m. After about one minute into the conversation the telephone call got cut off. The witness stated that prior to the telephone call dropping he did not hear a male voice and the VC sounded fine.

[9] The witness Christine Leonard, the VC's neighbor, gave testimony that on or about 11:45 p.m. on 8th August 2008, she saw the appellant entering the VC's apartment by using his hands to open the window louvers and then reaching for the door knob on the inside to open the door. The appellant tip toed into the apartment, stayed for about two minutes, came out of the apartment closing the window louvers half way and then left looking angry. The appellant did this twice in the space of 15 minutes. Ms. Leonard never saw the VC that evening and did not think that she was at home because the lights were on in the apartment, which was not usually the case.

[10] The appellant made no further statements about the matter save for the statement denying the allegations, neither did he give evidence at the trial. From the questions posed by his counsel in cross-examination of the prosecution witnesses, it was apparent that his defence was a complete denial of the incident which in essence was to suggest that he was not there and/or that it was not him, and further that the VC had fabricated the entire incident for her own purposes.

[11] After considering the evidence put to them, the jury returned a unanimous verdict of guilty. The learned trial judge sentenced the appellant to 10 years imprisonment. The appellant has appealed against his conviction only essentially on three main grounds:

(i) the learned trial judge failed to give a good character direction to the jury;

(ii) the trial judge misdirected the jury on how they were to deal with the recent complaint evidence of Pastor Ricketts;

(iii) the learned trial judge erred in permitting the Crown to adduce evidence that the appellant had buggered the VC when there was no count for buggery on the indictment.

I will now consider each ground in turn.

Lack of a good character direction

[12] The appellant contends that the trial judge failed to give a good character direction in her summation to the jury. The appellant's good character was not raised by counsel until the sentencing phase of the trial. In addition the appellant never gave evidence at his trial. As a result, the jury was never exposed to the appellant's seemingly good character and therefore did not get an opportunity to consider it before coming to their decision.

[13] Counsel for the appellant argues further that the appellant's trial counsel failed in his duty to the client by not raising the appellant's good character earlier. In this case counsel deemed the failure to do so as having a profound effect on the safety of the conviction, rendering it deserving of being quashed. He says that as a result the jury was deprived of the opportunity to examine the appellant's good character and make a determination as to the appellant's guilt or innocence. The case, he says, came down to the issue of credibility as the evidence upon which the appellant was convicted was circumstantial, there being no independent evidence to confirm the allegations made by the VC. He says that the appellant's credibility was in issue and therefore the jury should have been given a good character direction, even though his good character was not raised by his counsel. Counsel accepts however, that in the absence of any evidence led by the appellant he would not have been entitled to the credibility limb of the good

character direction, but only the propensity limb. Evidence of the appellant's good character would have assisted the jury in their deliberations and therefore should have been brought to their attention. The appellant was therefore disadvantaged by both counsel's failure and the learned trial judge's omission of such a direction.

[14] Counsel for the Crown contends that the judge's failure to give a good character direction in her summation to the jury was not a material irregularity which renders the conviction unsafe and unsatisfactory. Counsel advances that the case against the appellant was so overwhelming that a good character direction would not have changed the outcome. In this regard, she relied on the following factors:

(a) The VC was not shaken in her evidence as to be considered unreliable. Also, the only version of the story before the jury was the version told by the VC.

(b) The method by which the appellant gained access to the VC's apartment, coupled with the fact that just 48 hours later, a witness Ms. Leonard saw the appellant accessing the VC's apartment by lifting the louvres;

(c) That although the appellant told the police when they first met him that he had been at home all evening, the witness Mr. Peters testified to seeing the appellant during the evening on the road which followed the direction and was in the vicinity of VC's house. Further, Mr. Peters had spoken to him whilst the appellant was going along that road. Mr. Peters also testified that he knew of the appellant and the VC being in a relationship and that the appellant was jealous.

(d) The doctors' evidence which confirmed injuries consistent with the allegations of assault made by the VC.

[15] A fitting starting point would be to examine the basic principle which was summarised by the Privy Council in Mantoor Ramdhanie and Others v The State.[2] There the Board held:

> "Where a defendant's good character is established by evidence (including an admission by the prosecution) or cross-examination, it is incumbent on a trial judge to direct the jury as to its significance in relation to both credibility and the (un)likelihood of the defendant having committed the offence charged: *R v. Vye* [1993] 1 WLR 471 and *R v. Aziz*, cited above. But before a judge is so obliged, the defence must have raised the point "distinctly", establishing the absence of any prior record by evidence or cross-examination: *Barrow v. The State* [1998] AC 846, 852d; *Teeluck and John v. The State* [2005] UKPC 14, para. 33(v). There are however 'some circumstances in which the failure of defence counsel to discharge a duty, such as the duty to raise the issue of good character, which lies on counsel …. can lead to the conclusion that the conviction is unsafe and that there has been a miscarriage of justice': *Sealey and Headley v. The State* [2002] UKPC 52, para. 30; *Teeluck and John*, paras. 38-40."[3]

[16] In Troy Simon v The Queen[4] Rawlins JA, endorsing this principle, opined:

> "The obligation of a trial judge to give a good character direction, will therefore ordinarily be triggered after the defence raises the point "distinctly", establishing the absence of any prior criminal record by evidence or cross-examination. However, the exception to this general rule is that the accused will still be entitled to a good character direction in the rare cases in which the misbehaviour or ineptitude of defence counsel is so extreme that it constitutes a denial of due process to the accused."[5]

[17] The question for this court is no doubt the same one which the court of appeal was asked to consider in Simon – can it be said that this case is an exception to the rule, or would the jury have reached the same verdict had the appellant's good character been put into evidence?

[18] It must be understood that the terms upon which the jury is directed is dependent on the evidence that is adduced for the case. Therefore each case may develop differently. In this case evidence that the appellant had no previous convictions

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[2] [2005] UKPC 47.
[3] para. 14.
[4] Grenada High Court Criminal Appeal HCRAP2003/0016 (delivered 22nd May 2006, unreported).
[5] para. 4.

was not introduced by his counsel at trial and no explanation was given for counsel's failure to raise evidence of the appellant's good character before the sentencing phase, notwithstanding current counsel's request for an explanation. It is quite likely that because it was not raised by counsel during the trial the learned trial judge did not introduce it in her summation. Indeed it is reasonable to infer that the learned trial judge was unaware of the appellant's good character.

[19] In France and Vassell v The Queen[6] the Court stated:

> "… in the absence of an explanation from counsel as to why he did not raise the issue of the defendant's good character, it is necessary to examine whether the lack of a good character direction has affected the fairness of the trial and the safety of the appellant's conviction, on the basis that such a direction ought to have been given."[7]

The Board continued:

> "[T]here would be cases where it was simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference. *Jagdeo Singh* and *Teeluck* were obvious examples. But it recognised that there would also be cases where the sheer force of the evidence against the defendant was overwhelming and it expressed the view that in those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case came within one category or the other would depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues and evidence."[8]

Therefore in order to determine whether this case falls under the exception to the rule, this court must examine the evidence adduced and consider the effect which the failure to raise evidence of the appellant's good character had on the verdict. To do so we must first consider the purpose of a good character direction.

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[6] [2012] UKPC 28.
[7] para. 44.
[8] para. 46.

[20] In Teeluck and John v The State[9] the Board examined the principles to be applied regarding good character directions.

> "(i) When a defendant is of good character, ie has no convictions of any relevance or significance, he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case: *Thompson v The Queen* [1998] AC 811, following *R v Aziz* [1996] AC 41 and *R v Vye* [1993] 1 WLR 471.
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> (ii) The direction should be given as a matter of course, not of discretion. It will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given: *R v Fulcher* [1995] 2 Cr App R 251, 260. If it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial: *R v Kamar* The Times, 14 May 1999.
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> (iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.
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> (iv) Where credibility is in issue, a good character direction is always relevant: *Berry v The Queen* [1992] 2 AC 364, 381; *Barrow v The State* [1998] AC 846, 850; *Sealey and Headley v The State* [2002] UKPC 52, para 34.
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> (v) The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: *Barrow v The State* [1998] AC 846, 852, following *Thompson v The Queen* [1998] AC 811, 844. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: *Thompson v The Queen*" [10]

[21] The purpose of the direction would be twofold, the first limb being the credibility direction, which would express that the appellant, having no previous convictions, could be considered a person of good character and would more likely be telling the truth than a person of bad character. In this case the appellant gave no

[9] [2005] UKPC 14.
[10] para. 33.

evidence and thus his credibility could not be said to have been put in issue such as to benefit from a credibility direction.

[22] The second limb from which the appellant could have possibly benefited is a direction on propensity. Such a direction would have informed the jury that the appellant, having no previous convictions, could be considered a person of good character and would be less likely to commit a crime, especially one of the nature with which he is charged.

[23] In Bally Sheng Balston v The State[11] the Board, who were faced with a similar situation, opined:

> "[Counsel for the appellant] did not lead any evidence as to the appellant's good character, with the result that a direction to that effect was not given by the trial judge. It is clear that the appellant had no previous convictions. This was an omission on counsel's part for which no satisfactory explanation has been given. But their Lordships are of the opinion that a good character direction would have made no difference to the result in this case. The only question was whether it was the appellant who murdered the deceased or whether she was killed by an intruder. All the circumstantial evidence pointed to the conclusion that the appellant was the murderer. There was no evidence to suggest that anyone else was in the house that night who could have killed her or that anyone else had a motive for doing so. In these circumstances the issues about the appellant's propensity to violent conduct and his credibility, as to which a good character reference might have been of assistance, are wholly outweighed by the nature and coherence of the circumstantial evidence."[12]

[24] As the Board puts it in Nigel Brown v The State:[13]

> "It is well established that the omission of a good character direction is not necessarily fatal to the fairness of the trial or to the safety of a conviction – *Jagdeo Singh's case*. [2006] 1 WLR 146 para 25 and *Bhola v The State* [2006] UKPC 9, paras 14-17. As Lord Bingham of Cornhill said [at para 25] in *Jagdeo Singh's case*, 'Much may turn on the nature of and issues in a case, and on the other available evidence.'"[14]

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[11] [2005] UKPC 2.
[12] para. 38.
[13] [2012] UKPC 2.
[14] para. 33.

[25] In Simon the omission was deemed fatal to the conviction. In that case the appellant maintained that the intercourse was consensual and further there were notable discrepancies between the evidence of the virtual complainant and at least one of her witnesses who was used to corroborate her story. Rawlins JA opined that under such circumstances a good character direction would have been proper and it was not possible to tell how such a direction would have influenced the jury. On that premise the appeal was allowed, the sentence set aside and a retrial ordered.

[26] Having examined all of the evidence, I don't think that this case is an exception to the rule as described by Rawlins JA in Simon. I am of the view that the evidence against the appellant is very compelling, and therefore it is very unlikely that the failure on the part of counsel or the omission of the learned trial judge would have affected the verdict returned by the jury. The VC's evidence was not discredited in any way and no differing account was put forward. There was no evidence to show that anyone else had motive or could have committed the offence. Further the doctors' evidence was to the effect that the injuries they saw on examination were consistent with the VC's account of being assaulted. There was no evidence that the VC was in a physical altercation with anyone else or any other explanation given for the injuries sustained by her. There was also the evidence of the appellant gaining access to the VC's house by use of the open louvres. There is no evidence of any other person accessing her house at any time or in that manner. Further he was seen on the road in the vicinity of the VC's house the very evening of the incident. Therefore even if the fact that he had no previous convictions was brought to the jury for consideration as to his propensity, this in my view would have made no difference to the outcome of the verdict. The VC's evidence coupled with the other circumstantial evidence was compelling. This is also fortified by the nature of the defence which was put – "it was not me, I was not there" which does not explain the VC's injuries as confirmed by the doctors. The statement of the Board in Bally Sheng Balston recited above, is accordingly quite applicable to the circumstances of this case. Taking all of this into consideration I

agree with counsel for the respondent that had the appellant's good character been raised and a good character direction given the verdict would have been the same. Accordingly this ground fails.

Recent Complaint

[27] The appellant's second ground of appeal is that the trial judge misdirected the jury when in her summation she read a statement which was given to the police by Pastor Ricketts on 21st August 2008, during her treatment of evidence of recent complaint. This statement however was not in evidence at the trial. To bolster the argument further the appellant argues that there was no corroboration of the VC's evidence. Counsel for the appellant contends that by making such improper comments the trial judge would have confused the jurors and prejudiced the appellant. This could not have been undone by directing the jury that the statement made by the pastor was not in evidence.

[28] In her summation the trial judge addressed the issue of recent complaint and the evidence which was given by the pastor. The trial judge read to the jury the part of the pastor's statement which pertained to that aspect of the case. Making reference to the pastor's statement, the trial judge expressed:

> "What was said to the police is not in evidence in this Court. In fact, what is said to the police is not even evidence under oath and what is said is not tested. … Coming to Court doesn't necessarily mean that the person is speaking the truth also, but they are subjected to cross-examination. They have taken an oath and the veracity, the truthfulness is normally revealed under cross-examination.
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> "So having told the police that, I told you how to deal with those evidence *[sic]* it's really to test the credibility of the pastor…"[15]

[29] After doing so the trial judge further directed the jury along these lines:

> "What Pastor Ricketts told you relates to evidence [of] what [the VC] told him shortly after the incident. It's not what he saw. He came to tell you that he met [the VC] in the roadside by the marina and what transpired

[15] Record of Appeal, Vol. 2, Tab 3, pp. 30-31.

> and what she relayed to him that afternoon. In law, and I need not saddle you with the legal jargons, in law we call that recent complaint because it came out of the mouth of the Prosecution and I believe the Defence. I believe I should use the that terminology, but really simply put what pastor Ricketts have [sic] told is not evidence of what actually happened between [the VC] and the Accused, because Pastor Ricketts was not present at the time of this alleged rape. [The VC] didn't tell you Pastor Ricketts was under the bed and he saw or he was in the bathroom or anywhere. Neither did Pastor Ricketts tell you, but he told you the day after I saw her, she appeared sad, she was crying, we spoke and this is what she told me. So in law we called that recent complaint, the first available person that she came to and complained. So as I told you, what Pastor Ricketts told you is not evidence as to what actually happened between [the VC] and the Accused because he was not present and he did not see anything if anything happened between [the VC] and the Accused. However, it is evidence which you are entitled to consider because it may help you to decide whether or not [the VC] has told you the truth. That is, if you believe what Pastor Ricketts has told you, it goes towards what we call consistency in evidence."[16]

[30] In R v Lambert and Others[17] the Court of Appeal dealt with a situation where the trial judge allowed improper material before the jury and the judge refused to discharge the jury. The Court found that in a situation where material which should not have been is put before the jury, it is incorrect to begin on the premise that this action vitiated the trial. Instead the question to be asked is whether upon viewing the evidence and proceedings of the trial as a whole the verdict has been put in jeopardy or the fairness of the trial has in any other way been prejudiced to the point where it would have been necessary to discharge the jury or quash the verdict.

[31] In The Queen v Tonderai Chakwane[18] the Court of Appeal considered whether the explanation given by the trial judge was to clarify that the recent complaint was not evidence of the facts. The Court reiterated that a careful direction must be

[16] Record of Appeal, Vol. 2, Tab 3, pp. 32-33.
[17] [2006] EWCA Crim 827.
[18] [2013] NICA 24.

given in relation to how the jury should use evidence of recent complaint. To do so the Court made reference to R v Alan Greene[19] as follows:

> "[7] Evidence of recent complaint has always been admissible at common law on the issue of the credibility of the complainant. … In assessing the weight to be given to the evidence on that issue it is important that the jury are directed to pay particular regard to the circumstances of any disclosure and the period of time that may have elapsed between the alleged offence and the complaint. Of course as appears from the preceding paragraph the evidence is also admissible for the purpose of proving the truth of what has been said. In any case it is important for the judge to direct the jury that they should be cautious about the weight that they should give to such evidence since it is coming from the same source as the complainant. It is not independent evidence supporting the complainant's case. In a case such as this where there is a conflict between the complainant and the alleged offender and little or no independent evidence it is particularly important that the jury should be directed about the manner in which such evidence should be considered by them."[20]

[32] Further, in respect of admission of evidence of recent complaint:

> "… it is not necessary that it discloses the ingredients of the offence, but it is usually necessary that it discloses evidence of material and relevant unlawful sexual conduct on the part of the accused that can support the complainant's credibility. Thus it is not necessary that the complainant describes the full extent of the unlawful sexual conduct alleged by the complainant in the witness box, provided it is capable of supporting the credibility of the complainant's evidence."[21]

[33] In the case at bar the learned trial judge was careful to explain to the jury that the account given by the pastor is not independent evidence of what, if anything, transpired between the VC and the appellant. She went on further to explain that the statement of the pastor cannot on its own prove the veracity of the VC's complaint. However, taken along with the other evidence adduced, it can go towards showing the consistency of the VC's story and assist the jury in deciding whether to believe it or not.

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[19] [2010] NICA 47.
[20] para. 16.
[21] Blackstone's Criminal Practice 2008, para. F6.20.

[34] In this case there is also the consideration as to how the Pastor's prior statement to the police came to be raised. The statement made by the pastor was raised by counsel for the appellant in cross-examination with a view towards shaking his credibility. At that time counsel asked the witness to read out a portion of the statement to highlight that the VC never specifically mentioned to the pastor that she was raped by the appellant.

[35] Counsel for the Crown contends that by the appellant's counsel's doing, the jury had the pastor's evidence before them. Therefore when the learned trial judge made mention of it in her summation she was not introducing anything new to the jury. The learned trial judge in her summation also directed the jury on how to treat a witness's prior witness statement, and how that may affect a witness's credibility. She was entitled to make reference to the pastor's prior statement, a portion of which had been introduced by defence counsel, in seeking to show an inconsistency in the pastor's account as set out in his witness statement in terms, it appears, of what he had omitted to tell the police as compared to the additional matters said in evidence. This would have been necessary so as to explain to the jury, the matters on which the pastor's credibility was attacked in relation to the evidence which he gave as compared to his prior witness statement, which had been put to him by the defence.

[36] In R v Adam James Lumsden,[22] the Court of Appeal held that comments made by the trial judge were not improper based on the facts which the jury had before them. Consequently the trial judge was entitled to put such matters before the jury for their consideration.

[37] I agree with counsel for the Crown in this regard. The trial judge in her summation sought to explain to the jury the evidence of the pastor which they had before them and the regard which the jury should have for it. To do so she made reference to what was placed before the jury. She was careful to explain to the

[22] [2011] EWCA Crim 1707.

jury that the pastor's statement was not evidence in the trial as it was not given under oath.

[38] Counsel for the appellant argues that this action by the learned trial judge sought to prejudice the appellant and as a result renders the conviction unsafe and unsatisfactory. I disagree. Firstly, it raised the issue of the pastor's credibility which was a matter for the jury's consideration. Secondly, if the previous statement was accepted, it would favor the appellant rather than prejudice him. The previous statement made no mention of the VC complaining to the pastor that she had been raped. Accordingly, the impact of its admission would have been more favourable to the appellant rather than detrimental.

[39] Taking into consideration the case as a whole, and the evidence which was put before the jury, I am unable to find that the judge's comments undermined the fairness of the trial or was prejudicial in such a manner which would necessitate that the conviction be quashed. Au contraire, it would have enhanced it. This ground therefore also fails.

Wrongful admission of evidence of buggery

[40] It is the appellant's contention that the learned trial judge erred in allowing the crown to adduce evidence of buggery when there was no count on the indictment charging the appellant with buggery. Further, the appellant was only charged with one count of rape but the VC in her evidence spoke to 2 incidents. The evidence adduced was therefore irrelevant, inadmissible and highly prejudicial and it was inappropriate for the learned trial judge to remind the jury of both the second act of sexual intercourse and the act of buggery.

[41] The Crown relied on the Court of Appeal's findings in R v John Harris.[23] In that case the appellant was convicted on two counts, one count of buggery and the

[23] (1969) 53 Cr App R 376.

other of indecent assault, in relation to the same complainant, both counts arising out of the same incident. The appellant was sentenced to seven years imprisonment on the buggery count and five years imprisonment on the count of indecent assault, to run concurrently. He applied for leave to appeal against conviction and sentence. The Court of Appeal granted leave in respect of the conviction of indecent assault, and ordered that the conviction be quashed. Edmund Davies LJ who gave the judgment opined:

> "It is perfectly clear on reading the transcript that the two charges related to one and the same incident. … It does not seem to this Court right or desirable that one and the same incident should be made the subject matter of distinct charges, so that hereafter it may appear to those not familiar with the circumstances that two entirely separate offences were committed. Were this permitted generally, a single offence could frequently give rise to a multiplicity of charges and great unfairness could ensue."[24]

[42] The reasoning in R v John Harris was applied by the Trinidad and Tobago Court of Appeal in Steve Williams v The State.[25] In the latter case Williams who was convicted of a number of offences arising from the same incident, including indecent assault and buggery, appealed on the ground that it was an abuse of process to be convicted of both offences. The Court of Appeal, in quashing the conviction and sentence with respect to indecent assault, found that the act of indecent assault can be said to have merged with the act of buggery amounting to one and the same incident. Therefore the conviction for the greater offence stood.

[43] Similarly in R v Lewis,[26] a judgment from the Jamaica Court of Appeal, the Court held that it was incorrect that two convictions should have been recorded against the appellant for what was substantially one offence arising out of one incident. The Court of Appeal posited that the judge ought not to have treated the counts as if they were from two entirely different offences.

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[24] p. 379.
[25] Republic of Trinidad and Tobago Court of Appeal CvA. No. 43 of 2001.
[26] (1965) 9 WIR 333.

[44] The determining factor in this case is that the sexual assaults in this case, one by way of insertion of the penis into the vagina and the other by insertion of the penis into the anus, were part of the same incident and not two isolated incidents. This was the undisputed evidence presented by the VC. It is not uncommon that the appellant would have been charged with the more serious offence, but that evidence of both would be brought in an effort to give a full account of what transpired. This is what happened in the present case. The fact that the prosecution chose to charge the appellant with the more serious offence of rape does not make the part of the story, relating to the actions which amounted in law to the commission of buggery so prejudicial as to require expunging it from the evidence. Clearly the incident complained of revealed that other criminal offences had been committed such as an assault and battery having regard to the VC's account of being punched in the eye and breast. It does not however mean that unless the prosecution charges for all the offences all the evidence pertaining to the offences with which the appellant was not charged must be excised from the story of the one continuing incident. Counsel does not complain of the evidence showing a common assault being adduced, but considers that the evidence of the anal intercourse should be treated differently as being more prejudicial. He has cited no authority for making this distinction. I can see no reason why evidence which relates to a sexual assault which shows the commission of the offence of buggery should be treated any differently than evidence which shows the commission of a common assault and battery. To create such a distinction would in my view legitimise an approach grounded not in law but rather on an unconscious bias based solely on the nature and perception of a particular form of sexual assault. To excise evidence relating to one incident merely on such a basis could also be said to be unfair. The fairness of a trial must be seen from both sides. As Chief Justice Bernard said in Henry v The State:[27]

> "The right to (and to insist upon) pure and adulterated justice is not only the hallowed preserve of accused persons; it is also that of the alleged victims of criminal acts. The principle of fairness never was, nor was it

[27] (1986) 40 WIR 317.

> ever intended to be a one-sided affair; or for that matter the inviolable *sanctum* of a few."[28]

It cannot be said that this evidence was not relevant to the appellant's conduct. It is acknowledged that in the scheme of a criminal prosecution, all evidence adduced by the prosecution will be of some prejudice to an accused. The test however, continues to be that of relevance of the evidence – whether it is more prejudicial than probative. In the circumstances of this case its probative value outweighed its prejudicial value.

[45] Also relevant is the fact that no one, including the learned trial judge, made mention of the commission of another criminal offence. She simply related the VC's story. Therefore the litmus test is still whether such rendered the trial unfair, or whether without it, the jury would have arrived at the same verdict. Given the facts and circumstances of this case as already described above, I do not consider that the excision of the evidence showing the commission of the offence of buggery would have made any difference to the verdict reached by the jury. This ground also fails.

Conclusion

[46] Having found that the challenges to the appellant's conviction have all failed, I would dismiss the appeal, and affirm the conviction.

Dame Janice M. Pereira
Chief Justice

[28] p. 337.

[47] MICHEL, JA: On 13th May 2010, the appellant was convicted in the High Court of Justice of the British Virgin Islands for the offence of raping a woman on the night of 6th August 2008 and was sentenced to ten years imprisonment.

[48] On 24th June 2010, the appellant filed notice of appeal against his conviction, with the sole ground of appeal being that he was deprived of a right to a fair trial because section 27(b) of the Jury Act[29] does not guarantee the appellant equality before the law due to the Crown's unlimited right to stand by any juror without assigning any cause.

[49] On 7th May 2013, the appellant filed an amended notice of appeal replacing his sole ground of appeal with six new grounds of appeal based on misdirection by the trial judge.

[50] At the hearing of the appeal on 16th September 2013, the appellant pursued three of the six grounds of appeal.

[51] I have read in draft the judgment to be delivered by the Chief Justice and I agree with the conclusion reached by her and with the reasons advanced by her therefor that all three grounds of appeal pursued by the appellant should be dismissed.

[52] I only wish to add that, in respect of the third ground of appeal pursued by the appellant, if the appellant was correct in his submission on this ground, it would mean that the virtual complainant in giving her evidence in court could only have said that the appellant raped her in her bedroom on the night in question and no evidence could have been given as to how he might have gotten into her apartment that night, what he told her and did to her in order to subdue her, or all of the things that he did to her while he was in her apartment that night, apart from inserting his penis once into her vagina, since by giving such evidence it would be revealed that several offences were committed by the appellant that night apart

[29] Cap. 36, Revised Laws of the Virgin Islands 1991.

from the one for which he was charged, because the evidence given in recounting what happened at the virtual complainant's apartment on the night of 6th August 2008, revealed that the appellant had committed the offences of housebreaking, threatening to kill the virtual complaint, assaulting her with a dangerous weapon, assaulting and beating her by punching her on her eye and breast, buggering her and raping her twice. Indeed, it would be absurd if a witness giving evidence at a criminal trial would be confined to speak only about what he or she witnessed the accused do or say in the course of committing the particular offence for which he (the accused) is charged and could not say anything about what he witnessed the accused do or say before, after or around the time when the actus reus of the offence charged was taking place. If that were so then criminal trials would be very brief and bereft of information on context and circumstance on the basis of which juries could, in the majority of cases, determine the guilt or innocence of accused persons.

[53] In any event the defence put up by the appellant in this case, as evidenced by his statement to the police which he never disavowed or recanted, was a denial that he was in the virtual complainant's apartment on the night of 6th August 2008 and an assertion that he never left his home that night, so he could not have said or done any of the things which the virtual complaint alleged that he said or did at her apartment that night. If the jury believed him or was unsure whether this was or was not true then they would have acquitted him, but if they believed the virtual complainant when she testified that the appellant was in her apartment on the night in question and there and then he had sexual intercourse with her without her consent then they would convict him, and it mattered not whether the non-consensual sexual intercourse took place following an invitation to him to visit her, the utterance by him of the most pleasant words to her and his touching of her in the most gentle manner. The jury evidently believed the virtual complainant and rejected the appellant's version of events of which they learnt from his statement to the police. The jury cannot be faulted for so doing and the trial judge cannot be faulted for allowing the jury to hear from the virtual complainant what happened

between her and the appellant that night and leaving it to the jury to accept or reject the virtual complainant's or the appellant's version of the what happened on the night in question.

[54] For these reasons, in addition to those given by the Chief Justice, I too would dismiss the appeal and affirm the conviction.

Mario Michel
Justice of Appeal

[55] I have read in draft the judgment of Chief Justice Pereira and that of Justice of Appeal Michel. I agree that this appeal be dismissed for the reasons given by the learned Chief Justice and for the additional reason given by learned Justice of Appeal Michel.

E. Ann Henry
Justice of Appeal [Ag.]