

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No CACR025/2012

Ind 26/12

C#01431/2012

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

Dwight Wright

Appellant

Before:

The Honorable Mr. Justice Mottley, Justice of Appeal

The Honorable Mr. Justice Campbell, Justice of Appeal

The Honorable Mr. Justice Martin, Justice of Appeal

Appearances: Mr. Nicholas Dixey of Nelsons for the Appellant
Ms. Tricia Hutchinson Senior Crown Counsel for Director of Public Prosecutions

Heard and Judgment given: 4 April 2014,
Reasons released: 24 October 2014

Mottley JA

At the conclusion of the hearing of the application for leave to appeal against his conviction, the Court indicated that leave to appeal against conviction was refused and the conviction and sentence were affirmed. At that time, the Court stated that it would put into writing its reasons for rejecting the application. These are those reasons.

1. The applicant was tried by Mr. Justice Henderson sitting without a jury on an indictment which contained three counts. The judge accepted a submission that he had no case to answer on count one which alleged that, on 13 June 2011, he was in possession of an imitation firearm with intent to commit an offence of rape. On the second count of having unlawful sexual intercourse with W.P. without her consent on 13 June 2011, he was convicted and sentenced to 12 years imprisonment. He was also convicted on count three of indecently assaulting W.P. on the same date, time and place and was sentenced to 5 years imprisonment to run concurrently with the sentence on count two.
2. The prosecution's case was that the applicant went to the home of W.P., the complainant, in Frank Sound located on the Eastern End of Grand Cayman. At the time, the complainant was watching television in her living room. The applicant kicked open the front door of her home. The applicant previously had a relationship with the complainant. After saying something to her, he held her by her hands and pulled her into her bedroom where he had sexual intercourse with her without her consent. The applicant also, without her consent, performed oral sex on her. The complainant stated that when the applicant entered the house she saw a gun in the waistband of his pants. However, the applicant never pointed the gun at her. While having sexual intercourse with her, the applicant

placed the gun on the bed. The complainant gave a description of the gun as being five to six inches in length; she nonetheless conceded that she had never seen a gun before that night. The applicant remained at the complainant's house until the morning. Before leaving, he asked the complainant not to report the matter to the police. He said he would have the door fixed. The complainant did in fact make a complaint to the police but did not allege rape at that time. During the investigation into the complaint, the police went to the home of the applicant; they called out to him to come outside but he did not. After entering the house, the police found the applicant hiding under a bed.

3. The applicant did not give evidence but relied on his interview with the police. In that interview he stated that the complainant had invited him to her house and had consented to him having sex with her. In short, his defence was that both the oral sex and intercourse were consensual. In addition, he denied that he had a gun.
4. The first ground of the application for leave to appeal is that the judge failed to satisfy himself that the applicant understood that, if he chose not to give evidence or refused to answer any questions (presumably if he gave evidence), the judge might draw an adverse inference from his silence. Notwithstanding that the judge made no inquiry, the judge nevertheless drew adverse inferences from the applicant's decision not to give evidence. It is said that, in the circumstances, the trial was unfair and the convictions on counts 2 and 3 are unsafe.
5. Mr. Dixey submitted that the correct procedure to be adopted was for the judge to satisfy himself that the applicant had been advised or otherwise understood the consequences of his choosing not to give evidence. He further submitted that the orderly administration of

justice would favour a presumption that, in the absence of such inquiry, a defendant did not understand the consequences and, in such circumstances, to draw adverse inferences from the defendant's silence at the trial would be impermissible.

6. Counsel said that it was clear that Mr. Justice Henderson drew adverse inferences against the applicant in the absence of an explanation in respect of the broken door frame and the conduct of the applicant prior to being arrested when he was found by the police hiding under a bed at his home after being told by the police to come out of the house. The judge in his Reasons for Judgment concluded:

“This defendant did not testify. If there was an innocent explanation for the broken door frame he could have testified and said so. If there was an innocent interpretation to be placed upon his action at the time of arrest he could have said so. The natural inference and the one I do draw, is that the defendant considers that giving evidence and subjecting himself to cross-examination would not assist his defence. When I consider the inference in conjunction with all the other evidence in the case, I find that I am sure that (the complainant) did not consent to sexual intercourse or to oral sex with the defendant at the time of these events.”

7. Miss. Hutchinson for the Crown stated that at the close of the Crown's case, the applicant had indicated that he would be giving evidence; however, he later decided not to give evidence. The defence did not call any witness and closed its case.
8. Section 18(b) of the Evidence Law (2007 Revision) provides:

“18. Every person charged with an offence is a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:

Provided that:

(b) the failure of a person charged with an offence to give evidence shall not be made the subject of comment by the prosecution but the court or jury may draw any reasonable inference from such failure.”

This provision was replaced by the 2011 revision but the section remains unchanged. It should be noted that no duty is placed on the court to bring the contents of section 18(b) to the attention of a defendant.

9. In 2010, provisions were enacted which dealt with the effect of a defendant’s silence at his trial. Section 149 of the Police Law 2010 provided as follows:

149. (1) At the trial of any person for an offence subsections (2) and (3) apply unless –

(a) the accused’s guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence,

but subsection (2) does not apply if, at the conclusion of the evidence for the prosecution, his attorney-at-law informs the court that the accused will give

evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment with a jury, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

(5) For the purposes of this section a person who, having been sworn, refuses to answer any questions shall be taken to do so without good cause unless-

(a) he is entitled to refuse to answer the question by virtue of any Law, whenever passed or made, or on the ground of privilege; or

(b) the court in exercise of its general discretion excuses him from answering it.

(6) This section applies –

(a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section; and

(b) in relation to proceedings in a Magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of this section.

10. Section 149(2) makes it imperative for the court, at the conclusion of the evidence of the prosecution, to satisfy itself, in a jury trial in the presence of the jury, that the accused is aware that the stage is reached at which he, if he wishes, may give evidence. Further, that if he chooses not to give evidence or having been sworn, refuses without good cause to answer any question, it is permissible for the court or jury to draw such adverse inferences as appear proper from his failure to give evidence or refusal, without good cause to answer any questions. The provisions of section 149 of the Police Law 2010 are similar to the provisions of section 35 of the Criminal Justice and Public Order Act 1994 of the United Kingdom. Section 35 provides as follows:

"(1) At the trial of any person who has attained the age of fourteen years for an offence, subsections (2) and (3) below apply unless --

(a) the accused's guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;

but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal without good cause to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of

court by reason of a failure to do so.

(5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless --

(a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege;

or

(b) the court in the exercise of its general discretion excuses him from answering it.

(6) Where the age of any person is material for the purposes of subsection (1) above, his age shall for those purposes be taken to be that which appears to the court to be his age.

(7) This section applies --

(a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section;

(b) in relation to proceedings in magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of this section."

11. It is clear that the provision of section 149 of the Police Law gives the court a complete discretion whether inferences should be drawn or not, in determining whether the accused is guilty. But, before the court or jury may draw such inferences, the court is required to ensure that the accused is aware that the stages of proceedings have been reached at which he may give evidence and that if he chooses not to give evidence, it is permissible

for the court draw such inferences as appear proper from his failure to give evidence. In addition, he must be told that if he gives evidence and, without good cause, refuses to answer any questions, the court or jury may draw such inferences as appear proper from his failure to give evidence.

12. Mr. Dixey drew the Court's attention to the fact that no practice direction had been issued in the Cayman Islands to assist the court with the operation of section 149 of the Police Law as was done in England and Wales where Directions were issued relating to section 35 (2) of the Criminal Justice Public Order Act 1994. He referred the Court to para iv.44 of the Practice Direction (Criminal Proceedings Consolidation) [2002] 1 WLR 2870. Para iv.44 provides *inter alia*:

“iv.44.2 Section 35(1) provides that section 2 does not apply if at the conclusion of the evidence for the prosecution the accused's legal representative informs the Court that he accused will give evidence. This should be done in the presence of the jury. If the representative indicates that the accused will give evidence, the case should proceed in the usual way.

iv.44.3 If the court is not so informed or of the court is informed that the accused does not intent to give evidence, the judge should in the presence of the jury, inquire of the representative in these terms:

“Have you advised your client that the stage has now been reached at which he may give evidence and, if he chooses not to do so or, having been sworn, without good cause refuses to answer any

question, the jury may draw such inferences as appear proper from his failure to do so?”

iv.44.4 If the representative replies to the judge that the accused had been so advised, then the case shall proceed. If counsel replies that the accused had not been so advised, then the judge shall direct the representative to advise his client of the consequences set out in paragraph 44.3 and should adjourn briefly for this purpose before proceeding further.”

13. Mr. Dixey submitted that, in the absence of practice direction in the Cayman Islands, the 2002 Practice Direction should be adopted. In support of his submissions, he relied on the provisions of section 113 of the Criminal Procedure Code (2010 Revision) which provided:

“113. Subject to this Code and to any other law for the time being in force in the Islands, the practice of the Grand Court in the exercise of its criminal jurisdiction and the mode of conduct and procedure at the trial of any person upon indictment shall be assimilated so far as circumstances admit to the practice of courts of equivalent jurisdiction in England.”

14. While Ms. Hutchinson submitted that there is no equivalent practice direction in the Cayman Islands, she accepted that the practice would likely be the same if a direction was given on the section.

15. The practice direction was obviously intended to help judges in carrying out the duty which is placed on them under the provision of section 35 of the UK Act. A similar duty is placed on the judge under the provision of section 149 of the Police Law.

16. Mr. Dixey, who did not appear at the trial, indicated that trial counsel could not recall any such inquiry as set out in the practice direction taking place. Ms. Hutchinson stated that at the close of the Crown's case, the applicant had indicated that he would be giving evidence but then decided that he would not

17. In this case, Mr. Justice Henderson was sitting without a jury. He had a duty to ascertain from counsel who appeared at trial, whether he had advised the applicant of his right to give evidence and the consequence of his failure to do so. It is imperative that the judge fulfills the duty placed on him. In this case, the Court cannot be satisfied that the judge did conduct the inquiry which he ought to have done.

18. The issue that arises for the determination of this Court is what is the effect of the failure of the judge to fulfill the duty cast upon him by section 149 of the Police Law. The Law does not contain any sanction for failing to comply with its requirement.

19. In the opinion of this Court, the failure of the judge to carry on the mandatory duty placed on him, amounted to an irregularity in the course of the trial. But the further question which has to be determined is whether that irregularity was such as to make the trial of the applicant unfair and the conviction unsafe.

20. In *Randall v The Queen* [2002] 60 W.I.R 103 Lord Bingham of Cornhill observed at page 28:

“But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court

will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.”

21. In dealing with the effect of an irregularity or wrong decision in law, Mantell L J in *David Johnson & Rowe* [2000] EWCA Criminal 109 posed the following question:-

“Assuming the wrong decision on law or the irregularity had not occurred and the trial had been free from legal error, would the only reasonable and proper verdict have been one of guilty?”

22. In his Reasons for his decision Henderson J stated:

“The sole issue before me is this: has the Crown made me sure that (the complainant) did not consent to the act of intercourse and to the act of oral sex? The defendant’s case, as given in his short response to the arresting officer, is that he was present on the night in question and he did have sex with (the complainant) but that it was with her consent. In other words, it is his position that she is now lying.”

After his arrest and caution the applicant said to the police:

“Rape? Officer that is a wicked woman. That is a lie. I went there for sex – rather she called me there for sex.”

Later the judge stated :

“I observed the demeanour of (the complainant) closely when she was giving evidence. There was nothing about her demeanour which suggested to me that she was lying.”

Photographs produced by the prosecution showed that the door frame was broken and that the lock was inoperative. A footprint appeared to be on the door. The judge observed that he did not believe that a woman living alone in Frank Sound would have left her door in that state for any length of time. The judge concluded that the broken door frame and the footprint in the door constituted some independent support for the credibility of the complainant.

23. As the judge pointed out, the only issue for him to decide at the trial was whether the sexual intercourse and oral sex took place without consent. The judge who had the advantage of seeing and hearing the complainant give evidence formed the impression that there was nothing about her demeanour which suggested to him that she was lying. In short, the judge was in fact saying that he accepted the complainant as speaking the truth; He indicated that the broken door was independent evidence which supported the complainant's credibility. The judge is not in this statement drawing any adverse inference against the applicant. In addition, the complainant's conduct of reporting to the police that she had been raped showed consistency with her complaint.

24. In our opinion, there was evidence in which the judge could have reached the conclusion that the applicant was guilty of the offence without drawing the adverse inferences which

the judge indicated that he would draw in relation to the breaking down of the door and his hiding under the bed in an attempt to avoid arrest by the police.

25. In Ground 2, the applicant alleges that the guilty verdicts on Counts 2 and 3 are inconsistent with the finding by the judge that the applicant had no case to answer on count1 with the result that the convictions in Counts 2 and 3 are unsafe.

26. Count 1 alleged that the applicant on 13 June 2011 had in his possession an imitation firearm with the intent to commit an offence namely rape. Mr. Dixey suggested that the judge having ‘thrown out one count as being unsafe to be considered at all must have considered that there was a yawning gap between the potency of the Crown’s case on Count 1 as compared to Counts 2 & 3.’ Counsel said that the gun was inextricably linked to the issue of consent during the sexual encounter. He referred to the complainant’s evidence-in-chief when she said that the applicant never pointed the gun at her. The complainant also indicated that the applicant never threatened her with the gun. However, she said that the gun had scared ‘the hell out of her’. She went on to say that while he was having intercourse with her and he was performing oral sex on her the gun was on the bed but he never pointed the gun at her. Counsel submitted that this evidence showed that “it was the presence of the gun that bent her to the applicant’s will.” He argued that it was the complainant’s fear of the gun that prevented her from fighting as the gun had scared her to death. He argued that the gun was an essential ingredient in the Crown’s case in respect of consent. He submitted that if the gun is removed from the equation there is a void. This, he said is a fatal gap in the Crown’s case amounting to a logical inconsistency in so far as the issue of consent is concerned.

27. Crown counsel relied on the ruling by the judge. In that ruling, Mr. Justice Henderson stated:

“No firearm has ever been recovered. The case on Count 1 turns solely on the unconfirmed evidence of the complainant. She said in her evidence that during the events on the night in question the defendant had what appeared to be a small gun in his back pocket. She says she saw a bit of it protruding from the pocket. She also says that later when committing the act of rape he took the gun out of his pocket and laid it on the bed beside her. When asked about the appearance of the gun she said it was black. She was unable to add anything more except she did estimate that its length was around 5 to 6 inches. She said she was unfamiliar with guns. She had never seen guns before, but it looked like one.”

28. The judge pointed out that in cross-examination, the complainant agreed with a suggestion that she told the police that she had seen the applicant holding the gun which was inconsistent with what she said in her evidence. The judge also referred to the complainant's recent complaint in which she made mention of the gun but did not say that he was holding the gun or that he had it in his pocket or that he placed it on the bed. In addition the judge stated that the complainant's statement about feeling the gun in her neck was inconsistent with her testimony and with what she later told the police.

29. The judge concluded that the evidence in support of Count 1 was sufficiently contradictory and uncorroborated and he considered that it would be dangerous to allow the case to proceed and to call on the defendant for a defence on Count 1.

30. In respect of Count 1, the judge had to be satisfied that the applicant had in his possession an imitation firearm. It was an essential element of Count 1 that the applicant was in possession of the firearm with intent to commit the offence of rape. From the reasons for judgment, it would appear that the judge was not satisfied that the applicant had the imitation firearm in his possession. In addition, even if a gun may be said to have been in his possession, there was no evidence that he used the gun for the commission of the offence of rape.

31. In *Minott v The State* [2002] 2LRC 470 Mr. Justice De La Bastide, then Chief Justice of Trinidad & Tobago, dealing with the issue of inconsistent verdicts stated:

“Notwithstanding my recognition of the danger of trying to formulate any principles of general application in this area of the law, I would venture to suggest that the following guidelines can be extracted from the authorities (despite their apparent lack of consistency).

(1) The Court of Appeal should be extremely slow to quash a conviction on the ground that it is supported by evidence from a source which must have been regarded by the jury as unreliable, having regard to a 'not guilty' verdict which they returned against the same accused on another count or against a co-accused on the

same charge. If there is any plausible way at all of explaining how a reasonable jury might have reached the two verdicts, the Court of Appeal will not quash the conviction.

(2) If there is any evidence to support the conviction which is confirmatory of, or supplemental to, the evidence which has been rendered questionable by the acquittal, this is sufficient to justify different verdicts and the conviction will be upheld.

(3) If the implied rejection by a jury of a witness' evidence inherent in a verdict of acquittal can be explained on any basis which does not involve attributing to that witness an intention deliberately to mislead, eg faulty recollection, mistake, confusion, etc a conviction based on other evidence from the same witness will not necessarily be regarded as unsafe.

(4) Even if an acquittal connotes lack of confidence by the jury in the truthfulness of a witness, a conviction based on the unsupported and challenged evidence of that witness may none the less be upheld if from the evidence there is available some reasonable basis for believing that the witness may have lied in relation to the charge that failed, but told the truth in relation to the charge that succeeded.

(5) In determining whether it was reasonable for a jury to have accepted one segment or aspect of a witness's evidence while

rejecting another segment or aspect of his evidence, it is material to consider how closely linked in terms of time, place and subject matter are the two segments or aspects of his evidence.

(6) If an acquittal cannot be explained on any other basis but that the jury doubted the truthfulness of a witness, a conviction which depends on the jury having accepted that same witness as a witness of truth, cannot in the absence of some explanation of the jury's differing assessment of that witness' credibility, stand.”

32. In *R v Dhillon* [2010] EWCA Crim 1577 Lord Justice Elias delivering the judgment of the Court of Appeal in England stated:

“34. The requirement summarised in the second principle, namely that there must be a logical inconsistency in the verdicts, is now very firmly established. It was affirmed by the decision of this court in *R v Rafferty and Rafferty* [2004] Crim 968 when the then Vice President (Rose LJ) said this (para 18):

"So far as inconsistent verdicts are concerned, during the last 10 years or so, this court has said again and again that an appeal based on inconsistent verdicts cannot and will not get off the ground unless there is, first a logical inconsistency between the verdicts returned by the jury. We repeat yet again, in summary form, just a few of the authorities in this court, in which the need for logical inconsistency between the verdicts to be prevented before

such a ground can take off. We identify, for example, *R v McCluskey* 98 Criminal Appeal Reports 216; *R v Bell* Court of Appeal (Criminal Division) 15 May 1997, *R v Clarke and Fletcher* Court of Appeal (Criminal Division) Transcript 3 July 1997, *R v Gee* [1998] Crim LR 483, and *R v McCartney & Others* [2003] EWCA Crim 1372. Finally, we refer to an observation made by Buxton LJ in *G* at page 484 of the report which, regrettably, seems to be far less heeded than it should be. It is in these terms:

"In appeals in relation to alleged inconsistent verdicts those promoting the appeal should ensure that *Bell* and the instant case [*G*] are before the court and should be in a position to explain why the general approach adumbrated in *Bell* (i.e the need to establish a logical inconsistency) should not apply."

35. The third principle is supported by a number of authorities where this court has accepted that there is a logical inconsistency in the verdicts, but has nonetheless not been persuaded that the verdict is unsafe: see e.g. *R v Segal* [1976] RTR 319; *R v McCluskey* (1994) 98 Cr App R 216 and most recently, *R v Lewis, Ward and Cook* [2010] EWCA Crim 496. In *Clarke and Fletcher* (30 June 1997) Hutchison LJ said that an appellate court will not conclude that the verdict is unsafe "if it possible to

postulate a legitimate train of reasoning which could sensibly account for the inconsistency."

33. It is necessary for this court to determine whether the decision to return a not guilty verdict on Count 1 is logically inconsistent with the verdicts of guilt on Counts 2 and 3.
34. It must be remembered that Count 1 did not charge the applicant with possession of an imitation firearm simpliciter but with possession with intent to commit an offence of rape. In her evidence, the complainant in her evidence-in-chief said that the applicant never pointed the gun at her. Further, she said that the applicant never threatened her with the gun. She however said that the gun was there and it scared the hell out of her. Later, she indicated that she did not fight or scream because she was scared by seeing the gun.
35. Mr. Dixey submitted that even though the gun was not pointed at her, it was the complainant's fear of the gun that led her to consent. Even if the presence of the gun created fear in the complainant, the evidence does not show that the applicant used the gun to obtain the consent of the complainant to the applicant having intercourse with her. It is unclear at what point of the sexual act the gun was placed on the bed.
36. For the reasons which he set out in his Ruling on the no case Submission on Count 1, the judge reviewed the evidence as set out above and concluded that the evidence is sufficiently contradictory and uncorroborated that it would be dangerous to allow the finder of fact to consider a conviction. During the course of his Reason for Judgment, Mr. Justice Henderson amplified his reasons for acceding to the no case submission when he observed that he found that the applicant did not have a case to answer on Count 1 of being in possession of an imitation firearm with intent since he was not satisfied with the

evidence relating to the firearm which he considered vague and lacking in detail and was not sufficiently cogent as to permit a conviction in safety. The judge went on to point out that he did not consider that his dismissal of the charge involving the gun or imitation gun either diminished her credibility or supported it. The judge pointed out that in so far as Counts 2 and 3 were concerned, he had watched her give evidence and was satisfied that there was nothing about her demeanour to suggest that she was lying. The judge found the applicant guilty because as, he said, the complainant's evidence did not stand alone. Her complaint to the police about being raped was consistent with the allegation she was making. The broken door would tend to suggest that he was not invited to the house to have consensual sex. As regards to Count 1 the complainant was unable to give any proper description of the gun, bearing in mind that she had never seen one before. In addition, no firearm or imitation firearm was ever found.

37. The court is not satisfied that there is a logical inconsistency between the verdict on Count 1 and the verdicts on Counts 2 and 3. In any event, even if it may be said to be a logical inconsistency, we accept the reasons stated by the judge for such inconsistency. The judge had the advantage of hearing and observing the complainant as she gave evidence. We have not been shown any reason why we should displace that advantage.

38. For the reasons stated above, we do not consider that the conviction is unsafe. The Court did not consider that the appeal would have any chance of success and, consequently, the Court refused leave to appeal.

Mottley JA

Campbell JA

Martin JA