

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No 2 of 2013

ADRIAN ANDREW BAILEY

Appellant

AND

HER MAJESTY THE QUEEN

Respondent

Before the Honourable Sir Marston Gibson K.A., Chief Justice; The Honourable Mr. Justice Sherman R. Moore CHB; and The Honourable Madam Justice Sandra P. Mason, Justices of Appeal

2014: October 29;

2015: January 20; June 19

Mrs. Angella A. Mitchell-Gittens of Messrs Pilgrim & Associates for the Appellant

Mr. Elwood Watts for the Respondent

DECISION

GIBSON CJ:

Introduction

[1] I have had the advantage of reading in draft form the reasons for judgment of *Moore, JA* and I concur with both the reasoning and conclusion. I agree that the appeal should be dismissed and the sentence affirmed.

[2] I take the opportunity of writing separately on the issue of circumstantial evidence since it is my view that, at the pivot of some of the appellant's contentions, is a misconception of the nature of such evidence. I will therefore only discuss Ground 2 of the Grounds of Appeal and refer only to such facts as I regard as material.

Ground 2

[3] Under this ground, the appellant complained that the Learned Trial Judge erred in law when she directed the jury that it is not in dispute that a witness, Fabian Waldron, saw a man and a woman that night and that they could reasonably infer that it was [the VC] and [the appellant]. He contends that at no point did Mr. Waldron identify the VC or him as the persons whom he saw in his evidence nor could he give a description of the vehicle driven by the appellant. The direction given to the jury was therefore improper, so the argument goes, and caused the jury to deliberate on the basis of erroneous considerations.

[4] Mrs. Mitchell-Gittens for the appellant referred to page 225 of the Record in support of her submissions. Before looking at the essence of this ground, it is important to understand the evidence in issue. Mr. Waldron testified that, on the night in question, he was working the graveyard shift which commenced around 10:00 p.m. but he came to work early around 8:35 p.m.

He clocked in and then borrowed a bicycle to go to the shop in Charles Rowe Bridge some ten minutes away for something to eat. On his way back he saw a car parked at the side of the road. He saw a man and a woman outside of the car on the side of the road and the man had his hands over the woman's mouth. The woman was crying and he thought they were fighting. He stated that she wore a blue jeans skirt but he admitted that he could not identify either of them. He did not want to get involved in their affairs and he rode past the car to work. On the following day he heard about the rape and waited for the police to come to him to make a statement.

- [5] This case was based on circumstantial evidence which, by its very nature, is like a chain comprising several different links which, if credible, leads to proof beyond a reasonable doubt in criminal cases and on the balance of probabilities in civil cases. In **Cross on Evidence, 9th Australian Edition (J. D. Heydon)**, para. [1100], it is stated:

If the only classes of evidence that could be given of facts in issue were testimony, admissible hearsay, documents and things, many claims would fail from want of adequate proof. The limited scope of the evidence provided by documents and things is obvious enough, and it is not often that every fact in issue was perceived, either by a witness, or else by the maker of a statement which is admissible under an exception to the law against hearsay. At some stage, resort almost always has to be had to "circumstantial evidence", which may be defined as any fact (sometimes called an "evidentiary fact", *factum probans* or "fact relevant to the issue") from the existence of which the judge or jury may infer the existence of a fact in issue (sometimes called the "principal fact" or *factum probandum*). A typical instance is afforded by the statement of a witness at a trial for murder that the witness saw the accused carrying a blood-stained knife at the door of the house in which the deceased was found mortally wounded.

The prosecutor invites the jury first, to decide that the witness is speaking the truth, and secondly, to infer that the accused inflicted the mortal wound with the knife.

[6] **Archbold Criminal Pleading, Evidence and Practice 2013 (Richardson, ed.)** at para. 10-3, states:

‘Circumstantial evidence is receivable in criminal as well as in civil cases; and, indeed, the necessity of admitting such evidence is more obvious in the former than in the latter; for in criminal cases, the possibility of proving the matter charged by the direct and positive testimony of eye-witnesses or by conclusive documents is much more rare than in civil cases; and where such testimony is not available, the jury are permitted to infer from the facts proved other facts necessary to complete the elements of guilt or establish innocence. ‘It must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. . . It is also necessary before drawing the inference of an accused’s guilt for circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference’; *per* Lord Normand in *Teper v R [1952] AC 480 at 489 P.C.* On the other hand, it has been said that circumstantial evidence is often the best evidence. It is evidence of surrounding circumstances which, by under signed coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial: *R v Taylor, Weaver and Donovan, 21 Cr. App. Rep. 20 CCA.*

[7] Properly understood, then, circumstantial evidence is a concatenation of evidentiary items which, individually, may prove little or nothing, but when linked together provides the proof needed of the fact or facts to be inferred. Sometimes, circumstantial evidence is compared or contrasted with direct evidence. In *Shepherd v R, (1990) 170 CLR 573, 579; 97 ALR 161,164-165*, a decision of the High Court of Australia, *Dawson, J* opined as follows:

Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved. The inference which the jury may actually be asked to make in a case turning upon circumstantial evidence

may simply be that of the guilt of the accused. However, in most, if not all, cases, that ultimate inference must be drawn from some intermediate factual conclusion, whether identified expressly or not. Proof of an intermediate fact will depend upon the evidence, usually a body of individual items of evidence, and it may itself be a matter of inference. More than one intermediate fact may be identifiable; indeed the number will depend to some extent upon how minutely the elements of the crime in question are dissected, bearing in mind that the ultimate burden which lies upon the prosecution is the proof of those elements.

- [8] What this means is that, whether individual items of circumstantial evidence are perceived as links in a chain or, to use the preferred metaphor suggested in **Vol 9 Wigmore on Evidence (Chadbourn Rev. 1981)** para 2497 at pp 412-414, “strands in a cable rather than links in a chain” (cited *per Dawson, J* in *Shepherd v R*, *supra*; see also *R v Hillier*, (2007) 233 A.L.R 634, at para 63, per *Callinan, J* [High Court of Australia]), it is often as balkanizing an exercise to examine each item of fact with microscopic exactitude as it is to examine each link in a chain (or each strand in the cable) before using the chain or laying the cable.
- [9] The application of this principle can be seen in the recent High Court of Australia decision in *R v Hillier*, *supra*. There, Ms. Ana Louise Hardwick was found dead in her bedroom. There had been a fire at her home but she had died before the fire. The cause of her death was neck compression, though the pathologist could not say whether as a result of ligature, rod or manual strangulation. The respondent, Steven Wayne Hillier, was charged with her murder. Mr. Hillier and Ms. Hardwick had lived together for about

12 years, from 1987 to 1999. They had two children. When the couple separated in 1999, they agreed that the two children would live with Mr. Hillier but, in June 2002 on Ms. Hardwick's application, the Family Court of Australia ordered that the children reside with Ms. Hardwick. Mr. Hillier appealed and, pending the appeal against those orders, interim orders were made that the children live alternate weeks with each parent. Those interim orders were discharged with the result that the orders for the children to reside with their mother took effect. The prosecution's case at trial was that Mr. Hillier murdered Ms. Hardwick to regain custody of the children. Harwick was convicted of murder.

[10] The Court of Appeal of the Supreme Court of the Capital Territory set aside his conviction, and the Director of Public Prosecutions sought special leave to appeal to the High Court of Australia. The High Court reversed the Court of Appeal. The Court viewed together the evidentiary links of **opportunity** (Ms. Hardwick was found dead on a Wednesday; had spoken with a friend two days earlier on the Monday but had missed work on the Tuesday and the Wednesday; and the respondent had arranged for his children, who were at his house on the Monday night, to sleep over at his father's house, so that he was alone on the Monday night); **motive** (the respondent and Ms. Hardwick were engaged in active appellate litigation

over the custody of their children, and he had taken active steps in the appeal but had taken no steps whatever on the Monday, Tuesday or the Wednesday, suggesting his knowledge that Ms. Hardwick was already dead); **some DNA evidence** belonging to the respondent, (even though there might also have been the DNA of another contributor whom it was not possible to exclude); and the fact that the respondent had been asked in writing to provide a sample of his fingerprints and, when he had done so, it was discovered that there had been chemical damage to his fingertips suggesting self-inflicted injuries to impede police investigation.

[11] In their joint reasons, the majority (*Gummow, Hayne and Crennan, JJ*) stated at para [48]:

Often enough, in a circumstantial case, there will be evidence of matters which, looked at in isolation from other evidence, would yield an inference compatible with the innocence of the accused. *But neither at trial, nor on appeal, is a circumstantial case to be considered piecemeal. As Gibbs, CJ and Mason, J said in Chamberlain, (1984) 53 CLR 521, 535; 51 ALR 225, 236-237: At the end of the trial the jury must consider all the evidence, and in doing so they may find that one piece of evidence resolves their doubts as to another. For example, the jury, considering the evidence of one witness by itself, may doubt whether it is truthful, but other evidence may provide corroboration, and when the jury considers the evidence as a whole they may decide that the witness should be believed. Again, the quality of evidence of identification may be poor, but other evidence may support its correctness; in such a case the jury should not be told to look at the evidence of each witness separately in, so to speak, a hermetically sealed compartment; they should consider the accumulation of the evidence: cf Weeder v R, (1980) 71 Cr App R 228, 231. Similarly, in a case depending on circumstantial evidence, the jury should not reject one circumstance because, considered alone, no inference of guilt can be drawn from it. It is well established that the jury must consider "the weight which is to be given to the united force of all the circumstances put together": per*

Lord Cairns, in *Belhaven and Stenton Peerage*, (1875) 1 App Cas 278, 279, cited in *R v Van Beelen*, (1973) 4 SASR 353, 373.

[Emphasis added]

[12] What is clear from the principles set out above is that a piece of circumstantial evidence, viewed in isolation from the other items, is unhelpful. But this is at the heart of the argument on the second ground of appeal, namely that the Trial Judge erred in directing the jury that it was not disputed that the witness Fabian Waldron saw a man or the woman on the night in question and that the jury could infer that it was the appellant and the VC. The Trial Judge was correct.

[13] At pages 222–223 of the summation to the jury, her Ladyship stated:

While [the VC's] evidence alone is enough to make you sure if you believe her, the prosecution is also saying to you that there is other evidence that you may look at that will assist you in concluding that Adrian Bayley committed the offence for which he has been charged. That evidence by itself is not conclusive. It is circumstantial. The case for the prosecution against the accused is not based on circumstantial evidence but there is relevant evidence which is circumstantial. So I will tell you something about circumstantial evidence.

Circumstantial evidence is receivable in criminal cases for often the possibility of proving the matter charged by direct and positive evidence of eye witnesses or by conclusive documents is rare. And, where such evidence is not available juries are permitted to infer from the facts proved other facts that are necessary to complete the elements of guilt or to establish innocence. Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion upon another. It is also necessary before drawing the inference of the accused man's guilt from circumstantial evidence to be sure that there are no existing or co-existing circumstances which would weaken or destroy the inference.

[14] The Trial Judge continued at pp. 224-225, as follows:

Now I remind you, members of the jury, that the Crown is relying on circumstantial evidence in this case and that is my direction to you on circumstantial evidence. In this case the prosecution invites you to look at the evidence other than [the VC's] direct testimony. It is a fact admitted by [the appellant] that she left Barbarees Hill in his car. It is a fact that she was on her way to her boyfriend's house for 7:30 or 8:00 p.m., and after getting into [the appellant's] car did not arrive there until after 9:00 p.m. and she arrived there crying, frightened, dishevelled, muddied and reporting that she was raped. It is not disputed that Fabian Waldron saw a man and a woman near Precision Packaging that night and that you can reasonably infer that it was [the VC] and [the appellant]. There is no dispute with the finding that there was seminal fluid and sperm on the clothing worn by her on that night as taken in the context of the evidence of the Forensic Scientist that sexual activity involving a male person occurred in the vicinity of these articles of clothing. There is no dispute with the fact that this rape was reported within an hour of its alleged commission, a fact inconsistent with the allegation of a contrived story.

[15] Finally, at page 256 of her summation, her Ladyship stated:

‘Fabian Walrond’s evidence should be assessed by you. It is circumstantial evidence and you should bear this in mind. It is not meant nor should it be understood by itself to be proof that [the appellant] kidnapped and raped [the VC] but it is circumstantial evidence and use the language of my earlier direction to you, it is a mere strand in the cord of evidence.’

[16] In the context of the whole summation, involving a case predicated on circumstantial evidence, I find it impossible to conclude that the appellant was in anyway prejudiced. The directions of the Trial Judge under this head were in my view fair, balanced and unexceptionable. Accordingly this ground is without merit.

Chief Justice

MOORE JA:

[17] The appellant was tried by judge and jury and convicted on the two counts in the indictment: one of kidnapping, contrary to **section 30** of the *Offences Against the Person Act, Cap. 141 (Cap. 141)*; and the other of rape, contrary to **section 3(1)** of the *Sexual Offences Act, Cap. 154*. On 6 February, 2013 he was sentenced to 3 years imprisonment for kidnapping and 7 years imprisonment for rape.

Background

[18] On 11 October 2002, about 7:45 p.m., the complainant left her home at Passage Road in the parish of St. Michael to walk to the home of her boyfriend at Rosemont, Black Rock in the said parish. Whilst walking along Barbarees Hill she saw the appellant sitting in his stationary motor car talking to Jason White who was standing beside the motor car. The complainant knew both men. The appellant was the brother of her ex-boyfriend and Jason White was her neighbour. She had a brief conversation with both men and continued on her way. The appellant quickly drove off and stopped his motor car next to the complainant and invited her to get into the motor car. She declined his invitation. The appellant then got out of the motor car, held the complainant and put her in the motor car. She said that he held her hand with one of his hands as he drove, using his free hand to

control the motor car. She said he threatened to kill her if she told anyone anything. She said when he stopped she recognised the area as the Belle also in the parish of St. Michael. At the Belle, she said he pulled her out of the motor car, pushed her onto the ground in the mud and grass where he ravished her. When the appellant had finished she got up off the ground and ran to the nearby highway. There she saw a man riding a bicycle. That man took her to her boyfriend's house at Rosemont, to whom she reported her plight. It was then about 9:00 p.m. Her boyfriend took her to the police station at Black Rock. Later, at an informal exercise, she identified the appellant as her attacker.

[19] The complainant's boyfriend testified that he had expected her to arrive at his house about 7:30 p.m. on the night in question but she arrived about 9:00 p.m. He said that when she arrived she appeared frightened, she was crying, her clothes appeared torn and there was mud on her clothes, her arms and her feet. She spoke to him and he took her by bicycle to the police station.

[20] From the outset the appellant admitted having seen the complainant that night. He admitted that he gave her a lift in his motor car but said that he took her to the gas station at Black Rock. He denied that he had ravished her. The following is the appellant's written statement to the police:

“On Friday, 11th day of October 2002, I left home and I pass through Baxter's Road on my way, me and a fellow who I saw on Baxter's Road

start talking and then I saw a girl that uses to talk to my brother, Mark Bayley, and she would use to visit my brother house where I also live. That is where I know her from. She asked me what direction I was going and I tell she Eagle Hall and she tell me she going Black Rock. I offer her a drop to the Black Rock gas station by Deacons. She get in the car and I put her off at the gas station. I then went back by Eagle Hall at Cammie Shop where I cool out and had some drinks. I left the shop after 11:10 p.m. and went to St. George and pick up my girlfriend, Sandra Fields. I then went home and remain. I got witness that de woman get into my car, I didn't force her. I never had sex with that lady Sherry-Ann. I ain't went to no Belle at all."

[21] The appellant also gave an unsworn statement from the dock in which he denied having committed the offences and asserted that his statement to the police was true. The appellant's sole witness was Jason White who testified that he had seen and spoken to the appellant and complainant at Barbarees Hill.

The Appeal

[22] The appellant has appealed against his convictions and sentences on seven grounds. We consider those grounds and the written submissions seriatim below.

Ground 1

[23] This ground alleged that the directions given by the learned trial judge when defining the elements of the offence of kidnapping "were such that it would have led the jury to draw inferences unfavourable to the appellant". In the written submissions counsel for the appellant submitted that the sentence, "She most evidently did not consent" uttered by the judge when explaining

the ingredients of the offence of kidnapping would have caused the jury to conclude that the appellant had in fact committed that offence and, as such it amounted to a direction to the jury to convict the appellant.

[24] Counsel for the respondent contended that a summation must be taken as a whole. He submitted that: “The trial judge started by giving a definition of the offence charged and then identified the relevant elements necessary to establish the offence ...”. He supported that submission by pointing out extracts from the direction of the trial judge. He submitted that “there is no merit in this ground of appeal”.

[25] It would seem that counsel for the appellant embarked on picking what seemed to her to be the plums and throwing away what seemed to her to be the duff. Counsel reached into the heart of a lengthy explanation by the judge of the offence of kidnapping and picked out the sentence: “She most evidently did not consent”, uttered by the judge when explaining the phrase “removing another from any place without that other’s consent”, the ingredient in the offence of kidnapping. The judge had first read **section 30** of **Cap. 141** and then proceeded from line 12 of page 209 to line 14 of page 210 of the trial record to explain that ingredient. From line 24 of page 209 to line 14 of page 210 she said:

“If you examine and most importantly accept the case for the Crown you will find all four elements. You will find that there was a taking or a

carrying away when Adrian Bayley forced, that is the second ingredient, Sherry-Ann Seale into his car on Barbarees Hill and carried her to the Belle. She most evidently did not consent. In fact, it is her evidence that she refused before he physically placed her in the car and nothing further need be said on the last ingredient. There was no lawful excuse for the action taken. This, I direct you, members of the jury, as a matter of law, if you accept the case for the prosecution this is a taking or carrying away in law. There was no consent, lack of consent is important because without it there is no lawful excuse. There was no lawful excuse and there was the use of force. These are the other elements referred to above.”

[26] Counsel’s submission that the judge’s statement at “lines 8-14 of page 210 also indicates that the offense (sic) of Kidnapping has been established” failed to acknowledge the fact that the judge told the jury that they could only have reached that conclusion if they accepted the case for the prosecution. For these reasons, this ground is unsustainable.

Ground 2

[27] Counsel for the appellant contended that:

“The Learned Trial Judge erred in law when she directed the jury that “it is not disputed that Fabian Waldron saw a man and a woman near Precision Packaging that night and that you can reasonably infer that it was Sherry Ann Seale and Adrian Bayley.”

She then summarised the evidence of Fabian Waldron and submitted that the:

“direction invited the jury to reject the alibi of the appellant, find that the virtual complainant was truthful and by implication convict the accused”.

[28] In support of her submissions counsel cited: *Martin v R*, [1972] 57 Cr. App. R 279 (*Martin*); *Urquhart v R.*, [1970] 54 Cr. App. R 369 (*Urquhart*);

Lang v R [1975] 62 Cr. App. R. 50 and Warner v M.P.C [1976] 52 Cr. App. R 373 (Warner).

[29] The Crown sought to rebut this ground by contending:

“A careful reading of the trial judge’s direction does not suggest that the Court is making a finding of fact which is a jury function. The Judge is not saying to the jury how they are to deal with the evidence of Fabian Waldron. She is by no means dealing with the subject of inferences since she has already given a direction on that aspect of the trial”.

Counsel submitted that the judge was enumerating examples of circumstantial evidence and he supported that submission by reference to extracts from the relevant part of the summation.

[30] Fabian Waldron testified that he was an employee of Precision Packaging, a company situate at the Belle, and about 8:35 p.m. he left his workplace by bicycle en route to Charles Rowe Bridge, St. George to buy a meal. He said that he saw a man and a woman standing next to a motor car. He saw the woman’s face and she was crying but he did not see the man’s face. The couple appeared to be quarrelling. The next day he heard that there was a rape in the Belle and he reported what he had seen to the police. Fabian Waldron could not and did not identify anyone.

[31] The judge gave the jury the following direction in respect of Fabian Waldron’s evidence at p. 256 line 16 to 22:

“Fabian Waldron’s evidence should be assessed by you. It is circumstantial evidence and you should bear this in mind. It is not meant nor should it be understood by itself to be proof that Adrian Bayley kidnapped and raped

Sherry-Ann Seale but it is circumstantial evidence and to use the language of my earlier direction to you, it is a mere strand in the cord of evidence”.

[32] In his statement to the police the appellant admitted that the complainant was in his motor car on the night in question but he denied taking her to the Belle and he denied ravishing her. He said that he went to “Cammie shop”, left there about 11.10 p.m., picked up his girlfriend in St. George and went back home. As a result the judge gave the following direction on alibi at p. 227 line 17 to p. 229 line 8:

“The law requires me to give you special directions where the defence of alibi is advanced. An alibi is where it is said by the defence that at the time when the offence is alleged to have been committed the accused was somewhere else and therefore could not have committed it. Let me remind you here of my earlier direction to you on the burden of proof. It is the duty of the prosecution to prove their case beyond reasonable doubt so that it is not for the accused to prove that he was somewhere else. It is for the prosecution to prove that the accused was in fact where they say he was. In other words, the prosecution must disprove alibi. So if you believe the alibi put forward by the defence based on the statement of the accused, if you believe that the accused was somewhere else then your verdict will be a verdict of not guilty. If you are in doubt as to whether he was somewhere else or not your verdict will also be a verdict of not guilty. You can only convict the accused members of the jury, that is, return a verdict of guilty if you completely reject the defence which has been put forward and you are convinced and feel sure of the guilt of the accused on the strength of the case of the prosecution. So that even if you reject the alibi defence that is not the end of the matter. That does not of itself entitle you to convict the accused. You still have to look at the evidence for the prosecution to see whether the prosecution has established its case beyond a reasonable doubt.

Now, Madam Foreman and members of the jury, I must tell you that an alibi is sometimes invented to bolster a genuine defence. And, I must tell you that it is possible for an accused to give a false alibi and not be the perpetrator of the offence charged. So I must warn you, the law requires that I must warn you members of the jury, that if you disbelieve the alibi put forward by the accused, your belief does not necessarily confirm that the accused was the person who raped Sherry-Ann Seale. It is only when you are satisfied that the sole reason for the fabrication was to deceive you and

there is no other explanation for its being put forward can fabrication provide any support for alibi evidence. So I must remind you that disbelieving the accused does not mean that he was where the virtual complainant says he was on that night”.

[33] We set out those passages from the judge’s summation in their entirety as we can see nothing in them that supports counsel’s ground and submissions. In our view they were generously favourable to the appellant.

[34] The cases cited by counsel for the appellant are not relevant and therefore do not support the contentions. In *Martin* it was held that the judge was wrong to withdraw from the jury “the issue whether the appellant was unfit to drive though drunk and, accordingly, whether the arrest was lawful”. In that case the judge told the jury:

“I hold that there is no defence disclosed on the facts to go to your consideration. Therefore, members of the jury, I have no option but to direct you to convict, and that I do”.

In the instant case, unlike *Martin*, the judge did not expressly or impliedly direct the jury to convict the appellant. Equally the relevance of **Lang**, *Urquhart* and *Warner* is difficult to discern. Each of those cases turned on a single issue.

[35] Counsel for the Crown said and we agree that the judge was merely explaining instances of circumstantial evidence. The witness, Waldron, did not identify anyone. It is not disputed that the complainant was on her way to her boyfriend’s house between 7:30 and 7:45p.m. when she met Jason

White and the appellant. The appellant admitted that she was in his motor car at the critical time. She arrived at her boyfriend's house about 9:00 p.m. crying, frightened, dishevelled, muddied and crying rape. Later her clothing tested positive for seminal fluid. Given that evidence, this Court is of the opinion that there has been no miscarriage of justice – no jury of reasonable persons alive to their responsibilities could have arrived at any conclusion other than that to which they came.

Ground 3

[36] This ground was abandoned.

Ground 4

[37] On this ground counsel alleged as follows:

“The Learned Trial Judge misdirected the jury when she failed to point out to them that discrepancies must arise among witnesses for the Crown or witnesses for the Defence. This misdirection was further compounded when the learned trial judge identified the version of events as given by the virtual complainant and that given by the accused as an example of a discrepancy”.

Counsel submitted that the judge was under a duty to explain the nature of discrepancies and inconsistencies and to highlight examples from the evidence. She also contended that:

“The learned trial judge's directions on the issues of discrepancies and inconsistencies amounted to a misdirection on the law”.

[38] The Crown responded to this ground by referring to the definition of discrepancy at page 230 lines 16-17 of the record where the judge described

a discrepancy as (a) “where two persons give different evidence about the same set of facts”; and (b) the definition in the Concise Oxford English Dictionary, “an illogical or surprising lack of compatibility or similarity between two or more facts”. Counsel also relied on *Scantlebury v R, Criminal Appeal No.34 of 2002 (unreported)* in which, at paragraph 16 this Court set out the standard direction that is given by judges. Counsel then submitted that in the instant case the trial judge cannot be faulted because she complied with the law.

[39] The trial judge dealt with this matter from line 11 at page 229 to line 1 at page 233 of the trial record. At page 230 the judge referred to the difference between the evidence of the complainant and the evidence of the appellant as “the most glaring discrepancy”. Whilst it is not usual to regard the difference between the evidence given by prosecution witnesses and the evidence given by defence witnesses as discrepancies there is nothing in this ground to advance the case for or against the appellant. The outcome of the case depended entirely upon how the jury assessed the credibility of the complainant and the credibility of the appellant.

Ground 5

[40] This ground alleged:

“The Learned Trial Judge failed adequately to put the defense (sic) of the accused and the summation in many regards sought to negative the defense

(sic) of the accused and to put the most favorable (sic) interpretation on the evidence of the Virtual Complainant.”

Counsel identified various pages in the summation that she alleged were unfavourable to the appellant. She submitted that the comments of the “judge were such that the summation was unbalanced and would have inevitably led to the accused’s conviction”.

[41] In support of her argument counsel cited *Mears v R (1993) 42 WIR 284 (Mears)*; *R v Bentley (1998) Times 31 July (Bentley)* and *Berrada v R (1990) 91 Cr. App. R 131 (Berrada)*.

[42] The Crown contended that much of the appellant’s complaints on this ground is repetitive of grounds 2 and 4 and submitted that the trial judge “was not merely directing the jury on the applicable law, but as she was obligated to do, was assisting them in analysing the facts”. Counsel cited *Huggins v R, Criminal Appeal No. 39 of 2001 (unreported)* where it was alleged that the trial judge had “erred in law when he offered excuses for the weaknesses in the quality of the evidence given by Crown witnesses” and counsel submitted, relying on that case that: “A judge is under a duty to direct a jury as to the manner of dealing with discrepancies ...and the judge’s comments contained a proper direction on discrepancies” and that it was “clear that the trial judge was doing no more than explaining to the jury that they had to bear in mind the total context in which a discrepancy might have

arisen”. He then set out the following statement from paragraph [22] of this Court’s decision in *Huggins*:

“We merely wish to remind that, although a judge must, of course, be impartial, he should not be fettered or gagged to such an extent that he should withhold from a jury such difficulties and deficiencies as may appear in the evidence. It is the duty of the judge not only to direct the jury on the applicable law. He is also under an obligation to assist in analysing the facts”.

[43] At page 225 of the trial record the judge told the jury that it was “not disputed that Fabian Waldron saw a man and a woman near Precision Packaging that night and that you can reasonably infer that it was Sherry-Ann Seale and Adrian Bayley”. The witness had not given any evidence of having seen more than two persons that night in that area at about 8:35 p.m. – the critical time. The judge also told the jury that:

- (a) Evidence of seminal fluid and sperm on the complainant’s clothing indicated sexual activity; and that there was early evidence of recent complaint; and
- (b) They should not be influenced by the fact that the complainant in the course of giving evidence had lost her composure and cried. She directed the jury to put that from their minds and focus on the evidence.

It is quite proper for the judge to direct the jury that they should not be sympathetic to the complainant.

[44] We accept and agree with the Crown’s response on this ground.

[45] We have already set out at (paragraph 16 above) the thorough direction the judge gave on alibi. At various places in the summation the judge

painstakingly set out elements of the appellant's defence, in particular from line 4 at page 253 to line 20 at page 254 she said:

"We come now, members of the jury, to the case for the accused remember that he has nothing to prove. He can sit back and require the Prosecution to make you sure of his guilt, he does not have to prove his innocence, he does not have to give evidence, he does not have to call witnesses, it is for the prosecution to make you sure of his guilt. Accused Adrian Bayley chose to make an unsworn statement from the dock and to call one witness. When an accused man speaks, members of the jury, you are entitled to examine what he says. You are also entitled to look at what his witness says and you must treat that evidence with the same standard of fairness with which you treat all other evidence in this case.

Accused Adrian Bayley is saying to you that Sherry-Ann Seale has concocted and fabricated this entire story. She is a liar and you should disregard every word that she has said. The many discrepancies and inconsistencies are not indicative of a mistaken recollection but rather the clear evidence of dishonesty, the fabrication of this entire story by Sherry-Ann Seale. The fact that she told the police that the bicycle man dropped her at the corner of Waterford and Stadium Road and told this Court that he dropped her to her boyfriend's house is significant. The fact of her confusion over whether she was going to or coming from her boyfriend's house is significant. The fact that she told the police in 2002 that she started to scream but told this Court that she did not scream, the fact that she could not recall the exact route from Barbarees Hill to the Belle. It is the case for the defence that all these inconsistencies should indicate to you that Sherry-Ann Seale is lying, her story does not make sense, the timelines do not add up and it is the submission of the defence that Sherry-Ann Seale told lies to this Court. Her inconsistencies are in contrast to Adrian Bayley's consistency since 2002 in saying that he did not commit this crime. It is the case for the defence that the evidence brought by the prosecution is not of a nature, quality and kind to make you feel sure that accused Adrian Bayley kidnapped and raped Sherry-Ann Seale and you must resolve these doubts in the favour of Adrian Bayley and return verdicts of not guilty of kidnapping and not guilty of rape."

No useful purpose will be served by setting out in detail every iota that the judge said.

[46] From line 21 at page 256 to line 24 at page 258 and elsewhere in the summation the judge analysed the critical part of the complainant's evidence

and put Dr. Roachford's evidence in perspective. In her final charge to the jury she said from line 25 at page 258 to line 23 at page 259:

“These, members of the jury, are some of the matters that you must look at, some of the matters for your determination. So, you must consider all the evidence led in this courtroom and the demeanour of the various witnesses as they gave their evidence in your effort to determine these issues.

If you find that Adrian Bayley removed Sherry-Ann Seale from Barbarees Hill on 11th October 2002, without her permission, without lawful excuse, if you are sure about it then you will return a verdict of guilty of the first count. If you believe that he is innocent or you are in reasonable doubt about it then you will find him not guilty of the first count.

If you find that Adrian Bayley had sexual intercourse with Sherry-Ann Seale on 11th October and that he did so knowing that she did not consent to the said sexual intercourse or was reckless as to whether she so consented and you are sure about it, then you will return a verdict of guilty on the second count.

If you believe he is innocent or if you are in reasonable doubt about it, then you will find him not guilty on the second count. Remember Madam Foreman and members of the jury, that you must return a verdict on the first count and a verdict on the second count.”

[47] The headnote in *Mears* states that the strongest point in that was:

“was the fact that the pathologist stated that there were no gunshot wounds on the body; by directing the jury that they could convict the appellant even if the body was not that of the alleged victim, the trial judge had diluted or destroyed the cogent point that what the appellant was reported to have said to **S** was totally inconsistent with what had in reality occurred; in so doing the judge went beyond the proper bounds of judicial comment, weighting his remarks against the appellant so that in practice it was difficult for the jury to do other than what he was suggesting.”

[48] The reason for counsel's reliance on *Bentley* is not immediately clear.

Bentley was reviewed by the English Court of Criminal Appeal 46 years after it had been decided. The Court said:

“Having regard to the evidence adduced at trial the jury, if properly directed, would have been entitled to convict Derek Bentley of murder as the offence was then constituted, before the abolition of constructive malice and the introduction of the defence of diminished responsibility.

However, since the trial judge in his summing-up failed to direct the jury on the standard and burden of proof, to give sufficient direction on the law of joint enterprise, or adequately to summarise the defence case, made prejudicial comments about the defendants and their defences, and indicated that the police officers’ evidence, because of their bravery on the night in question, was more worthy of belief than that of the defendants, Bentley was denied the fair trial to which he was entitled and his conviction was in consequence unsafe.”

In *Berrada* the Court found that “the comments of the judge went well beyond legitimate bounds in presenting the prosecution and defence case”.

The matters here complained of and so well-articulated by counsel cannot, by any stretch of the imagination, be so categorised.

[49] In the instant case as demonstrated by the respondent’s submissions and the excerpts from the judge’s summation throughout this decision the criticism of counsel for the appellant cannot be sustained. It is also clear that the cases relied on by counsel are not relevant. Whatever might be said or whatever view might be taken of the evidence of Fabian Waldron the jury still had to take account of the significant admission of the appellant that the complainant was the passenger in his motorcar at the critical time.

Ground 6

[50] This ground alleged that:

“The Learned Trial Judge erred in law when directing the jury after they had failed to reach a unanimous verdict as she simply reiterated the case for the prosecution.

Counsel contended that:

“The query of the jury as indicated by the judge related to a question of fact. The Learned Trial Judge did not direct the jury on the approach to be taken with respect to factual issues. The Learned Trial Judge defined kidnapping and then proceeded to point out elements of the prosecution’s case that should aid them in reaching a decision to convict”.

[51] Counsel relied on *Gouldbourne v R J M 2010 CA 101 (Gouldbourne)*.

[52] The Crown also responded to this ground in the terms set out below:

“The approach to dealing with queries from the jury has been widely discussed. In *Linton Berry v R [1992] 2 A.C. 364* and discussed in *Gouldbourne v R* on which my friend relies the principles were established. What is of primary relevance to us is to what extent has the trial judge complied with the requirements of the law? It is said:

“If the judge fears that the foreman may unwittingly say something harmful he should obtain the query from him in writing, read it, let counsel see it and then give such open directions as he sees fit. If he has decided not to read out the query as it was written, he must ensure that it becomes part of the record. Failure to clear up a problem which is or may be legal will usually be fatal unless the facts admit of only one answer...”.

From the record it is clear that the Judge responded to the request for assistance and with the involvement of counsel gave such assistance as was agreed and accepted by counsel. The outstanding issue is has the question been made part of the record? I do not see it but was it given or even asked for of the Judge?

The question as to whether such an error is fatal in this case may be answered by recourse to *Huggins v R* which considered and applied *Berry* with a different result. The Court stated of *Berry* “It seems to us that the appeal was allowed for three reasons” the failure to disclose the witness statements being “by far the most important ground of appeal” as Lord Lowry described in his advice ... In this case it is the Crown’s submission that the absence of the query is a mere blemish which does not lead to any

prejudice or unfairness to the appellant. In all the circumstances we submit there is no merit in this ground of appeal.”

[53] The jury retired at 11:02 a.m. and returned into court at 1:28 p.m. The clerk then put the standard question to them and the Foreman said that they had not reached a verdict. The following then ensued at page 261 line 21 to page 262 line 25:

“The Court: Madam Foreman, can I be of assistance to you or is it that you require more time?

Madam Foreman: We need your further assistance, ma’am.

The Court: On what areas? Perhaps if you could give us a note.

Madam Foreman: Yes, I have a note, ma’am.

The Court: Could I see the note please?

(Note shown to the judge)

I’d like to show counsel. Could you pass it to prosecution and defence counsel?

(Note shown to prosecution and defence counsel).

Yes counsel, we have read the note, it is my view that really this is a question of fact for the jury. At best what I can do is to revisit for the jury the direction that I gave on the ingredients for the offence of kidnapping.

Mr. Watts: Indeed, My Lady.

The Court: But really as I see it, this is really a question of fact for the jury to determine based on the evidence that has been led. Do you have any contrary views on this issue?

Mr. Watts: No, My Lady, I believe the Court is well advised to proceed as suggested, My Lady.

The Court: Mrs. Mitchell-Gittens?
Mrs. Mitchell-Gittens: No, My Lady, I don't have any contrary view at all.
The Court: So you are in agreement that I -- .
Mrs. Mitchell-Gittens: Yes, ma'am, I am in total agreement.
The Court: Yes, okay."

[54] The judge then repeated the direction on kidnapping which she had given during her summation.

[55] With Mr. Watts having no contrary view to, and Mrs. Mitchell-Gittens totally agreeing with, the judge's proposed course of action, the judge then repeated the direction she had earlier given. That was the correct thing to do. The Foreman in answer to a question put by the judge said that the jury had no further issue. They retired at 1:38 p.m. and at 2:12 p.m. they returned into court and delivered guilty verdicts.

[56] The note was not preserved for the appeal and neither Mr. Watts nor Mrs. Mitchell-Gittens had any recollection of its contents. That is not surprising as they are both very busy counsel. However, they confirmed the accuracy of the trial record on the issue.

[57] It is clear that a jury is entitled to the assistance of the judge at any stage of the trial on matters of law and fact. In this case at that critical moment the judge, with the help and concurrence of both counsel, gave the jury that

assistance. It is difficult to understand, having regard to all that transpired, why that incident was elevated to a ground of appeal. We will not speculate. *Gouldbourne* is not relevant. In that case the judge not only admitted prejudicial evidence she also failed to assist the jury when they returned into court seeking help.

Ground 7

[58] This ground alleged that the convictions are unsafe or unsatisfactory. Counsel contended that the appeal should be allowed and the convictions set aside because of the errors of law identified in grounds one to six.

[59] On the contrary, counsel for the respondent concluded that the convictions are safe and satisfactory and therefore the appeal should be dismissed and the convictions and sentences affirmed. He submitted that:

“the adequacy and thoroughness of the summation coupled with the jury’s assessment of the witnesses combined to produce a fair and just trial”.

[60] We agree with the Crown’s response on this ground. Throughout this judgment we have quoted passages from the judge’s summation to illustrate the inaccuracy of the grounds of appeal and the approach of counsel for the appellant to delve into the heart of a direction and pick out one sentence for criticism rather than assess the summation as a whole.

[61] A summation must be read as a whole. It is not fair for anyone to pick and choose without regard to the context of the entire passage from which he

picks and chooses. Each judge has his own style and manner of writing and speaking. Hardly any two judges organise the contents of their summation alike. It is not order of content but substance that matters. There is also no requirement for special words. The judge must use language that the jury can easily understand. There is no perfect trial nor is there a perfect summation. There will always be a blemish in whatever we do: each trial is imperfect, as all things human are.

[62] The appellant admitted that the complainant was in his motor car at the critical time and he said that he took her to the gas station at Deacons Road. He denied having taken her to the Belle and he denied that he ravished her. On the contrary, the complainant said that the appellant drove her to the Belle, took her out of the motor car, pushed her down into the mud and grass and ravished her. Her boyfriend testified that he expected her to arrive at his house at 7:30 p.m., but she arrived about 9:00 p.m. and she was crying, her clothes were torn and there was mud on her. Forensic evidence revealed the presence of seminal fluid and sperm on her clothing. On that critical evidence it boiled down to a question of credibility. The verdicts of the jury leave no doubt that they found the complainant the credible witness.

[63] Having reviewed the trial record and having read the judge's summation we find no merit in grounds one to six of the grounds of appeal. That being the case, ground seven is unsustainable.

Disposal

[64] In the circumstances, this appeal is dismissed and the convictions and sentences are affirmed.

Justice of Appeal

Justice of Appeal