IN THE COURT OF APPEAL OF BELIZE AD 2007

CRIMINAL APPEAL NO 29 OF 2005

CRISPIN JEFFRIES JR Appellant

v

THE QUEEN Respondent

BEFORE
The Hon Mr Justice Elliott Mottley President
The Hon Mr Justice Manuel Sosa Justice of Appeal
The Hon Mr Justice Boyd Carey Justice of Appeal

O Twist for the appellant.
C Branker-Taitt, Deputy Director of Public Prosecutions, for the respondent.

2007: 4 June and 26 October

SOSA JA

1. On 4 October 2005, in the court below, the appellant, Crispin Jeffries junior, was found guilty by a unanimous jury of the rape of MG, a 20-year-old young lady, and, on 14 October 2005, he was sentenced by the presiding judge, Lucas J, to eight years' imprisonment. This Court now gives the reasons for which, on 4 June 2007, the hearing having concluded, the appeal was dismissed and the conviction and sentence were affirmed.

2. The principal witness for the Crown at trial, MG herself, testified that, on the night of 12 March 2004, she, an elder sister of hers ('J') and a female friend

of theirs ('IE'), were collected at the Belize City address of MG and J in a car being driven by the appellant. With the appellant in this car were two young men, namely, a Mr Paulino and a Mr Requena. The appellant promptly introduced himself to MG as Crispin Jeffries junior, mentioning that he was a police officer.

3. The group proceeded in the car to Hattieville, stopping at the Fox Club, at which the appellant and Mark were to work as disc jockeys during a dance that night. It was the testimony of MG that the group remained at the club for about six hours, during which time she had no alcoholic beverage and there was no contact between her and the appellant other than when she danced with him, unwillingly, during the playing of four reggae songs.

4. MG gave evidence that during the group's drive back to Belize City she sat, again unwillingly, in the front passenger seat (that is to say, next to the appellant, who was driving), that being the sole unoccupied seat when she boarded the car. Upon returning to Belize City, said MG, the car made three stops before ending up at an hotel known as Diamond Hotel. (Evidence later given by W Sgt Escobar, who took photographs of the building complete with a name-sign, was to the effect that the place is, in fact, a motel named Diamond Motel and we shall hereafter refer to it as such.) MG gave evidence that, when she asked Mr Paulino why they had stopped there, he replied to the effect that

they had done so in order to check into a room where they could all sit down and talk.

5. In fact, three rooms, namely Nos 7, 8 and 9, were soon opened by a man who had emerged from the motel office. It was the testimony of MG that when she asked why that had been done, Mr Requena replied that it was 'because there are three of us'. There followed a discussion between MG and Mr Requena during which MG went so far as to say that she would remain in the vehicle rather than go into one of the rooms. She testified, however, that, eventually, after repeated urging by J to go into the room with the appellant because he would not do her anything and a promise by IE to knock at her door at 5.30 am, she came to believe that the appellant, being a police officer, would not 'hurt' her; and she told him that she would go into the room with him but only to talk.

6. The members of the group then entered the rooms in pairs. Room 8 was entered by MG and the appellant, who, according to MG, was dressed in a long-sleeved black shirt, cream or beige pants, a black hat and black footwear.

7. When the appellant announced that he was going to sleep, MG informed him that she was going over to '[IE's] room'. She was at the door of room 8 when the appellant pulled her from behind and dragged her to the bed, onto which she fell backwards. The appellant then switched off the light.

8. He next sat on top of MG's legs and held down her two 'hands' over her head. She was trying to fight him off by kicking him in the back. In the struggle which ensued, the evidence of which we shall not describe in all its disturbing detail, she scratched and bit him on the neck. She was fighting him off and screaming, but the appellant eventually succeeded in completely pulling off her long jeans pants. According to MG, she then told the appellant that she was menstruating but he replied that he did not care and, pulling her tights and underwear to one side, had sexual intercourse with her, for all her physical resistance and screams for help. It was her evidence that she had had no previous 'sexual experience'. When, after a while, he 'slowed down', MG shoved him off her and ran out of the room and over to the door of room 9. Dressed in her blouse and black tights, MG knocked at the door of this room but no one answered. She then went over to the door of room 7 and knocked on it. She heard the voice of J answer. Her crying, which had been going on for some time, continued.

9. IE then came out of room 9 and asked MG what had happened. The reply of the latter was that the appellant had just raped her.

10. MG next went into room 7, got into the bed, buried her face in a pillow and began screaming. J asked her what had happened. She replied that the appellant had raped her.

11. The appellant later left the motel in the company of Mr Paulino and Mr Requena. IE, J and MG took a taxi to IE's house, from where MG was subsequently taken to the Police Station in Belize City.

12. On a second visit to the Police Station later that day, MG had occasion to see the appellant again twice. It was her evidence that the clothes he was wearing on both of these occasions were not those in which she had seen him on the night before and in the early hours of that morning.

13. An interesting feature of the cross-examination of MG was that, notwithstanding her flat rejection of the suggestion that she and the appellant had gone outside of the Fox Club during the dance, defence counsel, whilst seeing it fit to put three specific questions to her as to things she did or accepted during that period allegedly spent *alfresco*, did not suggest to her that, as the appellant was later notably to testify, she had 'vamped' him on the neck at that time. And the subject of physical contact other than on the dance-floor was one visited on more than one occasion during the cross-examination. The only suggestion put to MG during cross-examination on the topic of injuries to the accused's neck was one of scratching, as opposed to 'vamping'. Moreover, whilst counsel suggested to MG that a pair of pants provided to the police by the appellant was the pair he had worn on the night/morning in question, a suggestion properly disallowed by the trial judge, he refrained from directly challenging MG's assertion, made in evidence-in-chief, that when she saw the

appellant at the Police Station on the morning of 13 March he was no longer wearing the clothes he had been wearing the night before and earlier that morning.

14. IE, who was aged 19 on 12 March 2004, and J, who was aged 22 at the time of trial, both testified of the visit to the club in Hattieville on the night of 12 March in the company of MG, Mr Paulino, Mr Requena and the appellant. Both further gave evidence of the group having made three stops on the return to Belize City, the last of these being at the Diamond Motel on the Northern Highway, where IE and Mr Paulino entered room 9, J and Mr Requena room 7 and MG and the appellant room 8.

15. IE further testified that, having closed their door and switched on both the air-conditioner and the ceiling fan, she and her companion went to bed and fell asleep. After the lapse of what she called 'a couple minutes', she heard a banging on the door and, when Mr Paulino opened it, she saw MG standing there in her blouse and a pair of black tights. MG was barefooted, her hair was in a mess and she was crying and trembling. Hugging her, IE asked her what had happened to her. She replied that the appellant had raped her.

16. According to IE, she then accompanied MG to room 7, where J asked MG what had happened to her but received no answer.

17. J, for her part, gave further evidence that, on 12 March 2004, she had known the appellant for only about a month and had never spoken to him. She said that all three ladies in the car questioned the action of the men in taking three rooms instead of one at the motel and she further stated that MG only went into room 8 with the appellant after having been advised by her (J) that the appellant could be trusted.

18. J said that, at about 5.30 am, she heard a banging on her door and, opening it, saw IE holding a weeping, trembling MG. The latter was in her blouse and tights, dishevelled and barefooted. Although asked repeatedly by J what had happened to her, she only went on crying and trembling. At length, however, she blurted out that the appellant had raped her.

19. WPC Shelmadine Daly was on duty in the CIB office at the Queen Street Police Station when MG arrived there and made a report at about 7 am on 13 March 2004. Later that same morning, at the Karl H Heusner Memorial Hospital ('the KHMH') in Belize City, a Dr Ávila, in the presence of WPC Daly, examined MG and took a swab of her vagina. The doctor used that swab to make a smear on a glass slide and then handed both swab and slide to the constable. The latter, on her return to the CIB office, handed over these samples, together with the tights, panties and sanitary pad MG had been wearing immediately prior to the examination, to W Cpl Carla Reynolds (to be

referred to hereafter, strictly for convenience, as W Cpl Reynolds although she had by the time of trial become W Sgt Gamboa).

20. W Cpl Reynolds testified to having handed over these items, and others, to Mr Eugenio Gómez, a forensic analyst at the National Forensic Services, Ministry of Home Affairs. But it was also her evidence that, at about 10 am on 13 March 2004, in the vicinity of the CIB office, she had detained the appellant, informing him of her reasons for so doing and remarking on what she described as 'scratches on his neck'. The appellant began explaining how he had come by those injuries and was immediately cautioned by the corporal but he went on to finish explaining why, in the words ascribed to him by this witness, 'I dig up'.

21. Mr Gómez gave evidence that scientific examinations conducted by him revealed that there was human blood on the crotch of the panties, a large amount of seminal fluid on the 'right lower leg' of the tights and a moderate amount of seminal fluid, together with blood, on the vaginal swab. He explained that semen is made up of seminal fluid and spermatozoa and, further, that he had performed no analysis of the sanitary pad. All items, said Mr Gómez, were subsequently returned to W Cpl Reynolds.

22. The appellant, aged 31 at the time of trial, gave sworn testimony on his own behalf and called witnesses. His defence was a denial of sexual intercourse with MG. It was his evidence, essentially, that he and MG were in

truth in room 8 at the motel but that they did no more than play (tickling each other) in there and that it was as part and parcel of the romping and the rough-housing of each other that he stripped MG of her pants. The rough playing only ended when MG scratched him and he told her to stop the playing. However, to his surprise, she told him that 'you could call that rape' and left the room saying that she was going to tell her sister. (It should be noted that this account by the appellant, with its strong undertone of a purely platonic relationship in-the-making, was preceded by testimony of his own to the effect that he had been, as he put it, 'courting' MG in Hattieville, and with no small measure of success, just a few hours earlier.)

23. Cross-examined, he said that, from the motel, he had gone to drop off Mr Requena and Mr Paulino at their respective homes and then gone home himself. His 'girl friend (*sic*)' was there on his arrival at about 6 am and he remained there until about 8.30 am. Later that day, having learned at the Police Station of the report that MG had made against him, he voluntarily submitted to an examination of injuries on his neck by a Dr Ramírez and allowed W Sgt Escobar to take photographs of those injuries. According to him, he 'had the clothes on' even at the stage, on 14 March, when Sgt Pérez escorted him to his (the appellant's) house so that he could take off those clothes there, rather than at the station, and hand them over to the sergeant for use by the police in their investigation. The appellant insisted under this round of questioning that the clothes he wore to the Police Station on 13 March were the same ones in which

he had gone to Hattieville on the night before. We note, however, that prosecuting counsel, in her closing speech to the jury, drew their attention to a photograph adduced during the testimony of W Sgt Escobar as taken of the appellant at the Police Station at 2 pm on 13 March in which, it is to be inferred, the appellant was not shown wearing a black T-shirt with a white undershirt.

24. A medical report under the hand of Dr Ávila was admitted in evidence when the judge recalled Crown witness W Cpl Reynolds on the application of the defence during the presentation of its case. The body of this report, the whole of which was read out in court by the witness, reads, in material part, as follows:

> 'Please be informed that I am in receipt of your memorandum requesting that a medical report be submitted in order to verify whether the above named was carnally known. During examination on 13th March 2004 I found that the above-named patient [MG] began sexual activities at the age of seventeen (17) years and in gynae examination I found that the said patient had no tear or scar that was recently done. She was currently having her menstruation at the time …'

25. Dr José Guerra testified for the defence as an expert in gynaecology. Defence counsel was allowed to question him on matters relating to the testing of semen but the doctor frankly acknowledged that, on matters of that sort, he

deferred to the specialised knowledge of the experts at the laboratories. Cross-examination proved more fruitful, as the doctor, dealing with a question falling squarely within his field, stated that the vagina of a virgin would not necessarily sustain lacerations upon being penetrated for the first time.

26. Mr Requena, aged 20 years, and Mr Paulino both testified for the defence. As regards the visit of the group to the Diamond Motel, their evidence, too, was that Mr Requena and J went into room 7, the appellant and MG into room 8 and Mr Paulino and IE into room 9.

27. According to Mr Requena, sometime later there was a knock on the door of room 7 and, opening it, he saw MG there but, on hearing J remark that MG 'like to mess around', he simply closed the door on MG. Not long after this, he heard more knocking on the door. Re-opening it, he saw both MG and IE there. MG went straight to the bed and lay down in it, prostrate. J asked MG what the problem was but got no reply. MG then mumbled something to IE who, in turn, said, 'You could call that rape.' It was only after that that he heard MG saying that the appellant had raped her.

28. In cross-examination, Mr Requena admitted to being the step-son of a police constable and said he lived 'right across the street' from the appellant, whose father was, as he accepted, 'a senior officer' who was present at the Police Station when he (Mr Requena) and Mr Paulino went there on 14 March

to give statements to the police. He also admitted that when MG came to the door of his motel room she was in a state of some undress: wearing a pair of black tights and a blouse (albeit with a brassiere underneath). And prosecuting counsel managed further to extract from him a grudging admission to the effect that MG was crying at the motel but he himself only noticed it when he and his friends were about to leave.

29. In his evidence, Mr Paulino, dealing with the visit to the motel, said that, sometime after having fallen asleep in his room, he was awakened by a banging on the door. He saw that it was MG but did not, unlike IE, come out of the room.

30. Mr Paulino accepted, under cross-examination, that he was a close friend of the appellant, as well as of the appellant's father, girlfriend and children, and even acknowledged that he affectionately called the appellant's father Pa Jeff. Questioned about MG's appearance immediately after the knocking at his door, his reply was that 'she didn't appear any abnormal way' to him. However, having given that reply, he admitted that MG, apart from being, at that stage, in her black tights and a blouse and barefooted, was, at a later stage, sobbing in room 7.

31. There was no suggestion as to why MG would want to raise a false allegation of rape against an almost total stranger, and a police officer to boot.

32. The first ground of appeal argued by Mr Twist, for the appellant, and the only one upon which we called for a reply from the respondent, was as follows:

> 'The learned trial judge erred in law in that he failed to direct the jury to the effect that little or no weight should be attach (*sic*) to the distress (*sic*) condition of the victim particularly where it is part and parcel of the complaint.'

We have already described the evidence of the distressed condition of MG adduced at trial and need not do so again.

33. Mr Twist noted that the trial judge told the jury in the course of his summing-up:

> 'So her crying you know and trembling is part and parcel of the report. Her trembling and crying is not separate, it is not independent evidence, so get that.'

But counsel dismissed those words as a mere allusion which did not go far enough; and he pointed disapprovingly, to the following passage occurring later in the summing-up:

> 'Sorry for that, as I am speaking I am remembering this; one of the witnesses said that when [MG] came out off (*sic*) the room both of them, her hair was undone, rumpled and remember how she came out too you know. She did not come with the pants on, the long pants, she came out with her tights, barefooted, barefoot (*sic*) sorry.'

34. These passages cannot, however, be divorced from the rest of the summing-up, since a summing-up, as has been said on countless occasions by this Court and other appellate courts elsewhere, must be read as a whole. In particular, the two passages cited are to be seen as coming after, and being, in the first case, elucidated by, and, in the second, subject to, the directions of the judge on the topic of recent complaint. In the course of giving those directions, the judge explained the term 'corroboration' to the jury, making the point, adequately in our view, that, in order to constitute corroboration, evidence must, *inter alia*, proceed from an independent source, and going on to label evidence proceeding from such a source (no doubt for ease of exposition) as 'independent evidence'. In the circumstances, we consider that the jury could have been left in no doubt that the evidence of the distressed condition of MG was not capable of constituting corroboration of her account. As a matter of good sense, that could only mean, to a reasonable jury, that the evidence of J and IE as to the distressed condition of MG (as distinct from their evidence as to the complaints actually made by MG) was not going to be of any

consequence to them in their deliberations since they would have recalled the words of prosecuting counsel in her closing address to them that:

> 'The prosecution did not call this (*sic*) witness (*sic*) [J and IE] to establish anybody (*sic*) except the complaint that [MG] made right after the incident and the way that she looked when she made the complaint.'

That suffices, in our view, to dispose of Mr Twist's submission which, we would add, derives no support from anything stated by this Court in *John Garcia Lambey v The Queen*, Criminal Appeal No 13 of 2004 and *Rudolph Smith v The Queen*, Criminal Appeal No 15 of 2004.

35. Before leaving this part of our judgment, however, we wish to say that it seems to us that the judge was unduly favourable to the appellant in his directions on the evidence of distressed condition in this case. This may well have been a case in which the jury could properly have been directed that the evidence of distressed condition was, in the exceptional circumstances of the case, capable of providing corroboration of MG's complaint that she had been raped by the appellant.

36. Mr Twist referred us to a number of authorities in his skeleton argument but had to be prodded by the Court to deal with the bulk of them in oral argument. Included in this bulk was *Ramesh Chauhan* (1981) 71 Cr App R

232, a case of indecent assault, which, despite the prodding, received only passing mention from counsel. We find some of the material circumstances of that case quite interesting. Referring to those circumstances, Lord Lane CJ, speaking for the English Court of Appeal, Criminal Division, said, at p 236:

> 'It seems to us that in this case the circumstances, as we have already indicated, were very different from those in many of the cases which appear in the reports. Here there were only two people in the room. Here there was a total denial by the appellant that anything of an indecent nature, or anything to which exception could be taken ever took place in the room at all. In those circumstances, it seems to us that it was essential for the jury to have before them the evidence of what happened when this lady left the room; evidence coming from Mrs Hindle. If they had not had that evidence before them, they could have legitimately complained that they were being deprived of a valuable aid to them in deciding the case properly according to the directions given to them by the recorder.'

37. Lord Lane CJ went on to say, on the same page:

> 'Taking Mr Worsley's argument to its logical conclusion, if he is right, then this evidence should never have been adduced before the jury at all, or mentioned from start to finish. One only has to state that, to see

how incredible that situation would be. The recorder had to make up his mind whether the evidence was of sufficient weight to leave to the jury at all. He came to the conclusion that it was. We agree with his decision on that point. Having decided that it was the sort of evidence which the jury should be allowed to take into consideration with regard to the question of corroboration, then the direction which he gave to them and which we have read cannot be criticised in any respect at all.' [Emphasis added.]

38. In the earlier decision of *Alan Redpath* (1962) 46 Cr App R 319, the same court had said, at p 321:

> 'It seems to this court that the distressed condition of a complainant is quite clearly capable of amounting to corroboration. Of course, the circumstances will vary enormously, and in some circumstances quite clearly no weight, or little weight, could be attached to such evidence as corroboration.'

39. It seems to us that the special circumstances in *Chauhan*, which, plainly, were not of the kind envisaged in the latter part of the second sentence of this quotation from *Redpath*, bore much similarity to those in the instant case. The point was not, of course, the subject of argument before us and we ought not, therefore, to be understood as expressing a concluded view.

40. The appellant’s second ground of appeal was in the following terms:

> ‘The learned trial judge erred in law in that he failed to direct the jury to take into consideration the evidence of the doctor as to the fact that the medical evidence proved that the Complainant was not a virgin and that the medical evidence did not support the Complainant (*sic*) story about forceful penetration since there was no tear or scar or for that fact recent evidence of sexual intercourse.’

Despite the wording of this ground, counsel for the appellant refrained, rightly in our view, from pressing the complaint as to the judge’s treatment of the so-called evidence of Dr Ávila which ‘proved that the Complainant was not a virgin’. WPC Daly had, in her evidence-in-chief, testified as to the existence of the medico-legal form that had been completed and signed by Dr Ávila. But the Crown had properly refrained from producing it and tendering it in evidence. During the cross-examination of WPC Daly, there came a point at which, understandably, prosecuting counsel objected pre-emptively to defence counsel quoting from the form in question that which was purportedly written on it by the doctor with respect to the supposed sexual history of MG. The judge’s ruling to the effect that the portion of the doctor’s report dealing with that matter was inadmissible hearsay was, in our view, correct. Consistent with this ruling, the corresponding portion of the deposition of Dr Ávila ought not, in our respectful opinion, to have been allowed to be read out for the jury to hear, when, on the

subsequent recall of W Cpl Reynolds, such deposition was, at the instance of the defence, admitted in evidence. The provisions of section 123 of the Indictable Procedure Act ('the IPA') which enabled the admission of the deposition of Dr Ávila cannot, in our view, be construed as rendering admissible, by a legislative side wind, that which, if said by Dr Ávila *viva voce* in court, would have fallen to be rejected by the judge as inadmissible hearsay. We also find highly unsatisfactory the fact that defence counsel effectively enjoyed free rein to refer, in the course of his address to the jury, to this inadmissible hearsay from the doctor's deposition (see pp 670-671 and 672, Record). It was not until he referred to this matter for the third time (p 689, Record) that the judge bestirred himself to intervene and say that he would be directing the jury (as he, in fact, did at pp 752-753, Record) that they could not 'use that'.

41. As regards the second complaint comprised in this ground, we are quite unable to accept its premise. We do not agree that 'the medical evidence did not support the Complainant (*sic*) story of forceful penetration since there was no tear or scar or for that fact recent evidence of sexual intercourse'. The medical evidence for present purposes was not that of Dr Ávila alone but the evidence of both Dr Ávila and Dr Guerra. That of Dr Ávila, untested by cross-examination as it was, could not fairly be concentrated upon to the exclusion of the *viva voce* testimony of Dr Guerra, who had been shown, by the answers to the opening questions of a defence counsel overbrimming with confidence in

his witness, to be a seasoned practitioner of more than 15 years' standing who had been no less than a supervisor of Dr Ávila at the KHMH. (The trial judge chose rather strongly to comment on the evidence of Dr Ávila but his comments were informed by the evidence of Dr Guerra and we can find no fault with them or with his approach to the medical evidence as a whole.)

42. Counsel drew our attention to the following passage taken from the summing-up:

> 'I was about to ask then when last [MG] had sexual intercourse before that day. According to [MG] she had no sexual intercourse before but Dr Daniel Ávila said that she had sexual intercourse before. So you are going to have that with you, during examination on 13th March 2004 I found that the above named patient begun (*sic*) having sexual intercourse I think it is at the age of 17 years. That means gynaecological examination <u>I found that the said patient had no tear or scar that was recently done</u>. She was currently having her menstruation at the time. <u>The doctor is telling you there is no recent tear or scar. That means if she was a virgin she should have tear or scar, that is what the doctor is saying.</u> But what I have to tell you, just like how I told you about [Mr Requena] and [Mr Paulino] going by the house of [MG] so that they could inquire about something there, you cannot, you are to disabuse your mind, erase your mind from the doctor saying that [MG] had sexual

activity from the age of 17, doctor can't know that. He didn't tell us then how he arrived at that. He asked, normally I could tell you what is the procedure, find out whether this person was carnally known and doctor normally write or always, except on this case, saying yes recent penetration, there is a tear at 12 o'clock or 6 o'clock of the vagina as the case may be. Doctor never tell you that this person had sexual intercourse from when yi (*sic*) 12 or whatever. So that is bad, that is not good evidence but it is a matter for you to accept the other part of the doctor's evidence, that is for you if you believe him.' [Emphasis added.]

43. In this passage the brunt of the rather strong judicial comment is, plainly, Dr Ávila's statements concerning the supposed sexual history of MG, with which we have already dealt at para 40, *supra*. What the judge had to say about the other part of Dr Ávila's deposition (which we have underlined for emphasis) was, in our view, eminently fair to the defence. The judge could quite properly have given even more attention than he did to the evidence of Dr Guerra, which was in violent conflict with that of Dr Ávila and, if accepted by the jury, could only serve wholly to neutralise the latter doctor's observations which implied that there was significance in the absence of a tear or scar.

44. Unless we ourselves have misinterpreted him, counsel further complained that the judge misinterpreted Dr Ávila's evidence as to the absence of a recent tear or scar in regarding that, if accepted, as a sign that MG was a

sexually active young woman and not the *virgo intacta*-turned-rape victim which she professed to be. Counsel further said that the judge should also have suggested to the jury the alternative interpretation that the absence of a recent tear or scar could equally mean that the appellant had not vaginally penetrated MG. We are surprised that it could be thought fit to advance an argument such as this. The judge was summing-up not simply at the end of a reading of Dr Ávila's deposition but at the end of a trial proper. As has already been pointed out, there was, at that trial, evidence from Dr Guerra, the defence's own expert witness, which was in diametric opposition to the expert evidence of Dr Ávila on the point under discussion. What is more, there was evidence from Mr Gómez that the vaginal swab taken by the selfsame Dr Ávila showed that there was seminal fluid inside the vagina of MG sometime not long after seven o'clock on the morning of the rape, a morning on which the appellant, on his own showing, had been alone in a motel room with MG, whom he had stripped of her pants. The judge's chosen course, of steering clear of an alternative interpretation such as that now suggested by Mr Twist, is one that calls for commendation rather than condemnation. It was a course which avoided the creation of unnecessary confusion, nay mischief.

45. Mr Twist's final contention in his quest for support for this ground was that it was not right for the judge to tell the jury that it was open to them to deduce that the semen found on MG's tights was the appellant's. We reject this contention for reasons founded on the matters adverted to in the fifth and sixth

sentences of the paragraph immediately preceding this one. There was, furthermore, no evidence in this case of sexual intercourse between MG and anyone other than the appellant, whether on 13 March 2004 or ever. Her claim to being a virgin up to the moment when she was rudely forced by the appellant remained, to the end, uncontradicted by admissible evidence. The judge's direction was perfectly sound in the circumstances and could quite properly have been expanded to include reference to the seminal fluid found on the swab.

46. The case of *Evan Reynolds v The Queen*, Criminal Appeal No 9 of 2006, was cited by counsel for the appellant but has, in our view, no bearing on this appeal and nothing more need be said of it.

47. Counsel's third ground was that the trial judge erred in law in failing to give to the jury a warning under section 92(3)(a) of the Evidence Act. The relevant provisions, which this Court has considered in *Mark Thompson v The Queen*, Criminal Appeal No 18 of 2001, and some later decisions, read as follows:

'Where at a trial on indictment

(a) a person is prosecuted for rape … and the only evidence for the prosecution is that of the person upon whom the offence is alleged to have been committed …

the judge shall, when he considers it appropriate to do so , warn the jury of the special need for caution before acting on the evidence of such person and he shall also explain the reasons for such caution.'

Counsel referred us to a lengthy list of pieces of evidence which, in his submission, cumulatively rendered the evidence of MG unreliable. We wish to direct attention, in passing, to the fact that, whilst the word 'unreliable' does occur several times in the judgment of the court in *Makanjuola and E v R* [1995] 2 Cr App R 469, it is, not unhelpfully, qualified by the adverb 'inherently' at p 475. First, counsel said that there was 'medical evidence' that MG was not a virgin at any time on 13 March 2004 and that she admitted having had a boyfriend before that date. As already pointed out, however, we agree with the trial judge that there was no such 'medical evidence'. As to the reliance on MG's admission, we simply regard it as entirely unworthy of comment. Counsel referred, secondly, to the evidence of the appellant and Dr Ramírez of a 'vamp' on the appellant's neck and to the evidence of Mr Paulino and Mr Requena that they saw the appellant and MG kissing in Hattieville. A complainant's evidence does not, upon being contradicted by the evidence of another witness or other witnesses, become, *ipso facto*, inherently unreliable. Thirdly, Mr Twist pointed out that there was no evidence from other Crown witnesses that they heard

screams coming from room 8 on the morning in question. MG did testify that she was screaming whilst in room 8, which, it is to be inferred, was, like rooms 7 and 9, locked at the time. There was also evidence that both the air-conditioner and a ceiling fan had been switched on in room 9. But we see no need to enter into a discussion of these pieces of evidence. Having just said that the mere existence of contradicting evidence is not enough to render the evidence of MG inherently unreliable, we are not prepared to stoop to the folly of stating that something less than contradicting evidence, namely the absence of supporting evidence, can have such an effect. Fourthly, counsel alluded to the fact that MG 'said the room was dark … yet she could have seen [the appellant's] erect penis without a condom'. This is an inaccurate reference to MG's evidence. Her clear testimony was that she did not see the appellant's penis (p 255, Record). As regards a contrary statement recorded from her by the police, her evidence was that she had not read that statement fully before signing it and that her signing of it was an indication that it was correct, not that it was, in fact, correct. 'Dark' is, in any event, a relative term. It was common ground that the light in the room was switched off at a relatively early stage, yet the appellant himself testified of having seen, for one thing, MG's dark tights when, at a later stage, he pulled off her pants. Fifthly, counsel adverted to the evidence of MG that she was raped whilst wearing a pad, panties and tights. That was a matter going to her credibility which was not, in our view, a sufficient basis for any conclusion by the judge that her evidence was inherently unreliable. A case in which matters of that sort will not be encountered is

difficult to conceive of. The giving of a warning under section 92(3)(a) in every case where such matters arise would make a complete mockery of the relevant provisions. The sixth point advanced by Mr Twist in his effort to furnish support for his sole contention under this ground was that MG, whilst claiming she was a virgin immediately before the alleged outrage, complained, as far as the evidence went, of no pain during intercourse. He tried to make up for the absence of pertinent expert evidence by himself venturing the opinion that a woman having sex for the first time will inevitably experience pain. This, we regret to say, is another point in which we find absolutely nothing. In summary, whether taken singly or as one, these points fail to invest this ground with any merit.

48. Ground 4 consisted of a complaint that the judge erred in law in failing to put the case of the appellant adequately before the jury. Counsel conceded at the very outset not only that the trial judge did put to the jury the defence case, namely that the appellant denied having sex with MG, but also that the judge reminded the jury of what the appellant had said from the witness-box. His complaint was that other pieces of evidence which were, in his submission, of importance to the defence were never pointed out by the judge to the jury. At the hearing, however, Mr Twist chose to press only one of the six points set out in his skeleton argument as supportive of this ground. This point related to the absence of a direction from the judge that the jury should disregard what he referred to as 'information' arising out of the cross-examination of the appellant

concerning Sgt Pérez, the police officer who, on the Crown's case as well as that of the defence, had accompanied the appellant to his house on 14 March in order for him to be able to change his clothes there and hand over those taken off for use by the police in their investigations. The relevant exchange, amongst prosecuting counsel, appellant and judge, was as follows:

> 'Q: And on the14th you went to your home with Sgt Perez to get your clothes?
>
> A: I had the clothes on; he took me home to get fresh clothes. He took the clothes that I had on.
>
> Q: And you are certain that it was Sgt Perez?
>
> A: Positive.
>
> Q: You knew Sgt Perez well before that day?
>
> A: No.
>
> Q: You knew him at all?
>
> A: He is a sergeant at the Police Station, that's all I know about him. We work together, different offices.
>
> COURT: You are saying we work together?
>
> A: Yes.
>
> COURT: At different offices?
>
> A: Different offices, yes.
>
> COURT: Go ahead, counsel.

> Q: This is the same Sgt Perez who has since been demoted to corporal?
>
> A: I am not aware of all that information.
>
> Q: You sure you are not aware that he was demoted to corporal and transferred to PG for mishandling exhibits?
>
> A: I am not aware of all that, this is the first time I am hearing of that.
>
> Q: How many times did Perez take you to your home?
>
> A: Once.'

Whatever prosecuting counsel may have wished to achieve by the posing of these questions, the fact is that no evidence even remotely prejudicial to the defence emerged from it. Counsel's references to the supposed fate of the sergeant were not evidence and could not possibly have been regarded as such by the jury when they entered upon their deliberations. After all, the judge made it clear to them early on in his summing-up that they were required to decide the case only on the evidence placed before them. Later on, he expanded on this somewhat when he told them that anything contained in a witness-statement recorded by the police was not evidence. The judge, whose long experience in criminal trials is well-known, did not further elaborate on what constitutes evidence as trial judges sometimes see it fit to do, especially with an inexperienced jury. In this regard, however, we do not fail to note, the judge's remark (p 146, Record) that many members of the jury sitting with him in this trial had served as jurors before. In conclusion, we do not consider that it

was necessary to tell such a jury that suggestions made by counsel in the course of cross-examination are not evidence; and if we had any doubts in this regard we would be prepared to apply the proviso to section 30(1) of the Court of Appeal Act.

49. Counsel for the appellant expressly abandoned ground 5 and proceeded to argue ground 6, which was a complaint that the judge erred in law by not leaving the alternative verdict of indecent assault to the jury. Endeavouring to support this ground, counsel made a single submission, namely that in a criminal trial for rape it is always open to the jury to bring in a verdict of guilty of the lesser offence of indecent assault and that the judge did not so direct the jury. This is not a submission we are able to accept; and it is not, to us, a matter of surprise that counsel cited no authority for his sweeping proposition.

50. In *Dennis Torres v The Queen*, Criminal Appeal No 36 of 2004, one facet of the ground of appeal argued before this Court (Mottley P, Sosa and Carey JJA) was that a manslaughter verdict ought to have been, but was not, left with the jury, which proceeded to convict Torres of murder. Having considered, *inter alia*, the provisions of section 126(1) of the Indictable Procedure Act ('the IPA'), we said, at para [14]:

> 'Nothing advanced by counsel for the appellant in this Court has succeeded in altering our understanding of this area of the law, which is

that a trial judge is under no absolute duty to direct a jury as to the option of convicting an accused person of an alternative crime and that it matters not whether such an option is provided for by law. But it is also our understanding that a trial judge should, if it is in the interests of justice so to do, leave the alternative verdict to a jury where there is a possibility, arising fairly on the evidence, that the accused is guilty only of a lesser offence and where such a course will not needlessly complicate matters for the jury.'

Our views on this matter remain unaltered.

51. The option of a jury to convict an accused person charged with rape of the lesser offence of indecent assault is one provided for by law in this jurisdiction. Section 130 of the IPA, as material in the present context, provides:

'130. If upon the trial of any indictment for:

(a) rape, the jury is satisfied that the accused person is guilty … of an indecent assault, but is not satisfied that the accused person is guilty of the crime charged in the indictment, or an attempt to commit such crime, the jury may acquit the accused person of the crime charged in the indictment and find him guilty … of an indecent assault …

> and thereupon the accused person shall be liable to be punished in the same manner as if he had been convicted upon an indictment … for the misdemeanour of indecent assault.’

52. Section 130(a) thus provides for that which a jury left with an alternative verdict may do, not for that which a trial judge should do in a case such as the instant one: see para [13] of the judgment in *Torres*, *supra*, for the expression of a similar view on section 126(1) of the IPA.

53. In our opinion, the trial judge was right not to leave the alternative verdict of indecent assault to the jury in the present case. He appears properly to have taken his guidance from the state of the evidence. The crucial question in this case had to be whether there was, before the jury, an identifiable evidential basis on which they could possibly return a verdict of indecent assault. A negative answer to this question would dictate a rape or nothing approach.

54. What, then, in terms of such an evidential basis was to be gleaned from the appellant’s case? That case comprised a denial not only of sexual intercourse with MG but also of any other behaviour on his part which was itself indecent in nature or had been treated as unacceptable by MG. On his evidence, the playing between him and MG had continued at all material times: it began before, and went on after, the admitted pulling off of the pants. To

suggest that a jury accepting such evidence could proceed to found upon it a verdict of guilty of indecent assault would be downright ludicrous. Nor could the essential evidential basis be found in the Crown case. There was no evidence from MG of the appellant kissing her or performing any other form of foreplay upon her prior to the sudden act of penetration. Surveying that evidential scene at the end of the trial, the trial judge correctly saw only one possible verdict, namely a verdict on rape. His decision to leave no alternative verdict is entirely beyond criticism.

55. The next, and last, ground to be put forward on behalf of the appellant was ground 7, which complained that '[t]he verdict of the jury was unreasonable having regard to the evidence'. The submission in writing advanced by counsel in his effort to give substance to this ground is one which, in our view, must fail. We would note that Mr Twist drastically abbreviated his treatment of this ground in oral argument by simply indicating that he would rely on, without repeating, such relevant points relating to the evidence as he had made earlier in arguing other grounds. The pertinent submission in writing was twofold. First, wrote Mr Twist, the medical evidence negated the evidence of MG. The reference here could only be to the admissible portion of Dr Ávila's evidence, according to which he found no recent tear or scar in MG's vagina. As we have pointed out, however, that was not all of the medical evidence: the evidence of Dr Guerra, the defence's own expert witness, was to the effect that the vagina of a woman having sexual intercourse for the first time would not necessarily be lacerated

by the act of penetration. Such evidence, if accepted, would effectively neutralise the testimony of Dr Ávila and thus facilitate acceptance of MG's rape allegation. The second part of the written submission (a) complains of the absence of any explanation in the evidence of how the appellant could have managed to penetrate MG when she was wearing 'the tights, the pants (sic) and most of all the [sanitary] pad' and (b) points to the absence of evidence that the alleged screams were heard by anyone. The evidence of MG was that her tights and panties (not pants) were pulled to one side, following the complete pulling off of her pants and prior to penile penetration. We consider that the presumably practical men and women of the jury were entitled to infer, and they obviously inferred, that, when the tights and panties were pulled aside, so, too, was the pad. As to the allegedly unheard screams, the Crown may well have felt that whether or not they had actually been heard by anyone outside room 8 was beside the point. Apparently, so, too, did the jury. The matter can hardly have been overlooked by them since both counsel alluded to it in their closing speeches. We reject the suggestion that the absence of evidence indicating that MG's alleged screams were heard goes anywhere near to the heart of the matter in this case.

56. In *Arthur Fred Hancox* (1913) 8 Cr App R 193, at 197, the English Court of Criminal Appeal, dismissing an appeal in which one of the grounds argued was that the verdict was against the weight of the evidence, said:

> 'This Court has said that it does not proceed on such lines as these – look at the evidence, see what conclusion the Court would have come to, and set aside the verdict if it does not correspond with such conclusion. There have been cases where the Court has thought fit to set aside a verdict on a question of fact alone, but only where the verdict was obviously and palpably wrong.'

Where the ground is the more particularised one argued by Mr Twist in this appeal, there can, in our view, be no justification for any whittling down of the principle stated in the passage just quoted. Keeping that principle in mind, we are persuaded that this ground cannot succeed. In our opinion, the verdict of the jury in the instant case was not wrong at all, let alone wrong in an obvious and palpable manner. On the contrary, we are satisfied that it was an entirely reasonable verdict which was overwhelmingly supported by the evidence.

57. No application was made by the appellant for leave to appeal against sentence, the judge having imposed the minimum sentence prescribed by law for the crime of rape. Whilst there was no application by the Crown for leave to appeal against sentence, we think it ought to be said that, in general, any police officer who, in circumstances similar to those of the instant case, receives the minimum sentence permitted by the statute should consider himself fortunate. There was, on the evidence in this case, a most outrageous betrayal of the trust reposed by MG in the appellant by virtue of the fact that he was a police officer.

And our scrutiny of the sentencing remarks set out in the Record does not reveal that this aggravating factor was taken into account by the sentencer in determining the sentence. We consider it worthwhile to place these observations of ours on the record for future reference since, distressingly, this is not the first appeal involving a charge of rape against a police officer to reach this Court in recent times.

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MOTTLEY P

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SOSA JA

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CAREY JA