REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Criminal Appeal No. T10 of 2014

JADE BOVELL

Appellant

AND

THE STATE

Respondent

PANEL:

A. Yorke-Soo Hon J.A.

R. Narine J.A

M. Mohammed J.A.

APPEARANCES:

Mr. D. Khan and Mrs. U. Nathai-Lutchman appeared on behalf of the Appellant

Mr. G. Busby appeared on behalf of the Respondent

DATE DELIVERED: March 26, 2019

JUDGMENT

Joint judgment delivered by A. Yorke-Soo Hon, J.A., R. Narine, J.A. and M. Mohammed, J.A.

INTRODUCTION

[1] The appellant, Jade Bovell, was charged with the offence of rape on August 2, 2007 contrary to section 4(1) of the Sexual Offences Act Chapter 11:28. On February 27, 2014 he was found guilty by a majority verdict and on April 3, 2014 he was sentenced to 12 years imprisonment with hard labour.

THE CASE FOR THE PROSECUTION

[2] The prosecution case was based primarily on the evidence of the virtual complainant (LB) and on an oral statement given by the appellant to Sergeant Roberts on October 26, 2008.

[3] In August 2007, LB, aged sixty-three, a foreign national, lived at Black Rock in Tobago. On August 2, 2007, between 5:00 to 5:30 p.m., she had just showered and was standing naked in front of her bathroom mirror drying her hair, when she noticed a movement out of the corner of her eye. As she turned around, she saw the appellant, who was armed with a cutlass, standing in the doorway to her bathroom. He was dressed in a faded black t-shirt, a pair of three-quarter length denim pants and he had a faded black or grey t-shirt wrapped around his head and face. He was about 6 feet tall and his complexion was dark brown. She described his eyes as *"dark, but bright"* and said that he had a *"slim, pug nose which was a little tilted at the end."* His face was *"young looking and clean shaven with no hair on it".* He was barefooted, his feet being very distinctive, very narrow, slim and "feminine looking", and which she described as being "*not like a man's foot in Tobago."* He was also soft spoken. Upon seeing his physical features, hearing his voice and seeing the manner in which he moved, LB knew that he was the same man who had attacked her on July 6, 2007. He was wearing the same clothes which he wore on that day.

[4] LB cried out, "*O God, no not again*" and the appellant placed his finger to his lips and told her to "shush". She asked him what he wanted and he said quietly, "*You*", as he pointed to her vagina. She said to him, "*You want me, you want me for sex?*" to which he nodded his head in agreement. This exchange lasted for approximately 5 to 6 minutes. The light in LB's bathroom was on and at that time in the afternoon, the sun shone brightly inside her house. The appellant stood about 3 feet away from her and she was able to have a full frontal view of him, down to his feet. She was only able to see his eyes because of the t-shirt which was wrapped around his face.

[5] LB begged the appellant not to hurt her like he had done before and to allow her to get a condom because she was concerned about contracting the AIDS virus. She walked away from the bathroom and ran to the nearby bedroom and attempted to close the door. The appellant burst open the door, threw her on the bed, stood over her and raised the cutlass in the air. The light was off in that room but there was a "good sized window" and the curtains were completely opened with the sun shining through. The lighting was good and she saw him plainly. He was directly in front of her with his legs on each side of hers and the front of his body was facing her. She saw his shoulders, arms, head and torso, almost down to his knees.

[6] LB apologized to the appellant and told him that she would not cause any more problems and that she had condoms in her bedroom. He then pushed her towards that bedroom with the cutlass against her back. She tried to run from him, but he caught up with her. She was able to see the appellant clearly in the light which shone through the window and through the opened door. The window in this bedroom was also of a "good size" and the curtains were drawn. The appellant pushed her on the bed and placed the cutlass on the floor. She opened her bedside cabinet drawer and gave him a condom. With the intention of getting rid of the cutlass, she asked him if she could move her belongings from the bed and he permitted her to do so. While the appellant was removing his pants, she quickly dove for the cutlass and threw it out the window. He proceeded to hit her and threw her on the bed. He knelt over her and tried to force her to perform oral sex on him. LB attempted to get the appellant off her but she was unsuccessful. The appellant then put on the condom and began masturbating. He requested her to stroke his penis but she refused. He then

removed the condom and took out one of his own. He then forced her legs apart and roughly pushed his penis in and out of her vagina in what LB described as a *"really hard and painful way."* She punched and shouted at the appellant, begging him to stop because he was hurting her. He pulled her towards the edge of the bed and continued having sexual intercourse with her. The appellant began perspiring and she recognised his distinctive body odour from the July 6, 2007 incident.

[7] LB tugged at the t-shirt which was wrapped around the appellant's face and he hit her hand away. She had managed to loosen it and it came off. She saw his face for approximately 10 to 30 seconds before he refastened it. She clarified that the time of observation of his face was closer to 30 seconds. LB reached for a knife which she had placed beneath her mattress after the first attack. Before she could attack the appellant with the knife, he grabbed on to her wrist, took the knife and threw it on the floor. He continued to have rough sexual intercourse with her during which she experienced pain. When he had finished, he stood up, picked up the knife from the floor and wiped it with a handkerchief. He started looking around at the things in the bedroom. He picked up an envelope and asked LB what was contained in it and she replied, *"just pictures"*. Those were the photographs of the injuries she had sustained after the first attack. The appellant looked at the photographs and kept them. He found her purse and took money from it. He then wiped the purse with a handkerchief. He also wiped the parts of the floor where his perspiration fell. LB walked away to the shower and he followed her, while pushing the knife against her back. When she got into the shower, the appellant told her not to tell anyone what had happened and he then walked away. LB pretended to take a shower as she did not want to get rid of any possible DNA evidence on her body. Shortly afterwards, she went to the nearest bedroom, locked the door, went to the window and shouted for help. LB saw the appellant picking up the cutlass from the ground. She also saw him with the envelope containing the photographs.

[8] Later that evening, LB was taken to the Scarborough Regional Hospital where she was medically examined. A medical report was prepared on her behalf by Dr. Nikolo, which was later passed on to Sergeant Roberts.

[9] On October 24, 2008, Sergeant Wilson, together with a party of police officers led by Sergeant Roberts, proceeded to the appellant's house at New Road in Black Rock, Tobago. Sergeant Wilson gave evidence that the appellant lived approximately 80 to 100 feet away from LB and that her house was clearly visible from the front of the appellant's house. The police officers continued their inquiries and later arrested the appellant. On October 26, 2008, Sergeant Roberts interviewed the appellant in the presence of Corporal Clarke at the Old Grange Police Station. Corporal Clarke took a record of that interview, which the appellant refused to sign.

[10] In those interview notes, the appellant admitted to having sexual intercourse with LB without her permission. He said that he got onto her premises by climbing over a wall and he entered the house through a window near the staircase. He was armed with a cutlass and he had a black t-shirt wrapped around his head and face. His intention was to rob LB. Upon entering the house, he saw LB standing naked and it appeared that she had just taken a bath. He said that he asked her to perform oral sex on him but she refused, saying *"she don't know what I have."* LB then retrieved a condom from a drawer and put it on his penis after which the appellant had sexual intercourse with her.

[11] Justice of the Peace Richard Alfred confirmed that when he spoke to the appellant on October 28, 2008 at the Old Grange Police Station, he told him that he did not sign the interview notes and that, "*He was not signing anything*".

[12] On October 28, 2008, Sergeant Roberts passed on the interview notes to Sergeant Wilson. On that day, at the Old Grange Police Station, Sergeant Wilson identified himself to the appellant. He told him of the reports made by LB and then showed him the notes of his interview. Sergeant Wilson enquired from the appellant if the contents of those notes were true and correct, and the appellant replied in the affirmative. Sergeant Wilson then enquired whether he was willing to give a statement relative to the interview notes and he responded in the negative. The appellant was then cautioned and charged for the offence.

THE EVIDENCE OF BAD CHARACTER

[13] An important plank of the case for the prosecution consisted of bad character evidence in the form of a series of incidents, one prior to and the others after the subject offence. It is essential to set out the details of these incidents briefly.

July 6, 2007

[14] At around 12:30 a.m., LB awoke and saw the appellant standing beside her bed. He was dressed in dark clothing, had a handkerchief tied around his nose and mouth and was wearing white gloves on his hands. He placed his finger to his lips and said "*shhh*". LB was lying naked under the sheets. The appellant placed a pillow over her face, held her down, took her night dress and used it to choke her. She fought him off. He punched her in her nose, causing it to bleed. He wrapped his arm around her neck and held on to her hair before dragging her from the bedroom to the sitting room. He then threw her on the floor and started punching her. He demanded money from LB and allowed her to get her purse which was in the kitchen. After taking the purse from LB, he continued beating her and demanded more money. The appellant began touching her breasts and between her legs. She pleaded with him not to rape her. The appellant then put his hand into her vagina and she screamed with pain. She shouted at him and told him to leave. He responded by punching her, causing her to fall and to hit her head. LB passed out and when she regained consciousness, she grabbed her phone and ran to the bathroom, into which she locked herself. She then contacted the police. That night, the appellant took her bank card and the sum of TT$4,300.00.

[15] During this incident, the lights inside the house were off but there were other lights in the exterior of the house which were on. Those lights were bright and lit the sitting/dining room area. LB was able to observe some of the appellant's features. He was about 6 feet tall and wore a "blackish" t-shirt and a pair of three-quarter length denim pants. He had a white handkerchief around his nose and mouth and gloves on his hands. He was slim built and according to LB, he had unusual feet for a man in that they were very slim and narrow. His eyes were described by her as being dark but

"bright and sparkly". The manner in which he spoke and carried about himself led LB to believe that he was in his early twenties.

[16] LB reported the incident to the police. Sergeant Wilson, who was involved in the investigation, visited LB's house and observed that her entire face was swollen, including her left eye which was shut due to the swelling. He also observed that LB had bandages on her left eye, her left ear and on the back of her head. He subsequently interviewed LB and recorded a statement from her. Sergeant Wilson continued his inquiries into the incident.

[17] Sergeant Roberts and PC MacDonald conducted an interview with the appellant concerning this incident, where he admitted to entering LB's home and robbing her.

October 4, 2007

[18] At around 9:00 p.m. LB's friend, Charles King, who had been staying with her since the July attack, had already retired to bed. LB was in the sitting room, resting on a bed. Her newly acquired pet dog was in the gallery. She had left the door to the gallery open, so that the dog could enter and leave. She had however locked the burglar proofing and disarmed the house alarm system. LB had fallen asleep and awoke to the sound of the dog barking. When she looked up, she saw the appellant approximately 15 feet away looking into the house from a window in the sitting room. Although the inside of the house was dark, there were several lights outside of the house which were on. The appellant wore a red scarf around his head and face, a black t-shirt and a pair of three-quarter length denim pants. He was barefooted. He was the same height as her previous attacker and was slim built. His hair was short and black. From the man's shape and built, she believed it was the same person who had attacked her before. He walked along the gallery and shook the doors and windows which were locked. LB woke up Charles King and the police were contacted. Before the police arrived, the appellant had ran way. LB had the appellant under her observation for approximately 4 minutes that night.

A night in November, 2007

[19] One night in November, 2007, LB observed that the security lights around her house had come on. The security alarm also sounded. She ran to one of the windows in the house and she saw the appellant standing at the bottom of the staircase. The lighting conditions were excellent. There was a double security light behind the appellant, one near LB's bedroom window which shone directly on him and the light in the gallery was also on. The appellant's face was uncovered and LB said that she saw him "as clear as daylight". He was approximately 15 feet away and the front of his body was fully visible to her. He was the same man who had raped her on August 2, 2007. He wore a faded black t-shirt, a pair of three-quarter length denim pants and was barefooted. His complexion was brown, he had short black hair, was clean shaven and he had the same bright eyes and nose as her previous assailant. He appeared to be in his early twenties. LB observed his face and the front of his body for approximately 30 seconds before he fled.

November 25, 2007

[20] At around 5:30 a.m., LB's friend, Charles King, had left her house and before doing so, he secured the burglar-proofing. LB was sitting on the couch watching television, with her back facing the door. She turned around and saw the appellant standing in the doorway of one of the bedrooms, which was approximately four feet away from her. He was dressed in a faded black t-shirt and a pair of three-quarter length black denim pants. He had a faded black or grey t-shirt wrapped around his head and face. He was approximately 6 feet tall and had a slim built. He was barefooted and was armed with a knife. LB recognised the appellant's distinctive feet. The appellant placed his left index finger to his lips and said *"shhhh"*. The lighting at that time was bright as the lights in the sitting room were on. LB stood up so she could see the appellant clearly and nothing blocked her view of him. She recognised his voice and knew that he was the same person who had attacked her in the past. She shouted at him and asked him how he had gotten into the house. He grabbed her left arm, forced her into one of the bedrooms and told her to undress herself. She refused and he pulled off her nightdress and told her to lie on the bed. He removed his pants and exposed himself. The appellant asked her to perform oral sex on him and she refused to do so. She told him that she was

concerned about contracting the AIDS virus. The lighting in the other rooms illuminated the bedroom. She recognised the appellant's body odour.

[21] The appellant waved his hand at the bedside cabinet and LB believed this to be an indication that he wanted a condom. In LB's view, the appellant knew where the condoms were located from the previous incident. The appellant pointed to the drawer and told her to take a condom out. He requested that she open the condom and she complied. He then asked her for another condom. LB was scared of the appellant as he was armed with a knife, which at that time was on the bedside cabinet. LB tried to reach for the knife but he hit her hand and it fell on the floor. The appellant picked it up and stuck it in the back of his pants. He proceeded to masturbate and attempted to insert his penis into her vagina. LB began to heave and pretended that she was about to throw up. She told him that she needed a glass of water. They both proceeded to the kitchen, while the appellant held onto LB's hand and placed the knife against her back. LB was about to have a drink of water when she reached for the alarm remote and activated the house security alarm. The appellant knocked off the remote from her hand and she ran to the bedroom and shut the door. The entire incident lasted approximately 10 to 15 minutes.

January 24, 2008

[22] LB had returned home at around 5:05a.m. She opened the automatic gate to her house, drove her vehicle into the garage and closed the gate. The car's engine and lights were on. She then heard her dog barking aggressively. She saw a shadow on the driver's side. The driver's side door was opened and LB felt an arm around her neck and throat. She threw herself forward and leaned on the car horn which sounded. She recognised the appellant, who leaned forward and unsuccessfully attempted to switch off the car. He was armed with a knife. He had a faded black or grey t-shirt wrapped around his head and face. He tried to force LB out of the car and pulled her by her neck but LB put up a fight. She managed to engage the house alarm system. The appellant ran away and LB chased after him. She noticed that he wore the same faded black t-shirt a pair of three-quarter length denim pants as he did before. He was also barefooted. She recognised him as the same person who had attacked her on the previous occasions based on his body type, his eyes and his

feet. The lighting on that occasion was good as several of the security lights around the house were on. The incident lasted around 10 minutes.

THE CASE FOR THE APPELLANT

[23] The appellant elected to give evidence and called no witnesses. His case was one of a denial, mistaken identification and fabrication of the evidence by the police witnesses. The appellant knew LB by her first name and said that she had lived close by. On mornings, he would pass by and exchange pleasantries with her. He however denied that he had committed the offence and that he had given an oral statement to Sergeant Roberts. He also denied being involved in the several incidents described by LB which were admitted as bad character evidence. He said that had never entered LB's premises. He claimed that LB was mistaken in her identification of him. He further asserted that the case against him was fabricated by the police witnesses as a result of his being discharged in proceedings for murder in the year 2000.

[24] The appellant also said that he was subjected to police brutality. On October 28, 2008, Justice of the Peace Alfred Richard gave him some documents and asked him to read through them. He read the documents and returned them. He indicated that he never said the things that were detailed in those documents. He also alleged that the Justice of the Peace tried to convince him to sign the documents but he refused to do so.

[25] According to the appellant, he never spoke to Sergeant Wilson on October 28, 2008 and was never asked if he wanted to give a statement in relation to the matter. The only time that he recalled seeing Sergeant Wilson was on the day that he was arrested at his house.

[26] The appellant referred to two incidents in support of his allegation of fabrication by the police officers. With respect to the first incident, he explained that he was charged for murder in the year 2000 and was subsequently discharged at the preliminary enquiry. He was incarcerated at the Youth Training Centre, together with a man by the name of Kishon Ross. Ross informed him that some

police officers instructed him to say that he (the appellant) had killed the man of whose murder he was accused. Ross gave no such evidence. According to the appellant, the police officers involved in the murder investigation were attached to the Old Grange Police and the Scarborough Police Stations. After the matter against him was dismissed, whenever one Inspector Nurse spoke to him, he would always tell him that *"he got away with murder"* and that *"he thinks that he could get away with anything*". Sergeant Roberts also told him that he got away with murder and that *"he must go down".*

[27] In relation to the second incident, on November 29, 2007, the appellant and his friend were walking along a road when they saw police vehicles and other vehicles passing by. The vehicles were transporting police officers and soldiers. Some police officers came out of one of the vehicles and instructed him and his friend to put their hands on a nearby fence. He also heard another officer shout, *"Is that the man all yuh going for?"* and a voice responded, *"Yes".* The police officers arrested him but released his friend. The police officers were from the Old Grange Police Station and he knew some of them quite well. They took him and other persons to the beach where he was beaten and questioned about a gun. He was then taken to the police station where the beating continued until he was eventually released.

THE APPEAL

Ground 1: The Learned Trial Judge erred in wrongfully admitting evidence wrongly categorized as bad character evidence through the propensity gateway when in fact such evidence did not establish propensity, with the corresponding prejudicial effect of denying the Appellant the benefits of a good character direction. (sic)

[28] The appellant relied on several sub-grounds of appeal within Ground 1. We have addressed these sub-grounds separately.

Sub-ground 1: Wrongly admitted bad character evidence through the propensity gateway

THE SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[29] Counsel for the appellant, Mr. Khan, submitted that the trial judge wrongly admitted evidence, which was erroneously classified as bad character, through the propensity gateway. He complained that such evidence did not establish propensity. The specific evidence complained of comprised the two incidents which allegedly took place on July 6 and November 25, 2007, between LB and the appellant. The evidence was admitted as being relevant to the question of whether the appellant possessed a propensity to commit offences of the kind with which he was charged. He further submitted that the allegations of misconduct were unconnected and unrelated to the offence charged and could not be used to show his propensity.

THE SUBMISSIONS MADE ON BEHALF OF THE PROSECUTION

[30] Counsel for the respondent, Mr. Busby, contended that the judge did not err in admitting the evidence of the said incidents. He submitted that they bore significant features which were shared with the offence charged. He submitted that it was open to the judge to conclude that such evidence showed propensity by the appellant to commit sexual offences, with a particular modus operandi and that in the circumstances, the evidence was of probative value.

LAW, ANALYSIS AND REASONING

[31] **Section 15 K of the Evidence (Amendment) Act Chapter 7:02** provides for the admission of evidence of a person's bad character which can take the form of reprehensible behaviour or conduct relating to the commission of an offence.

[32] The gateways governing the admissibility of an accused's bad character evidence are laid out under section **15 N (1**) and include:

> *15 N (1) In criminal proceedings evidence of the accused's bad character is admissible where—*
>
> *(d) it is relevant to an important matter in issue between the accused and the prosecution;*
>
> *…*

[33] Section **15 P (1)** sets out the meaning of an important matter in issue which includes:

> *(a) the question whether the accused has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;*

[34] The Act also allows for the exclusion of possible bad character evidence. **Section 15N(3**) provides that:

> *"(3) The Court shall not admit evidence under subsection (1) if, on an application by the accused to exclude it, it appears to the Court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it."*

[35] **Section 15N (4)** sets out factors which must be taken into account by a judge when balancing the fairness of the trial. It states:

> *"(4) On an application to exclude evidence under subsection (3), the Court shall have regard, in particular, to the length of time between the matter to which that evidence related and the matters which form the subject of the offence charged."*

[36] The Court of Appeal in **R v Hanson**[1], in referring to the Criminal Justice Act 2003, from which the Evidence (Amendment) Act 2009 of Trinidad and Tobago is fashioned, stated at paragraph 4:

> "*The starting point should be for Judges and practitioners to bear in mind that Parliament's purpose in the legislation, as we divine it from the terms of the Act, was to assist in the evidence-based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice. It is accordingly to be hoped that prosecution applications to adduce such evidence will not be made routinely, simply because a defendant has previous convictions,* ***but will be based on the particular circumstances of each case***". [emphasis added]

[37] In deciding whether the appellant has a propensity to commit offences of the kind with which he is charged, the court often considers the similarities between the conduct and the subject offence. Such an exercise is no longer required to conform to the elements of the common law doctrine of "similar fact evidence", where the similarities needed to be *"striking"* in nature. The statutory approach requires that there be "*a degree of similarity".* Even if "*a degree of similarity"* is established, it does not however lead to an automatic admission of the evidence. Where the evidence being relied upon displays a sufficient pattern of behaviour or nexus, to the exclusion of mere coincidence, this not only goes towards propensity but also towards proof of the charge. In **R v Tully and Wood**[2] Lady Justice Smith approved the reasoning in **R v Hanson** and stated at paragraph 26:

> "*…In Hanson the court said that the Judge should look for similarities between what the defendant had done in the past and what he was now charged with.* ***Those similarities did not have to be striking in the way that similar fact evidence has to be, but there must be a degree of similarity****…."* [emphasis added]

[1] R v Hanson; R v Gilmore; R v Pickstone [2005] EWCA Crim 824.

[2] [2006] EWCA Crim 2270.

[38] In **David Baptiste v The State**[3], this Court adopted the guidelines set out in **R v Hanson**[4]. In order to determine whether the evidence supports propensity, three questions must be asked, namely:

(i) Does the proposed evidence have the capacity to establish a propensity on the part of the defendant to commit offences of the kind charged?

(ii) If yes, does that propensity make it more likely that the defendant committed the offence charged?

(iii) If yes, is it unjust to rely on the proposed evidence and in any event, will the proceedings be unfair if they are admitted?

[39] Applying these principles to the present case, we note the following similarities in relation to the events of July 6, 2007, November 25, 2007 and the subject offence:

(i) The appellant gained unlawful entry into LB's home during the late evening to early hours of the morning (around 5:30p.m. to 5:30a.m.);

(ii) The appellant committed sexual violence against LB;

(iii) The appellant placed his index finger to his lips and told LB to *"shush"*;

(iv) The appellant was barefooted, wore a faded black t-shirt and a pair of three-quarter length denim pants;

(v) The appellant hid his face so that only his eyes were visible; and

(vi) In addition to the sexual violence, to some degree, the appellant committed acts of physical violence against LB.

[40] We are of the view that the bad character evidence adduced established a compelling degree of similarity with the features of the offence charged. These significant features established a sufficient pattern of behaviour to the exclusion of mere coincidence. These shared significant features were in terms of time of occurrence, the appellant's overall physical appearance, the use of violence and the general modus operandi. The evidence therefore had the capacity to establish that the appellant

[3] Crim. App. No. 023 of 2016.

[4] Hanson (n. 1).

possessed a propensity to commit offences of the type charged and that it was more likely that he committed the subject offence.

[41] The trial judge therefore correctly exercised her discretion to admit the bad character evidence. This admission of this evidence did not create any unfairness to the appellant. Pursuant to section 15 N(1)(4) of the Evidence Act, there was no significant lapse of time between the subject offence and the evidence relied upon. The incident on July 6, 2007 occurred approximately a month before the subject offence, while the incident of November 25, 2007 occurred a mere three months later. In our view, the application to adduce the evidence was not mechanical in nature. Indeed, in the particular context of this case, there was available for entirely legitimate use by the prosecution, evidence of a series of incidents which displayed an "underlying unity" in the manner of commission of the offence charged. We therefore disagree with the appellant's submission that the evidence was wrongly characterized as bad character evidence and wrongly admitted through the propensity gateway.

Sub Ground 2: Unproven allegations arising from one source

THE SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[42] Mr. Khan submitted that the prosecution relied on a pattern of conduct in relation to specific incidents which occurred at different times and which originated from one source, in order to establish the appellant's guilt. He submitted further that each incident of alleged misconduct remained unproven and the evidence relative to each of these incidents, in and of itself, was weak.

[43] He relied on the decision in **The State v Samuel Duke**[5], where the court rejected the prosecution's argument that without the proposed evidence, the jury would find it impossible or challenging to fully understand the other evidence in the case. Rather, the evidence was excluded as it would have had an adverse effect on the fairness of the proceedings. Mr. Khan submitted that the proposed

[5] H.C. Cr. No 70 of 2007 [2010].

bad character evidence could not be admitted merely because it appeared to be relevant to the charge, but only if it was both relevant and probative. He submitted that the trial judge ought to have excluded the evidence as it was not open to the prosecution to elicit evidence of incidents both prior to and after the offence charged.

THE SUBMISSIONS MADE ON BEHALF OF THE PROSECUTION

[44] In response, Mr. Busby submitted evidence of unproven incidents which originated from one source was admissible to show propensity or as important explanatory evidence. However, with unproven allegations, the trial judge had to exercise care before admitting them and he ought to direct the jury appropriately. He relied on the decisions in **R v P**[6] and **R v Bogjsha**[7] in support of this submission. He further submitted that the facts in this case were in line with **Bogjsha**, in that there was one source of the bad character evidence, which was unproven. This evidence was duly admitted through the gateways of "important explanatory evidence" and "evidence of propensity". He submitted that the trial judge, as was done by the judge in **Bogjsha**, directed the jury repeatedly that the prior incidents were only relevant if they were satisfied that they had happened as the prosecution alleged.[8] He further submitted that the judge's decision to admit the bad character evidence fell within the proper remit of her discretion. Additionally, the judge exercised significant care in directing the jury on the evidence of unproven allegations.

THE LAW, ANALYSIS AND REASONING

[45] Where disputed unproven or non-conviction incidents of misconduct are being relied on as evidence to show propensity, the jury must be directed not to place reliance on them unless they are sure of them: **R v Lafayette**[9] and **R v Campbell**[10].

[6] [2006] EWCA Crim 2517.
[7] [2014] EWCA Crim 1440.
[8] Summing Up: Day 2 at p.26 lines 33 - 48; p.27 lines 35 - 50; p. 28 lines 11 - 15; p. 29 lines 9 -22 and p.29 lines 26 – 48.
[9] [2008] EWCA Crim 3238.
[10] [2007] EWCA Crim 1472.

[46] In **R v P**[11], the appellant was convicted of attempted rape. He had previously pleaded guilty to a count of assault occasioning actual bodily harm arising out of the same incident. He appealed on the ground that the judge had erred in allowing the prosecution to adduce evidence relating to his bad character. The incident which gave rise to the counts in the indictment related to the events of April 23, 2005, when the complainant alleged that the appellant had assaulted her, pulled her trousers off, undid his jeans and then attempted to have sexual intercourse with her. She claimed that he grabbed her and tried to get her legs apart. She agreed that she had on occasions been under the influence of alcohol and that she and the appellant had argued on a number of occasions. The appellant admitted that his relationship with the complainant was volatile. He indicated that there was an incident on the relevant day in which he had slapped her, but he claimed it was because she was hysterical at the time. He denied that he attempted to have sexual intercourse with her as she had claimed. The prosecution led evidence from the virtual complainant of seven separate previous incidents, six of them involving the use of violence and the seventh being an allegation of rape, on the basis that it was "important explanatory evidence". The virtual complainant in her evidence was unable to identify the exact year the incidents occurred and accepted that she had neither previously made any complaint in connection with the rape nor did she give any witness statements. Counsel for the appellant opposed the application to adduce the bad character evidence on the basis that the issue between the prosecution and the defence was perfectly understandable without the previous incidents being led in evidence. Nonetheless, evidence of these prior incidents was held to have been correctly admitted because it would have been unfair to the prosecution if it was not allowed to adduce what the complainant had said about the relationship. Those incidents were matters of importance to explain the relationship between the parties and therefore necessary for the jury to understand the case as a whole. The value of the evidence was substantial.

[47] In **R v Bogjsha**[12], the appellant was convicted of the offences of threatening to kill, and assault occasioning actual bodily harm, which occurred on August 22, 2013. For several years before that

[11] R v P (n. 6).
[12] Bogjsha (n. 7).

date, the appellant and the victim had been in a relationship. On the date of the charged offences, the appellant had threatened to stab the victim if she did not give him access to her phone. When she refused, he punched her in her face. On two occasions prior to the relationship ending, the victim said that he had assaulted her. First, in January 2003, he had forced himself into her flat and threw her on the floor and punched her on her head and back. Next, in June 2013, he again pushed his way into her flat and grabbed her by her neck. Although the incidents had been reported to the police, no charges were laid. The prosecution was successful in applying to adduce evidence of the earlier assaults. Mr. Recorder Hill-Smith, reasoned that it was important explanatory evidence and that it was relevant in relation to the issue of the intent required for the offence of making a threat to kill. In directing the jury, the court said that it would have also been relevant to show a tendency on the appellant's part to assault the victim. The appellant applied for leave to appeal against his conviction on the ground that the evidence of the two earlier incidents was wrongly admitted. In refusing leave, the single judge gave the following reasons:

> "*The Recorder noted also that evidence of prior incidents could be prejudicial to you, but that is always the case. He took care to remind the jury more than once that these incidents were only relevant if the jury were satisfied to the criminal standard that they happened as the complainant alleged,* ***and was also alive to the need to ensure that the trial stayed principally focused on the events of 22 August 2013.****"* [emphasis added]

[48] On a renewed application for leave, the court said:

> *"Finally, any complaint about the admission of bad character evidence which causes an adverse effect on the fairness of the trial has to be judged against the general principle that issues relating to fairness under section 101(3) of the 2003 Act and section 78 of the Police and Criminal Evidence Act 1984 involve an exercise of the trial judge's discretion. This court will only interfere with a trial judge's decision if it was plainly wrong and renders a conviction unsafe. That clearly does not apply in this case - rather the reverse. The Recorder's decision was plainly right."*

[49] We agree with Mr. Busby that this case bears significant resemblance to that of **Bogjsha**[13] in that in both cases:

(i) the bad character evidence consisted of unproven allegations;

(ii) the allegations came from one source, the victim;

(iii) the allegations were duly admitted under the gateways of important explanatory evidence and as evidence of propensity;

(iv) the judge took care in directing the jury that they had to ensure that the allegations were proven to the criminal standard, before considering them as relevant to the charge(s) before them; and

(v) the judge was most alive to the need to ensure that the trial stayed primarily focused on the events of August 2, 2007.

[50] In this case, the trial judge exhibited the necessary cautious and careful approach both in admitting the evidence and in directing the jury. With respect to the issue of propensity, she reminded the jury that it was open to them to find that the evidence showed a pattern of conduct, from which they might conclude that it was the appellant who committed the offence. However, before doing so, they must be sure that each of the incidents relied upon was proven. She also directed the jury that they were required to be sure that the allegations were proven and made it clear that it was for the prosecution to make them sure that the incidents occurred as LB had alleged.[14]

[51] For these reasons, we conclude that the judge was correct in exercising her discretion to admit the evidence.

[13] Ibid.

[14] Summing Up: Day 2 at page 26, lines 33-48; page 27, lines 35-50; page 28, lines 11-15; page 29, lines 9-22 and page 29, lines 26-48.

Sub-ground 3: The Turnbull Evidence was manifestly unreliable and the case ought to have been withdrawn from the jury

THE SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[52] Mr. Khan submitted that the visual identification regarding each incident in the bad character narrative was manifestly unreliable. He contended that the prosecution was wrongly allowed to use several manifestly unreliable pieces of identification evidence to support the weak visual identification evidence in the subject offence. He contended that as the case relied solely on this evidence, it ought to have been withdrawn from the jury.

[53] Mr. Khan further submitted that the pieces of bad character propensity evidence should be viewed individually and not as an amalgamation. He submitted that such evidence ought not to be used in support of guilt.

THE SUBMISSIONS MADE ON BEHALF OF THE PROSECUTION

[54] Mr. Busby refuted the contention that the **Turnbull**[15] evidence in each incident was manifestly unreliable and rejected the notion that the identification evidence was weak. On the contrary, he submitted that taking into consideration all of the evidence in support of the conviction, the case was undeniably a strong, cogent and compelling one. He submitted that LB's evidence was very detailed[16] and that she had a good recollection of the incidents to which she testified. She also made a record on her computer after each attack.

[55] Mr. Busby submitted that it was clear that LB was alert at all times when she was confronted by her assailant. In between the incidents, she took preparatory steps, mindful that he might return. He submitted that during the events, she contemplated that she might have been required to identify

[15] [1977] QB 224.
[16] Notes of Evidence at page 362, lines 2-26.

him in the future and he recounted the evidence that she had even, on August 2, 2007, pretended to take a bath with the deliberate intention of possibly preserving the assailant's DNA. LB was clearly not confused or unsure about the incidents. The decisions in **R v Burdess**[17] and **R v Spittle**[18] were relied upon in support of these submissions.

THE LAW, ANALYSIS AND REASONING

[56] Bad character evidence of a prior incident may be admissible to identify the appellant as the perpetrator of a crime by dint of the distinctive and unusual features that the incidents shared in common**: see R v Akunyili (Richard)**[19] and **R v Burdess**.

[57] In **R v Spittle** the appellant was convicted of dangerous driving. The evidence of PC Loosemore, was that on July 27, 2007, he received information of a pursuit in progress and he was looking out for the vehicle. He then observed the vehicle. He first saw the appellant's face from 30 meters away for about two or three seconds. As the vehicle approached, he saw more of the side of the appellant's face. He had seen the appellant before and had recognized him. Seven weeks prior to that incident, he had interacted with the appellant for approximately 8 hours. On that occasion, for the first half hour to an hour, he had observed the appellant from approximately 3 meters away and they had had a conversation. For the remainder of that time, there were between six to ten instances when the appellant was no more than 1 meter away from him. After the pursuit, the officer returned to the police station and went through the photographs kept there. He was able to immediately identify the appellant as the driver. The Recorder formed the view that there was a basis on which the jury could be properly satisfied that the evidence in question was reliable and therefore declined to withdraw the case from them. At paragraph 11, Dyson LJ quoted the Recorder and said:

> *"The car approaching was probably travelling at some seventy miles an hour or more, maybe as high as seventy-seven miles an hour, so that the combined speeds of the*

[17] [2014] EWCA Crim 270.
[18] [2008] EWCA Crim 2537.
[19] [2014] EWCA Crim 346.

two cars was well in excess of eighty miles an hour, and of course it's suggested to me that PC Loosemore was looking through glass in his car and through the glass of the car approaching; but, on the other hand, he had good cause to look carefully at the face of the driver as the car approached, because of course he was looking at someone he knew to be an offender because he'd been forewarned of the approach of this car and that it was evading apprehension, and so, he knew that this was an offender and would have no doubt had in his contemplation the prospect that at some stage he might have to chase this individual and apprehend him."

[58] Dyson LJ also said at paragraph 13:

> *"In our judgment, the assessment made by the Recorder that the identification evidence was not so poor as to require him to withdraw the case from the jury at the close of the prosecution case is unassailable. He took into account all the relevant evidence. The assessment of that evidence and whether it amounted to poor identification evidence involved an exercise of judgment".*

[59] In **Mapp and Bissoon v The State**[20], this Court said at paragraph 67:

> "*Where identification evidence is the foundation of the prosecution's case, the quality of the identification should be considered and the jury should be directed to examine closely the circumstances in which the identification was made. Where the quality of the identification is good, the jury can safely be left to assess the value of the evidence, but, where the quality is poor, the case should be withdrawn from the jury unless there is other evidence capable of supporting the identification: R v Turnbull [1977] QB 224 applied in Daley v R [1994] 1 AC 117.*"

[60] In our view, the trial judge's directions on the visual identification evidence were unassailable. LB's account of the incident of August 2, 2007 was comprehensively analysed, consistent with the

[20] C.A. CRIM. 13 and 14 of 2012.

Turnbull[21] guidelines. She directed the jury to ask themselves the following questions when examining the evidence[22]:

(i) the length of time that LB had the appellant under observation;
(ii) the distance between LB and the appellant;
(iii) the lighting at the time that LB made the observations;
(iv) whether anything obstructed LB's view of the appellant;
(v) whether LB had known the appellant before;
(vi) the length of time between LB's initial observation of the appellant and her subsequent identification of him; and
(vii) the actual and potential weaknesses of the identification evidence.

[61] We do not consider that the identification evidence was weak or tenuous. While the appellant was having sexual intercourse with LB, he had a t-shirt around his face, which LB at one point managed to remove causing her to see his face for approximately 30 seconds. He was no more than 2 feet away from her and he was on top of her. The incident occurred around 5:30 p.m. and there was a "good sized" window with its curtains drawn back in the room which brought in sunlight. LB was able to see the appellant clearly. The identification evidence was therefore of a reasonably strong character and of a sufficient quality upon which a jury, property directed, could convict. The circumstances in which LB was able to observe the appellant were adequate and did not warrant the withdrawal of the case from the jury. This was not a case of a fleeting glance encounter or a longer observation made in difficult circumstances. A potential weakness in the evidence was that LB was traumatized and nervous during the incident. She also mentioned that she experienced difficulty in distinguishing ethnicities in Tobago. Further, no identification parade had been conducted and LB first identified the appellant in court. These actual and potential weaknesses were all drawn to the jury's attention.[23] The judge did so in a careful and coherent manner so that the

[21] Turnbull (n. 15).
[22] Summing Up: Day 2 at page 18, line 29 to page 19, line 10.
[23] Summing Up: Day 2 at page 21, lines 22-32.

cumulative impact of these weaknesses were fairly laid out: see **Archbold 2019 Edition at paragraph 14-24.**

[62] We agree with Mr. Busby that LB was not only attentive during the encounter on August 2, but was alert during all of her encounters with the appellant. She had even taken the additional step to faking a bath in order to preserve the appellant's DNA. After each incident, including that of August 2, she carefully made a written record of the incident on her computer, cognizant of the fact that she might be required to identify the appellant in the future. In addition, LB took several preparatory steps to ensure her safety, including:

(i) Putting a knife under her mattress;
(ii) Installing additional security lighting;
(iii) Installing a house alarm system;
(iv) Purchasing a large breed puppy; and
(v) She had her friend, Charles King, stay over on occasion.

[63] We are satisfied that the judge was meticulous in directing the jury according to the guidelines set out in **Turnbull**[24].

[64] We are not in agreement with Mr. Khan's submission that the bad character propensity evidence should be viewed individually. In examining the issues of modus operandi/pattern of conduct and nexus, a cumulative evaluation was required in the circumstances of this case in order to discern the underlying pattern. In terms of LB's ability to identify her assailant, the probative value of the bad character evidence was not limited to establishing her familiarity with the appellant's physical features alone but also extended to the manner in which he conducted himself during the intrusions. All of these matters could only have been sensibly evaluated by way of a cumulative assessment of the evidence.

[24] Turnbull (n. 15).

[65] For reasons additionally touched on at paragraph [62] above, we also do not agree with Mr. Khan's submission that the visual identification evidence for each incident in the bad character evidence narrative was manifestly unreliable. LB explained at great length the foundation for each opportunity for observation. Issues such as lighting and distance were fleshed out in detail. LB was cognizant that she might be called upon to identify the perpetrator and paid meticulous attention to fine details. In our view, the identification evidence in these incidents was of a sufficiently reliable quality to be safely placed before the jury for their evaluation.

Sub-ground 4: Bad character evidence supporting the appellant's identification

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[66] The prosecution was allowed to lead evidence of bad character relating to LB's identification of the appellant as the person who had attacked her on August 2, 2007. Mr. Khan submitted that the judge wrongly exercised her discretion in admitting the evidence as it was not relevant to an important issue between the appellant and the prosecution, namely, the identity of the offender.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[67] Mr. Busby submitted that the identification evidence in this case was not of a weak nature. He submitted that it was supported by the evidence of bad character which detailed many incidents, each with several similarities to the subject offence, with respect to the circumstances in which they were committed and the method employed in their commission. He submitted that the judge clearly and succinctly set out all of those several similarities for the jury. Moreover, the identification of the appellant was also supported by his own admissions in respect of the incident of July 6, 2007, as well as the subject offence. In support of his submissions, Mr. Busby relied on the decision in **R v Straffen**[25].

[25] [1952] 2 Q.B. 911.

THE LAW, ANALYSIS AND REASONING

[68] The prosecution led evidence in relation to allegations of misconduct on the part of the appellant. These incidents occurred between July, 6, 2007 and January 24, 2008 and are set out in detail at paragraphs [13] to [22] above. Of particular importance was the evidence in relation to the incident which was alleged to have occurred on July 6, 2007 in respect of which the appellant made an admission to the police and the incident which occurred on a night in November, 2007 where she was able to observe his face and the front of his body for approximately 30 seconds in excellent lighting conditions.

[69] In **R v Straffen**[26], the appellant was convicted of the murder of a young girl. On appeal, he contended that the trial judge had wrongly admitted evidence of two other murders alleged to have been committed by him. In dismissing the appeal, the court found that the evidence was rightly admitted as the prosecution had been entitled to adduce evidence of the previous murders as tending to identify the person who had committed the murder charged, as being the same person who had confessed to having murdered the other two girls in precisely the same way. Slade J at pages 916 to 917 said:

> *"I can see no distinction in principle between the present case and Thompson v. The King [1918] A.C. 221 to which we were referred, and, indeed, I think one cannot distinguish abnormal propensities from identification.* ***Abnormal propensity is a means of identification. In Thompson's case, evidence was admitted to prove his identity which showed that he was a person who suffered from the abnormal propensity of homosexuality. It is an abnormal propensity to strangle young girls and to do so without any apparent motive, without any attempt at sexual interference, and to leave their dead bodies where they can be seen and where, presumably, their deaths would be detected. In the judgment of the court, that evidence was admissible because it tended to identify the person who murdered Linda Bowyer with the person who confessed in his statements to having murdered the other two girls a year before, in exactly similar circumstances."*** [emphasis added]

[26] Ibid.

[70] In **DPP *v* P**[27] , the appellant was convicted of rape and incest against each of his two daughters. The judge refused his application that the counts relating to each girl should be tried separately. He was convicted on one count of rape and on each of the incest counts. The Court of Appeal allowed the appeal because the evidence of the girls did not demonstrate a striking similarity. The prosecution appealed to the House of Lords on the basis that the decision in **R v Boardman**[28] did not require a striking similarity test. On this issue, Lord Mackay said:

> *"As this matter has been left in R v Boardman I am of opinion that it is not appropriate to single out "striking similarity" as an essential element in every case in allowing evidence of an offence against one victim to be heard in connection with an allegation against another. **Obviously, in cases where the identity of the offender is in issue, evidence of a character sufficiently special reasonably to identify the perpetrator is required** and the discussion which follows in Lord Salmon's speech in the passage which I have quoted indicates that he had that type of case in mind."* [emphasis added]

[71] It can be deduced from the foregoing authorities, both of which were decided under the old common law regime, that the evidence which is the subject of the complaint under this ground may be used for the purpose of establishing identity once it can be shown that it is of a character which can reasonably be used to identify an offender. In this case, the bad character evidence could reasonably be used to identify the perpetrator based on the number of alleged incidents, the compelling similarities and the proximate timeframe during which they occurred: see paragraphs [15] to [22] above. In our view, the judge's exercise of her discretion in allowing the bad character evidence cannot be faulted.

[72] The judge in her summing up very comprehensively and carefully brought the jury's attention to the issue of the identification of the offender, by virtue of the circumstances of all the incidents, and properly directed them on how they were to use this evidence. The judge said:

> *"The evidence which the State relies on to establish this pattern are as follows: **One**, the incidents all occurred at the home of LB. **Two**, the incidents amounted to about 14,*

[27] [1991] 3 All ER 337.
[28] [1974] 3 All ER 887.

because you will recall the evidence, it happened about a dozen times after the 2nd August and then we add on the 6th July and the 2nd August to that. ***Three****, the home of the accused is in close proximity to LB.* ***Four****, according to Sergeant Wilson, one can see into the upper portion of LB's house from the accused's house.* ***Five****, the incident occurred at times when the accused would have had the opportunity, would not have been at work.* ***Six****, the person was always dressed similarly, a faded black T-shirt and the same three-quarter length denim pants. His face was covered except for that day in November 2007.* ***Seven****, on the 6th July 2007, on the 25th November 2007, he put his fingers to his lips and said, "shhh", in the same way he did on the 2nd August.* ***Eight****, if you accept that he gave the first interview and that interview he admitted to robbery in relation to LB's home, and if you will accept that, then his admission, it confirms LB's identification of him as the person who committed the act.* ***Nine****, he was always bare footed and had distinct feet.* ***Ten****, LB said she recognised his smell.* ***Eleven****, he was of slim built. And,* ***twelve****, of the attacks, apart from the 2nd August, 2007, two others involved acts of sexual violence, the one on the 6th July, 2007, when the person is alleged to have put their fist in her vagina, and the one on the 25th November 2007, when LB was told to perform oral sex and she refused, and he attempted to rape her.* ***Thirteen****, during the 25th November, 2007 incident, the man was alleged to have pointed to a drawer where the condoms were kept, and asked LB to open it. It is open to you to infer that that person knew where the condoms were and it would have been because that person was there on the 2nd August, 2007.*

So look at all those facts together, and you will have to determine whether the State has satisfied you so that you feel sure that all these factors looked at, together, comes to the inescapable conclusion that the accused is the person who committed the act."[29] [emphasis added]

[73] In our view, the judge meticulously marshalled the evidence on this issue and instructed the jury that the several incidents of alleged misconduct attributed to the appellant must be looked at cumulatively. We find her directions on this issue to be impeccable.

[74] Additionally, when the case is examined in the round, the admissions of the appellant to the police in relation to the July 6 and August 2, 2007 incidents were crucial evidence which had the potential to confirm the accuracy of LB's identification.

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[29] Summing Up: Day 2 at page 28, line 16 to page 29, line 8.

Sub Ground 5: Charges for which a defendant has been acquitted cannot be used as bad character evidence in the peculiar circumstances of this case

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[75] Mr. Khan submitted that the judge erred in admitting the evidence in relation to the July 6, 2007 incident, which was the subject of a preliminary enquiry in which the appellant was discharged, while at the same time admitting the post offence incidents. He referred the court to the decision **R v Z**[30] in support of this submission. In that case, the court held that evidence of complainants, in respect of whose complaints the defendant had been acquitted, are admissible if they were relevant to the question of whether the defendant was guilty of the offence with which he is currently charged. The admissibility of such evidence depended on whether it had probative value and was not merely prejudicial.

[76] Mr. Khan submitted that this case was distinguishable from the decision in **R v Z** based on the quality of the evidence. We understand Mr. Khan to be submitting that the evidence in this case was not as strong as the evidence in **R v Z**. In this case, LB was the sole witness relative to several incidents allegedly perpetrated against her by the appellant, where he was seen at night and/or for brief instances.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[77] Mr. Busby submitted that bad character evidence may be adduced notwithstanding an earlier dismissal or even a finding of not guilty. He relied on the decision in **R v M**[31] in support of this submission.

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[30] [2000] 3 All ER 385.
[31] [2010] All ER (D) 196 (Dec).

THE LAW, ANALYSIS AND REASONING

[78] In the decision in **Paul Vincent Seerattan v The State**[32], this Court conducted an in-depth review of the authorities on propensity evidence in the form of acquittals. At paragraphs 37-39, the Court said:

> *"37. …in R v Z [2000] 2 AC 483, the tide turned when an acquittal was used to establish previous bad character.* ***Past acquittals can now he used to establish previous bad character.*** *The defendant was acquitted on three previous charges of rape and convicted of one, the prosecutor sought to call the four previous complainants to give evidence of the defendant's conduct towards them in order to negate his defence of consent.* ***The House of Lords held that the principle of double jeopardy prevented a defendant from being prosecuted for an offence on the same facts or substantially the same facts as in a previous prosecution. However, the relevant evidence was not inadmissible merely because it showed or tended to show that the defendant had in fact been guilty of a previous offence of which he had been acquitted, and that, since the evidence of the 4 previous complainants was proposed to be deduced not to show that the defendant had been guilty on the previous occasions but to show by similar facts, his guilt of the offence for which he is being tried, the principle of double jeopardy was not infringed and the evidence was subject to the judge's discretion to exclude it after weighing its prejudicial effect against its probative value*** *under Section 78 of Police and Criminal Evidence Act, UK (PACE) 1984.*
>
> *38.* ***The reasoning in R v Z (supra) was adopted in R v Edwards and Rowlands, R v McLean, R v Smith and R v Enright [2006] 2 Cr App R 4 which was decided after the coming into force of the CJA. In R v Smith the appellant was charged in 1998 for rape, grievous indecency and indecent assault. Those 3 counts were stayed as an abuse of process in view of a letter from the Hampshire Constabulary, advising that no further action would be taken against him.*** *In 2005 he was tried on an indictment of 9 counts of sexual offences including the 3 for which he was charged in 1998. The judge stayed the proceedings in respect of the 1998 charges on account of the letter.* ***At the trial the prosecution was allowed to advance evidence which would have supported the stayed counts. The judge admitted the evidence as capable of establishing a propensity on the part of the appellant to commit the offences charged, within the meaning of Section 103(1) of the Criminal Justice Act 2003, so that the evidence was admissible through gateway (d) of Section 101(1). On appeal, it was held that the judge was***

[32] Cr. App. No. 32 of 2013.

correct. *Scott Barker LJ in delivering the judgment of the Court stated – at paragraphs 77 and 78, adopting Lord Hughes' reasoning in R v Z as follows:* ***"Therefore in the past evidence of previous acquittals were allowed, not to show that the defendant was guilty on those occasions, but to show by similar fact, his guilt for the offence for which he is being tried (R v Z). With the new regime such evidence is now admissible under the propensity gateway of Section 15 P(1) to show the propensity on the part of the defendant to commit offences of the kind with which he is charged." (R v Smith) R v Smith, decided after the coming into force of the CJA, paved the way for the admission of acquittals as evidence showing propensity under section 101 (d). By virtue of section 15 P (1) of the EAA we can now take the same approach as it applies to our jurisdiction."*** [emphasis added]

[79] In **R v M**[33], the defendant, aged 63, was in a relationship with the complainant's maternal grandmother. He was convicted of three counts of rape and three counts of indecent assault of the complainant. The prosecution case was that the defendant had sexually abused the complainant in his grandmother's bedroom between 1999 and 2001, when he was aged between 10 and 12. The defendant denied committing the offences. At the trial, the prosecution successfully applied to adduce bad character evidence, namely an allegation by the complainant's sister, V, that in 2003, when she was aged 7, the defendant had sexually assaulted her in her grandmother's bedroom by penetrating her anus and vagina. The defendant was charged for the offence but the prosecution had offered no evidence and he was acquitted. On appeal, one of the grounds advanced was that the judge erred in admitting the bad character evidence as it had an adverse effect on the fairness of the proceedings. The appeal was dismissed. The Court said:

*"In the instant case, the judge had not erred in admitting the bad character evidence. The defence case was that nothing indecent had occurred with the complainant. If true, the bad character evidence tended to establish that not long after the sexual relationship with L had ceased, the defendant had gone on to commit a similar sexual assault on V. Both the complainant and V were young children, the offences in respect of both had allegedly occurred in the bedroom of the complainants' grandmother, in both cases clothing had been removed and KY jelly used****. Accordingly, the evidence was relevant to establish a relevant propensity to commit offences of the like with which the***

[33] R v M (n. 31).

> ***defendant was charged and to rebut the defendant's assertion of innocent association. The judge had been bound to assess the relevance and probative value of the evidence on the basis that it was true. There was no evidence before the jury on which the court could reach a conclusion, pursuant to s 109 (2) of the 2003 Act, that no court or jury could reasonably find it to be true or to justify excluding it pursuant to s 78 of the 1984 Act. Whilst it had to be recognised that care needed to be taken in admitting bad character evidence where there had been no finding of guilty, there had been no lack of care by the judge in the instant case and there was nothing to cast doubt on V's account. The judge had been right to accept the reason advanced by the prosecution for stopping the case concerning V. Whilst there was nothing strikingly similar between the offences they revealed circumstantial similarities sufficiently probative of the defendant's behaviour towards L…"*** [emphasis added]

[80] It is evident from the foregoing line of authorities that evidence in previous proceedings which resulted in acquittals is not prohibited from being admitted and being used in later proceedings to establish propensity on the part of a defendant to commit offences of the kind with which he is charged.

[81] We do not agree with Mr. Khan's submission that the decision in **R v Z**[34] was distinguishable from this case on the basis of the quality of the evidence. LB's evidence in relation to the July 6, 2007 incident was of a reasonably strong character. She was able to identify certain physical traits of the appellant in good lighting conditions and at times, she was within very close proximity to him. More importantly, what elevates the overall quality of the evidence relative to the July 6 incident from being reasonably strong to being of a character which can properly be described as exceptionally cogent and compelling, is the consideration that the appellant gave a cautionary statement in which he admitted to robbing LB. There was also the evidence from Sergeant Wilson as to the injuries which he observed on LB on that day. The evidence of this incident, on the face of it, is not inferior to the relevant bad character evidence in **R v Z**.

[34] R v Z (n. 30).

[82] Accordingly, we conclude that the judge, in the factual milieu of this case, did not err in admitting the evidence of July 6, 2007.

Sub-ground 6: The allegations of misconduct of July 6, 2007 were not important explanatory evidence

THE SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[83] Mr. Khan submitted that the allegation of misconduct with respect to the incident on July 6, 2007, was not important explanatory evidence. He submitted that the decision in **R v Pettman**[35] did not render the evidence pertaining to that incident admissible since this case could be understood perfectly well as an attack of a sexual nature with the use of a weapon. Mr. Khan submitted that the evidence did not significantly advance the prosecution case by demonstrating LB's familiarity with the appellant. The decision in **Myers, Brangman and Cox v R**[36] was relied on in support of this submission.

THE SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[84] Mr. Busby submitted that the evidence of the incident of July 6, 2007 was important explanatory evidence. He submitted that the material was probative for the jury's consideration and its importance was substantial. He relied on the decision in **R v P**[37] in support of this submission.

THE LAW, ANALYSIS AND REASONING

[85] In this case, LB testified that:

(a) Upon seeing the appellant inside her house, she exclaimed, *"Oh God, not you again"*;

[35] 2nd May 1985 (Unreported) Court of Appeal.
[36] [2015] UKPC 40 (Bermuda).
[37] R v P (n. 6).

(b) She begged the appellant not to hurt her like he had done before and requested that he get a condom; and

(c) After the first attack, she placed a knife under her mattress.

[86] The prosecution relied on the allegations of misconduct as important explanatory evidence under **section 15 N (1) (c) of the Evidence Act**:

> *Section* ***15N****(1) In criminal proceedings evidence of the accused's bad character is admissible where—*
>
> *…*
>
> *…*
>
> *(c) it is important explanatory evidence;*

[87] Important explanatory evidence was defined in **R v Pettman**[38] as evidence of a continual background or history relevant to the offence charged. In that case, Purchas LJ said:

> *"…where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment,* ***and without the totality of which the account placed before the jury would be incomplete or incomprehensible then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence****".* [emphasis added]

[88] In the decision in **Myers, Brangman and Cox v R (Bermuda)**[39], the prosecution had sought to admit certain evidence as being "background evidence" in order to show motive. The defence objected primarily on the ground that it amounted to impermissible evidence of bad behaviour by the defendant other than the offence charged. The judge allowed the evidence to be admitted. On

[38] Pettman (n. 35).

[39] Myers, Brangman and Cox (n. 36).

appeal, the Judicial Committee of the Privy Council upheld the judge's admission of the evidence. Lord Hughes said at paragraphs 39-41:

> *"39. …**Evidence which shows that the defendant has a propensity to offend or behave badly may well be very relevant. But it is normally to be excluded on grounds of fairness, unless there is some reason to admit it beyond mere propensity …**"*
>
> *40. In jurisdictions, of which Bermuda is one, where there is no statutory modification of the common law to allow the admission of propensity alone in defined circumstances (such as sections 98-113 of the Criminal Justice Act 2003 do in England and Wales), the general rule in Makin stands.* ***Mere propensity to behave badly is to be excluded as unfair. Admission requires justification beyond such mere propensity. An example of such justification is so-called similar fact evidence (which was in question in Boardman, and see now DPP v P [1991] 2 AC 447); in such a case the justification arises because the evidence is sufficiently compelling to have real value in controverting innocent coincidence. Another example is the kind of case where there has been a course of violent dispute between the defendant and the victim; there the evidence may be admissible (inter alia) to show either who was responsible for the last (charged) occasion, or the intention with which the defendant acted on that occasion, or to explain the reactions of the two parties. Likewise, in a case of alleged sexual abuse, the history and nature of a relationship said to have been abusive will often be relevant to proving a particular incident charged, even though it also shows prior misbehaviour by the defendant. It is impossible to catalogue every situation in which such justification may be present. But unless it is, evidence of misbehaviour unconnected with the offence charged is not admissible. As Lord Hailsham explained in Boardman at 453F, relying on mere propensity as evidence of guilt is an inadmissible chain of reasoning. If the inadmissible chain of reasoning is the only purpose for which the evidence is to be adduced, the evidence is inadmissible. If there is some other justification for the admission of the evidence, the jury usually needs to be warned not to pursue the inadmissible chain of reasoning.***
> *41**. Moreover, to respect the general rule, where such justification does exist the evidence which is admitted ought normally to be restricted to that which is within the justification. The justification is the measure of the admissibility. The existence of such justification does not generally create "open season" to adduce any evidence of the defendant's bad character or misbehaviour.**"* [emphasis added]

[89] Lord Hughes however stated that trial judges ought to exercise care in admitting such evidence and must safeguard against mechanical claims by the prosecution that the evidence is necessary to understand the case. He stated at paragraph 52:

> "*The Pettman proposition, valid as it is, needs cautious handling if it is not to become a token excuse for admitting the inadmissible.* ***Claims by prosecutors that the evidence is necessary to understanding of the case, or, as is sometimes asserted, to discourage the jury from wondering about the context in which the events discussed occurred, need to be scrutinised with care****".* [emphasis added]

[90] In the decision of this Court in **The Director of Public Prosecutions v Magistrate Her Worship Cardenas Ragoonanan**[40]**,** Bereaux J.A. examined the decisions in **Myers, Brangman and Cox v R**[41] and **Phillip v The Director of Public Prosecutions**[42]. He said at paragraphs 17-18:

> *"17. …****in two subsequent decisions the Privy Council has warned that when evidence of misbehaviour other than that charged is advanced at trial, courts must be careful of the basis upon which such evidence can be considered.*** *It is not enough that such evidence is part of the background. These decisions are Myers, Brangman and Cox v. The Queen [2015] UKPC 40, [2016] AC 314 and the very recent decision of Phillip v. The Director of Public Prosecutions (St. Christopher and Nevis) [2017], UKPC 14. In Phillip v. The Director of Public Prosecutions (St. Christopher and Nevis) Lord Hughes giving the decision of the Board stated at paragraph 12:*
>
> > ***"The Board nevertheless draws attention to the importance, where evidence of misbehaviour other than that charged is advanced at the trial, of carefully observing the basis on which it can be considered. Counsel on both sides, as well as the judge, must start with Makin. The admission of evidence of this kind must be justified. It is not enough that it is "part of the background". That is too easy a generalisation and fails to distinguish the admissible from the inadmissible. If the accused has previous convictions for violence in bar-room brawls, that might be described by some as part of the background, but it would not make it admissible on a charge of murdering his wife. If the accused has in the past***

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[40] Application No. P 014 of 2015.
[41] Myers, Brangman and Cox (n. 36).
[42] [2017], UKPC 14.

conducted one or more extra-marital affairs, that might be described as part of the background, but that is unlikely to be admissible unless there is, additionally, a proper basis for saying that it is relevant beyond simply showing that he is a bad man. Such a proper basis might exist, but it must be demonstrated, such as, for example, good reason to suggest that he killed his wife in order to further a fresh affair, or that he had been encouraged by a lover to get rid of her, or to rebut untruthful protestations by him of his deep devotion to her.

…

18. This statement in Phillip was itself a repetition of a previous warning given by the Board in Myers, Brangman and Cox v. The Queen." [emphasis added]

[91] In the decision in **R v P**[43], referred to at paragraph [46] above, Latham LJ said at paragraph 8:

> ***"[8]*** *In our judgment, the judge was entitled to conclude on the material before him that both s 101(1)(c) and (d) were appropriate gateways for the evidence which the prosecution sought to put before the jury. The fact that the Appellant had himself given an account of the nature of the relationship between the parties meant that, unless the Complainant was allowed to give her account of the nature of the relationship, the jury would not be able to make a proper assessment of the respective evidence of the two protagonists. It was accordingly necessary material for the jury's consideration, and its importance for the jury was likely to be substantial…."*

[92] The judge in her summing up directed the jury in terms which were sufficient for them to properly assess the value of the bad character evidence. She directed on its potential to explain issues which presented themselves in the August 2, 2007 incident. The judge said:

> *"Members of the Jury, you have heard evidence in relation to allegations of misconduct by the accused, that's unconnected, unrelated, to the charge of rape. The accused denies all these allegations. These allegations of misconduct are relevant for several reasons, if you accept them, if you accept them to be true.* ***Firstly, without knowledge of the 6th July, 2007 incident, you would find it difficult to understand some of LB's evidence in relation to the 2nd August, 2007 incident, which LB and the State is saying did not happen in isolation.(A)****, for example, when LB said upon seeing the man on the 2nd August, 2007, "Oh God, no, not again," and when she told the Court about this 2nd*

[43] R v P (n. 6).

August 2007 incident, she also said I begged him not to hurt me like he did before, and to let me get a condom; and also when she said she placed her knife beneath her mattress after the first attack. ***(B)****, without the 6th July 2007 incident, you would find it difficult to understand LB's evidence in relation to the 2nd August, 2007 incident, and by this, I mean, the extent to which she was traumatised, that is, because the attack on the 2nd August, 2006, it was not the first act. The 6th July, 2007, was the first such act.* ***(C)****, there are certain aspects of what was allegedly said in the oral statement by the accused which you will find it difficult to understand if you did not hear evidence about the 6th July incident. In this regard, you will recall in the oral statement the accused said this is what was stated.*

'Question: Did you rape LB on that day?
Answer: I tell you I went dey twice.
Question: When?
Answer: Sometime in August last year and another time.'

You will also recall the following:
'Question: Did you rape LB?
Answer: I ask she for a condom because she say she not doing it without condom.'

I go on to another point. ***(D)****, you will find it difficult to understand the 2nd August, 2007 incident in relation to the motive of the accused. If you accept the contents of the 6th July, 2007, to be true, the accused admitted in the notes of interview in relation to the 6th July, 2007 incident, that he robbed LB. If you accept his evidence as true, then it supports the evidence stated in the 2nd August, 2007 oral statement that he went to LB's home to rob, and it might assist you in deciding whether the contents of the oral statement of 2nd August, 2007, is true."*[44][emphasis added]

[93] In our view, the judge was correct to admit the evidence of misconduct which was alleged to have occurred on July 6, 2007. Without such evidence, there was a palpable risk that the jury might have found it difficult to properly understand certain aspects of LB's testimony which are captured at paragraph [85] above. Without the important explanatory evidence, a somewhat distorted and potentially misleading and confusing picture would have been left for the jury's assessment. That evidence was important to demonstrate that LB was familiar with the appellant and the extent of that familiarity. It was also important with respect to her observations of the identifying features of

[44] Summing Up: Day 2 at page 25.

the appellant as the perpetrator in the subject offence. As well, the evidence was relevant to the understanding of aspects of the cautionary statement attributed to the appellant and his possible motive.

Sub-ground 7: The allegations of misconduct raised collateral issues at the trial

THE SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[94] Mr. Khan contended that the incident of July 6, 2007 ought not to have operated as a launch pad for establishing propensity since proof of previous alleged misconduct required the trial of collateral issues as part of the trial of the appellant for the subject offence. He further submitted that in relation to each incident, the judge must inform the jury that they could only rely on it if they were sure that they had occurred and were sure that the circumstances of the identification were sufficient before relying on them.

THE SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[95] Mr. Busby submitted that the evidence in the trial was led over the relatively short period of time of approximately three weeks. He submitted that whether the jury were considering the allegations of misconduct or the allegation with respect to the subject offence, the main issue for them was the same, that is, the credibility and reliability of LB and whether they could be satisfied so that they were sure about her testimony.

THE LAW, ANALYSIS AND REASONING

[96] In respect of the appellant's contention that the judge failed to direct the jury that they must first find the allegations contained in the bad character evidence to be true before they could act on it, the judge said:

> *"So looking at this case now.* ***In relation to this issue, you must be sure that the incidents in relation to the 6th July, 2007, 4th October, 2007, a date in November 2007, the 25th***

> ***November 2007 and the 24th January, 2008 and other occasions is proved, and if it is proved, to what extent.*** *The State, as stated above is relying on the evidence of LB to prove all those incidents except the 6th July, 2007 one… So you must decide whether from these incidents, whether any of these incidents in fact assist you in deciding that there is a pattern of conduct from which the only conclusion you can reach is that the accused is the person who perpetrated the act on the 2nd August incident."*[45] [emphasis added]

[97] The judge focused the jury's attention on LB's evidence as it related to the August 2, 2007 incident. On Day 1 of her summing up, she said:

> *"Let us consider the evidence of LB for you so that you can determine whether evidence established that she was raped.* ***In considering the evidence of LB, I will suggest that you ask yourselves two questions: One, do you accept LB's evidence when she said that a man raped her, and, two, if yes, do you accept her evidence when she identified the accused as the person who perpetrated the offence?"***[46]

[98] The judge went on to say:

> ***"If you accept the evidence of LB, and you are sure of it, that is, when she said that a man forced her legs apart, pushed his penis into her vagina, kept pushing it in and out in a really hard painful way, and that she was hitting and punching him and shouting at him over and over to stop because he was hurting her, but he pulled her towards the edge of the bed to penetrate her further, she got a knife that was hidden under the bed, or she tried to get it, he fought for the knife and he got it, and he continued pushing his penis in and out of her in the same hard and painful way in the circumstances which LB described. If you accept that, her evidence in that regard, it is open to you to find that all the elements of the offence of rape, as legally defined, have been made out from her evidence."***[47]

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[45] Summing Up: Day 2 at page 27, lines 45-50 and page 28, lines 1-10.

[46] Summing Up: Day 1 at page 11, line 49 to page 12, line 7.

[47] Summing Up: Day 1 at page 13, line 48 to page 14, line 14.

[99] The judge was also careful to warn the jury that they had to determine if LB's evidence was reliable and truthful before relying on the bad character evidence. On Day 2 of her summing up, the judge directed the jury that:

> *"**As I said, you must decide whether LB's evidence is reliable and truthful. If you are not sure, then you must disregard her evidence in this regard, and if you are sure that her evidence is truthful and honest and reliable, and the Prosecution bears the burden of making you sure of this as well as the persons involved in the 6th July statement taking, you have to ask yourself whether the State has satisfied you or made you sure that there is this propensity.** You then have to -- do you conclude that the accused has a propensity, as alleged by the Prosecution? That's a question you have to ask yourself. That is wholly a decision for you to make. If you are not sure, then in this sense, you have to disregard this evidence that it can lead to propensity, the issue of propensity. If you are sure that it shows a propensity to commit such an act, then you must assess whether, and, if so, to what extent it helps you in deciding whether the accused has committed the offence of rape. The fact that you find that the person has this propensity to commit such sexual acts does not necessarily mean that he has committed the act in question."*[48]

[100] The introduction of several pieces of bad character evidence in a trial has the potential to generate satellite issues, detracting the jury from the main issue in the case. However, in this case, the judge was careful to separate the incidents of bad character from the evidence surrounding the subject offence. The judge properly marshalled the evidence and gave appropriate and adequate directions in this regard. In so doing, the judge focused the jury on their main task. The main issue for the jury's consideration was whether LB was a reliable witness and whether they were satisfied beyond reasonable doubt of her version of the events with respect to the matter they were trying. It would not have been lost on the jury, upon being adequately directed on the main issues for their determination, and applying the common sense on which it is presumed that they would operate, that this was the principal issue for their determination.

[48] Summing Up: Day 2 at page 29, lines 26-48.

Sub-ground 8: The good character direction

THE SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[101] The essence of Mr. Khan's submission is that the wrongful admission of the bad character evidence had the effect of depriving the appellant of the benefit of a good character direction. He submitted that the judge's directions on how the jury were to treat with the incidents of misconduct on the part of the appellant had the potential to confuse the jury.

THE SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[102] Mr. Busby submitted that the appellant's convictions were not irrelevant. He submitted that they were recent, having occurred the year before, in 2006. One of those convictions concerned an element of dishonesty, that is, driving a vehicle without the owner's consent. Mr. Busby submitted that in that regard, the appellant was not entitled to either a full good character direction or to a positive credibility direction. He contended that the modified good character direction which the appellant received was fair and reasonable in the circumstances. The decision in **R v Saruwu**[49] was relied on in support of this submission.

THE LAW, ANALYSIS AND REASONING

[103] The judge found that the appellant was entitled to a modified good character direction and said in her summing up:

> *"I move on to another direction, what is called a good character direction. State and Defence attorney formally submitted that the accused has three previous convictions for which he has been convicted on the 3rd October, 2006. The convictions are for the offence of driving without a drivers' permit, where he was sentenced to a fine and for the offence*

[49] [2015] EWCA Crim. 631.

of driving another vehicle without the owner's consent, and he was also fined, and for the offence of driving with no certificate of insurance.

Now, so you have heard about those three traffic offences which arose out of one incident, and for which the accused pleaded guilty. Other than these three convictions, the accused has no other convictions Normally, the law considers a person to be of good character if he has no previous convictions, or, in a case such as this, if their previous convictions are for relatively minor offences.

So I direct you that you are to consider the accused to be a person of good character, but you could only consider my directions with respect to good character, which I am about to give you, if you disbelieve the submissions made by the State in relation to the unrelated incidents. If you disbelieve, if you think the unrelated incidents never occurred, all that I referred to of the 6th July, etc., if you believe they never occurred, then this direction applies. If, however, you accept that these other incidents, in fact, took place, then this direction doesn't apply. It only applies if you disbelieve that the other incidents occurred. That's the only time it applies.

So you have heard about those three offences, and I have explained to you how the Court has approached it. So the accused is considered a person of good character. Of course, good character cannot, by itself, provide a defence to a criminal charge, but when deciding whether the Prosecution has proved the charge against him beyond reasonable doubt, you should take this into account in his favour.

The fact that he is of good character may mean that he is less likely, than otherwise might be the case, to commit this crime now. It is for you to decide what weight you should give to this matter, and, in doing so, you are entitled to take into account everything you have heard about the accused, including his age. You must not assume that the accused is guilty of the offences to which he is now charged because he admitted to the three trafficking -- that he was guilty of the three trafficking offences. Those offences are not relevant at all to the likelihood of his having committed the offence with which he is now charged. It is relevant only as to whether you can believe him. So that's the direction which I propose to give you on that, on good character." [50]

[104] The judge directed the jury on the propensity limb of the good character direction, indicating that the offences were not relevant to the likelihood of his having committed the offence in this case. She informed them that the convictions related to traffic offences and were minor ones. She then

[50] Summing Up: Day 2 at page 29, line 49 to page 31, line 3.

went on to direct the jury that the offences were only relevant as to whether they could believe the appellant.

[105] Taking into consideration the fact that the appellant's previous convictions were for relatively minor driving offences, we are of the view that the appellant was entitled to a full good character direction. The judge erred in only directing the jury on the propensity limb of good character. She ought to have extended the direction to the credibility limb as well and to the associated favourable potential. However, it is well established that the omission of a good character direction is not necessarily fatal to the fairness of the trial or to the safety of a conviction[51]. In **Nigel Brown v The State**[52], Lord Kerr said at paragraph 35:

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

[106] Notwithstanding the judge's error in failing to give a full good character direction, in our view, given the strength of LB's evidence, combined most compellingly with the incriminating utterances attributed to the appellant, such a direction would have made no real difference and does not affect the safety of the verdict. The sheer force of the evidence against the appellant was overwhelming, and in our view, a jury properly directed on this issue would inevitably have convicted.

[107] The judge directed the jury that if they found that the instances of misbehavior did in fact occur, they should disregard the good character direction. These directions, in our view, were unassailable.

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[51] See **Jagdeo Singh and Brown (Uriah) v R** [2006] 1 AC 1 and **Bhola v The State** [2006] UKPC 9.
[52] [2012] UKPC 2.

The judge was obligated to leave these issues before the jury. If she had not, the issues surrounding the incidents of misconduct would have been suspended in mid-air, with the jury having no guidance on how they correlated with the good character direction, dependent on their assessment of this particular issue.

CONCLUSION ON GROUND 1

[108] For the reasons explained in sub-grounds 1-8 above, the first ground of appeal is without merit.

Ground 2: The trial judge erred in law in admitting the unsigned incriminating notes of an interview with the appellant which included incriminating answers to questions posed long after the appellant had already fully incriminated himself in the commission of the offence. (sic)

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[109] Without giving any particulars about the challenge to be mounted, Mr. Khan argued that if a challenge had been made in relation to the unsigned interview notes, it would have been successful. The result would have been that several of the incriminating questions and answers would have been excluded, in particular, the appellant's incriminating answer that he was LB's neighbour. He referred to the decision in **Nimrod Miguel v The State**[53]. He argued that such evidence was damaging, as the jury would undoubtedly have used it to establish a nexus between the appellant and the allegations.

[110] It appears that when Mr. Khan filed his written submissions on March 4, 2016, he was unaware that a voir dire had in fact been conducted. Part of the Record of Appeal filed on November 30, 2017, at pages 12-128, consists of a verbatim record of the voir dire which was conducted on January 14, 16 and 20, 2014.

[53] [2011] UKPC 14

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[111] Mr. Busby submitted that the appellant failed to demonstrate that the trial judge had erred in principle in exercising her discretion to admit the unsigned interview notes or that she was plainly wrong in so doing. He submitted that since the appellant did not give evidence on the voir dire, the evidence of the prosecution witnesses remained uncontradicted.

[112] Mr. Busby further contended that it was part of the appellant's case at trial that he was LB's next-door neighbour and that it was not now open to the appellant to complain that this evidence unfairly provided a nexus between him and the offence.

THE LAW, ANALYSIS AND REASONING

[113] In voir dire proceedings, there must be proof beyond a reasonable doubt that a statement was given voluntarily. The onus must be discharged by the prosecution. However, where there are breaches of the Judges' Rules, a statement may be allowed in evidence provided that it would, in all the given circumstances, be fair to admit it.

[114] The question of the admission of the evidence is left to the trial judge as a matter of discretion, having considered the guidelines in **Shabadine Peart v R**[54]. Lord Carswell in delivering the reasons of the Board stated at paragraph 24, inter alia, that:

> *"The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges' Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary".*

[54] [2006] UKPC 5.

[115] In this case, a voir dire was held by the trial judge to determine the admissibility of the statement given by the appellant in the unsigned interview notes recorded by the police on October 26, 2008. Its admission was opposed by the appellant on four grounds namely:

(i) breach of principle (d) of Appendix A of the Judges' Rules;

(ii) breach of the Rule II caution,

(iii) the failure to have a Justice of the Peace present at the time of the interview; and

(iv) unfairness based on the fact that the police made no attempt to comply with the appellant's request to have a family member present at the time of the interview.

[116] In the voir dire proceedings, the trial judge heard evidence from the prosecution witnesses that the appellant was cautioned and informed of his constitutional rights and privileges before he was interviewed. The appellant made no objection to being interviewed. Contemporaneous notes of the questions and answers were recorded. They were then read over to the appellant who said that they were correct but he refused to sign it. A contemporaneous note of his refusal was also made.

[117] The judge also heard evidence from Mr. Richard Alfred, Justice of the Peace, who testified that on October 28, 2008, the appellant informed him that he had not read the interview notes but that it had been read to him and that he had declined to sign it after being asked to do so. The Justice of the Peace further testified that he enquired from the appellant whether he could read, to which the appellant responded in the affirmative. He gave the appellant the statement sheets which the appellant then perused. The appellant indicated to him that he had nothing to say about it when asked and again, he refused to sign it.

[118] The appellant did not give any evidence on the voir dire and no witnesses were called on his behalf. At the end of the voir dire, the trial judge dismissed the challenge and ruled that the oral statement recorded in the unsigned interview notes would be admitted into evidence. The issue for this court is whether the trial judge erred in the exercise of her discretion.

[119] An appellate court would interfere with a trial judge's exercise of his discretion only in limited circumstances, namely, where the judge had misperceived, misconstrued or misdirected himself on the evidence or where it was plain that the court failed to come to grips with the evidence: see **PC Chapdeosingh v Anand Sankar**[55]; **Superintendant Jack and Another v Horace Lionel Hosein**[56]; and **Soman Rampersad et al v The State**[57].

[120] This Court has not had sight of the judge's ruling on the admissibility of the statement. In the decision in **Thongjai v R** [58], two written statements were ruled by the trial judge to be inadmissible but no reasons for the ruling were provided. The Judicial Committee of the Privy Council observed that it was desirable for a trial judge to give brief reasons as such may assist in clarifying issues on appeal. In **Leo and Ancil Poulette v The State**[59], this Court held that the purpose of the written reasons for the decision in a voir dire was to establish that the trial judge properly applied his mind to the issues before the court and arrived at his conclusion on the correct legal basis. The reasons would operate as proof that the judge heard and considered the issues raised and arrived at a decision without taking extraneous considerations into account. In **Keston Adams v The State**[60] this Court said that there would be "*everything to gain and little to lose*" by giving reasons for admitting a statement in a voir dire, even if they were brief. This Court in **Vernon Mahadeo v The State**[61] adopted the sentiments expressed in the decision of the Judicial Committee of the Privy Council in **Wallace and Fuller v R**[62] where it was said that there was no general rule that a judge should always express his reasons for any procedural ruling given during a trial. It is for the judge to decide whether the interests of justice call for the giving of reasons and if so, with what degree of particularity.

[55] Mag. App. No. 31 of 2013.
[56] Mag. App. No. 60 of 1992.
[57] Cr. App. Nos. 17, 18, 19, 20, 21 and 22 of 2015.
[58] [1997] 3 WLR 667. See also Montano, Roberts v Siagal Sewdass Cpl. #12167 Mag. App. No. P108 of 2016 at para. 86.
[59] Crim. App. Nos. 6 & 7 of 2007.
[60] Crim. App. No. 19 of 2001.
[61] Crim. App. No. 12 of 2008.
[62] [1997] 1 Cr. App. R. 396.

[121] In **Pooran and Asgarali v The State**[63], this Court stated that the absence of reasons for ruling on a voir dire was not an automatic ground for appellate review where there had been evidence in support of the judge's findings, and where the *"basis for the decision was quite apparent"*. In the decision in **Nimrod Miguel v The State**[64], the appellant was charged with murder. The judge had admitted 20 written questions and answers after the appellant had made both an oral and a written statement. The question for the judge was whether it was fair and just to admit the evidence even if, as held on the voir dire, the evidence had been obtained in breach of the Judges' Rules. The judge admitted the evidence after being satisfied that the appellant had given his statements voluntarily and that he had not been given any inducement to make them. Further, the judge found that the appellant had chosen to speak when he was under no obligation to do so. The Judicial Committee of the Privy Council concluded that the judge had not erred in principle in doing so, nor was his decision plainly wrong.

[122] In this case, there were no complex issues of law or fact in the voir dire. There was no opposed evidential version which was required to be unraveled as the appellant gave no evidence at the voir dire and the testimonies of the prosecution witnesses remained uncontroverted. In the evidence of the witnesses for the prosecution, there were no material inconsistencies, incongruities or inherent implausibilities. Further, there was nothing in the evidence which suggested that the appellant was induced into making the statement in question. Therefore, the *"basis for the decision was quite apparent"* and the path to the trial judge's conclusion was plain from the evidence. Her decision to admit the statement cannot be faulted. On the facts of this case, the judge's failure to give reasons for her decision is not fatal to the appellant's conviction.

[123] In line with the reasoning in **Pooran and Asgarali** and in **Nimrod Miguel**, we are satisfied that the trial judge necessarily addressed her mind to the questions of the voluntariness of the interview notes and the fairness of the circumstances in which they were recorded, in the exercise of her discretion to admit them into evidence. The issues of voluntariness and fairness stood at the front

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[63] Crim. App. No. 37 of 2003.

[64] Nimrod Miguel (n. 53).

and center of the challenge to the admission of the interview notes. The admission of the notes created no identifiable unfairness to the appellant. Accordingly, there is no proper basis to conclude that the judge erred in exercising her discretion.

[124] Mr. Khan also took issue with the following questions and answers contained in the interview notes:

> *"Q: How you feel doing this to your next door neighbour?*
> *A: I feeling really bad now that I talk about it.*
> *Q: If you see LB now, what would you say?*
> *A: Officer, I need someone to talk to me, family, friend – didn't correct me, so I just continue to do wrong. I am very sorry, I really didn't want to do that, but like there was an evil in me forcing me to do these things. I will love if she could forgive me."*

[125] He argued that such statements would no doubt have been used by the jury to establish a nexus between the appellant and the offences.

[126] It must first be observed that these questions did not lure the appellant into any level of self-incrimination greater than that to which he had already done. We also note that the appellant himself gave evidence before the jury that he was LB's neighbour and that they were known to each other when he testified as follows:

> *"Q: Now in relation to this matter before the court sir do you know LB?*
> *A: yes ma'am I know her by Lorraine but not her surname*
> *Q: and how do you know Lorraine?*
> *A: she live not too far away from me ma'am*
> *Q: what sort of interaction if any did you have with Ms. Lorraine?*
> *A: Well at times I might pass and say good morning, whatever was the time of the day"*[65]

[65] Notes of Evidence at page 588, lines 6-19.

[127] Thus, it is not open to the appellant to complain at this stage that the admission of the interview notes of his acquaintance with LB might have been used by the jury to incriminate him for the subject offence.

It follows that this ground is without merit.

Ground 3: The trial judge erred in law in failing to give the jury full, proper and adequate directions as to how to evaluate the incriminating unsigned notes of the interview with the Appellant in the context that they were unsigned.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[128] Mr. Khan complained that the trial judge's directions pertaining to the interview notes were insufficient, having regard to the fact that they were not signed by the appellant. In support of his complaint, Mr. Khan relied on the decisions in **Frankie Boodram v The State**[66] and **Deenish Benjamin & Anor. v The State**[67].

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[129] Mr. Busby submitted that the police officers complied with the guidelines in **Frankie Boodram** and therefore, the judge was not required to give a robust direction on this issue. He also contended that if the trial judge had directed the jury in more robust terms, the result would only have been to strengthen the case for the prosecution by demonstrating how fulsome the level of compliance had been. The fact that the trial judge did not do so therefore redounded to the benefit of the appellant.

[66] Cr. App. No. 17 of 2003.
[67] [2012] UKPC 8.

[130] Mr. Busby further submitted that it could be said that the appellant had adopted the notes as being his own and confirmed their accuracy. He made this submission based on the evidence of the Justice of the Peace who testified that the appellant had told him that the notes were read to him and that the appellant had read them in his presence. He relied on the decision in **R v Fenlon**[68] in support of this submission.

THE LAW, ANALYSIS AND REASONING

[131] In **Frankie Boodram v The State**[69], the appellant was charged with the offences of larceny and receiving stolen goods after parts from a stolen pick-up truck were found at his place of business. While a warrant to search his premises was being executed, it was alleged that the appellant made several utterances which formed the hub of the prosecution case. These utterances included pleas for understanding and sympathy, an offer to the police officers to *"settle this here"*, as well as an invitation for them to *"call a figure"*. Sharma CJ at pages 13-14 of the judgment said:

> *"…**where the State's case depends substantially or exclusively on oral admissions**, that it would be advisable for the police officers investigating to make contemporaneous notes of them which should be read to the accused and then ask him to sign them. It would be a matter of record and evidence whether he does so or not. If the note is disputed, copies could be made available to the jury.*
> *…*
> *…Should the police not follow these guidelines they may very well find that, the jury may be directed to draw a strong inference that the oral admissions were not true or, at least, questionable, and the trial judge would be entitled to give a robust direction on the failure of the police to comply."* (emphasis added)

[132] These guidelines are most relevant where the prosecution case depends substantially or exclusively on oral admissions. This suggests that where there is an absence of compliance, a critical assessment ought to be carried out and a caution administered to the jury with explanatory reasons for such a

[68] [1980] 71 Cr. App. R. 307.
[69] Frankie Boodram (n. 66).

caution. In **Deenish Benjamin & Anor. v The State**[70], Lord Kerr at paragraph 26 of the judgment opined that:

> *"26. …the question whether a warning is required about the dangers of* ***relying on an oral statement as a basis for conviction must depend heavily on the particular facts of an individual case. Obviously, if this is the only evidence against an accused, there is plainly a need for caution, particularly if the statement has not been recorded contemporaneously and if it has not been verified in writing by the accused.*** *But where the oral statement is but a minor part of the case against the defendant, a quite different position obtains."* [emphasis added]

[133] The appellant was cautioned before the interview was conducted. The statements were recorded contemporaneously. The notes of the interview were read to him and on a separate occasion, he read them but declined to sign them. Thus, there is no evidence of the absence of compliance with the **Frankie Boodram**[71] guidelines by the police during the course of the interview. The police complied fully with the requirements set out in that case. Should the judge have given a stronger and more robust direction, it would have redounded to the benefit of the prosecution in that, it would have strengthened the prosecution case on this particular issue.

[134] In addition, the prosecution case did not depend substantially or exclusively upon the statements contained in the unsigned interview notes. There was other evidence against the appellant which included LB's testimony and the bad character evidence.

This ground therefore does not succeed.

[70] Deenish Benjamin (n. 67).
[71] Frankie Boodram (n. 66).

Ground 4: There is a lurking doubt as to the safety of the conviction based on the tenuous nature of the identification evidence itself especially as there was no supporting pre-trial identification procedure.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[135] Mr. Khan submitted that the identification evidence, from the perspective of the **Turnbull**[72] guidelines, was unreliable. He submitted that the judge did not sufficiently direct the jury in terms of the legal principles surrounding the identification evidence. He asserted that the jury was not directed on the following:

(i) the failure of the police to hold an identification parade;

(ii) allowing the dock identification; and

(iii) the weight to be attached to dock identifications and the dangers of relying on such identification without the holding of an identification parade.

[136] Mr. Khan relied on the decisions in **Pop v R**[73], **Pipersburgh v R**[74] and the dissenting opinion of Lady Hale in **Ronald John v The State**[75], to support his contention that the appellant's conviction is unsafe due to the failure to hold an identification parade.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[137] Mr. Busby contended that having regard to the evidence led in the case that LB had three separate opportunities on August 2, 2007 to register and record the features of the appellant, it was incorrect to characterize the identification evidence as unreliable. The holding of an identification parade would have served no useful purpose. The absence of an identification parade did not make the

[72] Turnbull (n. 15).
[73] [2003] UKPC 40.
[74] [2008] UKPC 11.
[75] [2009] UKPC 12.

trial unfair. He relied on the decisions in **Francis Young v The State**[76] and **Goldson and McGlashan v R**[77] in support of his submissions.

[138] Mr. Busby also highlighted that the appellant made no request for an identification parade and argued that there was no miscarriage of justice arising from the dock identification or the failure to hold an identification parade. He contended that the decisions in **Pop**[78], **Pipersburgh**[79] and **Ronald John**[80] were all distinguishable from this case.

THE LAW, ANALYSIS AND REASONING

[139] Mr. Khan complained that the identification evidence was unreliable when analysed from the perspective of the **Turnbull**[81] directions. The dictum of Widgery CJ in **Turnbull** has been succinctly summarized in **Archbold 2019 Edition at paragraph 14 – 19** as follows:

> *"Where the case depends wholly or substantially upon the correctness of identification evidence, Turnbull requires that a judge should:*
>
> *(a) warn the jury of the special need for caution before convicting on that evidence.*
> *(b) instruct the jury as to the reason for such need.*
> *(c) refer the jury to the fact that a mistaken witness can be a convincing witness, and that a number of witnesses can be mistaken.*
> *(d) direct the jury to examine closely the circumstances in which each identification was made.*
> *(e) remind the jury of any specific weaknesses in the identification.*
> *(f) where appropriate, remind the jury that mistaken recognition can occur even of close relatives and friends.*
> *(g) identify to the jury the evidence capable of supporting the identification.*

[76] [2008] UKPC 27.
[77] (2000) 56 WIR 444.
[78] Pop (n. 73).
[79] Pipersburgh (n. 74).
[80] Ronald John (n. 75).
[81] Turnbull (n. 15).

(h) identify evidence which might appear to support the identification but which does not have that quality".

[140] The trial judge's direction on the identification evidence were correct, detailed and coherent. The trial judge warned the jury of the special need for caution when relying on the identification evidence before convicting the appellant. She explained that the special need for caution was necessary because it was possible for an honest witness to make a genuine and sincere mistake. She gave directions on the reliability of LB as a witness and the fact that she might be a convincing but mistaken witness.

[141] The accounts of LB of the three separate opportunities to view the appellant on the date of the offence, were fully analysed consistent with the **Turnbull**[82] guidelines. The judge directed the jury to consider several factors when examining the evidence, namely[83]:

(i) the length of time that LB had the appellant under observation;
(ii) the distance between LB and the appellant;
(iii) the lighting at the time that LB made the observations;
(iv) whether anything obstructed LB's view of the appellant;
(v) whether LB had known the appellant before;
(vi) the length of time between LB's initial observation of the appellant and her subsequent identification of him; and
(vii) the actual and potential weaknesses of the identification evidence.

[142] The judge gave a **Turnbull** direction[84] with respect to the identification evidence and those directions were fully in accord with all of the **Turnbull** elements set out above. We note that the

[82] Ibid.
[83] Summing Up: Day 2 at page 18, line 29 to page 19, line 10.
[84] Summing Up: Day 2 at page 17 line, 41 to page 21, line 32.

judge further instructed the jury to have regard to the time that elapsed between the initial sighting of the appellant and the subsequent identification and the fact that no identification parade was held. She thus directed the jury to consider these and other actual and potential weaknesses in the identification evidence. We can therefore find no reasonable basis for complaint.

[143] With respect to Mr. Khan's further complaints that the judge failed to direct the jury on several matters, including, (i) the failure of the police to hold an identification parade; (ii) allowing the dock identification; and (iii) the weight to be attached to dock identifications and the dangers of relying on such identification without a previous identification parade, the judge did give the following directions on the issue of the dock identification and the failure to hold an identification parade:

> *"You will recall that during the testimony of LB in this trial, she pointed out the accused, who is seated in the dock, as the man who raped her on the 2nd August, 2007. This type of identification is called a Dock identification, because the identification is of a person while he is in the Dock.* ***A Dock identification is undesirable evidence because of the obvious danger that the person occupying the Dock might automatically be assumed by even a well intentioned witness to be the person who had committed the crime with which he was charged. It is dangerous to rely on Dock identification evidence alone.*** *The normal procedure would have been for the police to hold an identification parade since the suspect is a stranger to LB. No such identification parade was conducted in this case.* ***An identification parade would have provided an opportunity to truly test LB's ability to identify her assailant who was a stranger to her prior to the incident.***
>
> *In a case of disputed identification evidence, an identification parade is usually held if the suspect asked for one, and if it is practicable to hold one. A parade may also be held if the officer considers that it would be useful.*
>
> *…*
>
> ***In this case, the accused has been placed at a great disadvantage because he has been denied the opportunity to participate in an identification parade. If an identification parade was held, there is the possibility there could have been an inconclusive result, and this could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. I must warn you, therefore, that you must exercise great, the greatest degree of caution before you decide to act***

on a Dock identification evidence, if that's the evidence alone. Of course, if there is supporting evidence that's another – it's different."[85] [emphasis added]

[144] In **Maxo Tido v R**[86], Lord Kerr, who delivered the judgment of the Board, re-affirmed the admissibility of dock identification evidence at paragraph 21 in the following terms:

> "21. *The Board therefore considers that it is important to make clear that a dock identification is not inadmissible evidence per se and that the admission of such evidence is not to be regarded as permissible in only the most exceptional circumstances. A trial judge will always need to consider, however, whether the admission of such testimony, particularly where it is the first occasion on which the accused is purportedly identified, should be permitted on the basis that its admission might imperil the fair trial of the accused.* ***Where it is decided that the evidence may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity. In such circumstances the judge should draw directly to the attention of the jury that the possibility of an inconclusive result to an identification parade, if it had materialised, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. The jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by even a well- intentioned eye-witness to be the person who had committed the crime with which he or she was charged.***" [emphasis added]

[145] It is thus manifest that the judge carefully pointed to the dangers of dock identification in that LB could have conveniently selected the appellant as the person who fitted the general description of the person whom she saw. We are also satisfied that the trial judge adequately pointed out to the jury the weaknesses in the identification of the appellant, including the failure of the police to hold an identification parade and the value to an accused person of having such a parade carried out. The judge's directions on all of these issues were unassailable.

[85] Summing Up: Day 2 at page 16, line 34 to page 17, line 40.

[86] [2011] UKPC 16.

[146] In addition, although it is good practice to conduct an identification parade, we are of the view that in this case, it would have served no useful purpose based on the following factors:

(i) the number of opportunities which LB had to observe the man whom she identified as the person who raped her;

(ii) her claim to have seen him on multiple occasions namely, July 6, 2007, October 4, 2007, a date unknown in November 2007 when she said that she saw him with his face unobstructed, on November 25, 2007 and on January 24, 2008; and

(iii) her having seen his face for approximately 30 seconds when the t-shirt around his face loosened while he was having sexual intercourse with her on August 2, 2007.

[147] The different occasions and the length of time during which LB had the appellant under observation suggests that the appellant was sufficiently known to her. These circumstances suggested that when LB pointed out the appellant in the dock as the man who had raped her, it was a matter of recognition of someone who was known to her. In these circumstances, an identification parade would have served no useful purpose.

This ground therefore fails.

Ground 5: The trial judge failed to remind the jurors of the ground rules regarding their note-taking, and its limited role during deliberations.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[148] Mr. Khan submitted that the trial judge should have given the jury a full cautionary instruction that the notes they had taken during the trial were only to assist them in remembering details of the evidence and that it was their memory that should control their deliberations. He further stated that incorrect information might have been written down and that there was the possibility or risk

that some of the jurors would have attached too much significance to their notes and too little significance to their independent memories of the evidence.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[149] Mr. Busby submitted that there could be no complaint if the jury had relied upon their notes during deliberations. He relied on the decision in **R v Fenlon**[87] in support of this proposition.

THE LAW, ANALYSIS AND REASONING

[150] In **R v Fenlon**, the appellant's unsigned notes of an alleged admission were exhibited in the trial and the jury were allowed to retire with them. Although the appeal was dismissed, the Court of Appeal held, that while it was technically incorrect to give the documents in question to the jury or to make them an exhibit, the irregularity which had occurred could have had no effect on the outcome of the case. The Lord Chief Justice in delivering the judgment stated at page 312 that:

> *"In this case we can see no reason on this basis for making the notes an exhibit. It does not appear to us that a mere sight of them would advance the case one way or the other. Consequently it was technically incorrect, in the view of this Court, to give those documents to the jury or to make them an exhibit. But* ***we are bound to remark that if the jury had taken the trouble to write down the contents of the notes as the police officers gave their evidence of what the defendant had said there would have been no possible complaint if the jury had relied upon such a jury-made note in considering their verdict.***
>
> *…*
>
> ***If it was an irregularity we think that it had no effect on the outcome of the case****."*
> (emphasis added)

[87] Fenlon (n. 68).

[151] Although **Fenlon**[88] dealt primarily with the issue of unsigned notes of an admission made by the appellant which was given to the jury, the pragmatic and functional approach adopted in that case is equally applicable here.

[152] The directions of the trial judge with respect to note taking were as follows:

> *"…You have asked if you could take notes during this trial and the Court agreed to allow you to do so. This, in the Court's mind, shows that you do appreciate the importance of the role you play in this case…"*[89]

[153] In our view, the more important considerations are these. While the trial judge did not explicitly warn the jury about placing undue reliance on the notes which they might have taken, she directed them to critically analyse the evidence in the case before coming to a verdict when she stated that:

> *"Each of you have taken an oath to return a true verdict based on the evidence. I ask you to critically analyse the evidence in this case before coming to your verdict. Do not simply hold on to one piece of evidence and come to your finding."*[90]

[154] More importantly, the trial judge, early in her summing up, defined the concept of evidence to the jury and gave examples of what would be considered as evidence in the case. She also gave examples of what would not be considered as evidence. She said:

> ***"The facts are the evidence which you find to be true. And what is the evidence in this case? The evidence in this case is the oral testimony of witnesses, that is, the State witnesses that you heard, and the accused; documentary evidence, for example, the medical certificate which was admitted as LD-1 through WPC Dumas, and formal evidence that was tendered by the parties.***
>
> *…*
>
> *…*
>
> *…*

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[88] Ibid.

[89] Summing Up: Day 1 at page 6, lines 32-36.

[90] Summing Up: Day 1 at page 6, lines 36-40.

In order for you to fully understand what evidence is, it is also useful to direct you, in law, on what is not evidence. ***The opening address of State attorney is not evidence. The closing addresses of the attorneys is not evidence. What is put is not evidence unless the witness accepts the content of what was put. The questions an attorney asks a witness is not evidence. Any views expressed by any of the attorneys and even by me, the trial judge, is not evidence.*** *It is entirely up to you to accept such views or reject it if it does not accord with your own independent assessment of the evidence, because you are the sole judges of the facts in this case. So by all means, consider the closing addresses of both attorneys; they have both thoroughly analysed the evidence in this case from their own perspectives, but it will be for you to decide how you view the evidence and what evidence you believe."*[91]

[155] The judge ideally ought to have directed the jury not to place undue reliance on the notes which they might have taken during the trial. However, in light of the judge's directions on how the jury were to assess the evidence, as well as what constituted evidence in terms of the legal definition of that term, directions which are standard in every criminal trial, in our view, there was absolutely no resultant prejudice to the appellant.

This ground of appeal is unmeritorious.

Ground 6: The trial judge failed to explain to the jury the "professional" requirement of the formal duty to put an accused case to the witnesses.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[156] While conceding that the judge did in fact direct the jury along the lines set out by the Judicial Committee of the Privy Council in **Warren Thomas Jackson v The State**[92], Mr. Khan submitted that the trial judge failed to explain to the jury the "professional" requirement of the formal duty to put

[91] Summing Up: Day 1 at page 3, lines 21-29 and at page 4, lines 19-35.
[92] [1998] UKPC 44.

an accused's case to the witnesses. He asserted that the judge ought to have explained to the jury that the professional (not ethical) duty to put one's case is more of a procedural than a factual issue and that the prosecution could have easily called rebuttal evidence. In support of this submission, Mr. Khan relied on the guidance provided in the Bench Notes published by the Judicial College of Victoria under the rubric "The Failure to Challenge Evidence (**Browne v Dunn**)".

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[157] Mr. Busby submitted that this ground was without merit and referred the Court to the decision in **Reed Richards v The State**[93].

THE LAW, ANALYSIS AND REASONING

[158] The rules of procedure require that an attorney-at-law put material issues to a witness in cross-examination so as to give him an opportunity to accept, deny or give an explanation with respect to the issue being challenged. Where this procedure was not followed and it was omitted, the jury should be warned that they should not use this to attribute fault to the appellant. This approach was endorsed by the Judicial Committee of the Privy Council in **Warren Thomas Jackson v The State**[94]. In that case, trial counsel omitted to cross-examine the prosecution witness Moorgan on matters raised in the case for the accused, particularly, that the deceased had been the aggressor and that the appellant had been merely defending himself. The appellant had first spoken to Moorgan after the incident, who testified that the appellant told him that he had killed the deceased. Trial counsel had omitted to challenge Moorgan on this piece of evidence. Nonetheless, the judge robustly directed the jury that they ought to look at the totality of the evidence which was before them. He pointed out that they ought to be mindful of the rules of procedure but that they should not hold it against the appellant if he might have forgotten to give his attorney certain

[93] Cr. App. No. 12 of 2008.
[94] Warren Thomas Jackson (n. 92).

instructions and his attorney was taken by complete surprise when the appellant went into the witness box, or where his attorney received the said instructions and forgot to put them to the prosecution witnesses.

[159] In this case, the trial judge warned the jury that what was put to the witnesses was not evidence. She highlighted to them that the appellant denied giving the oral statement and asserted that the police had fabricated the case against him. The judge identified three issues which were not put to the witnesses:[95]

(i) the appellant said that he had only seen Sergeant Wilson on the date on which he was arrested and that Sergeant Wilson had neither spoken to him nor read the notes to him in relation to the incident of August 2, 2007. The appellant never confirmed the validity of those notes. Further, Sergeant Wilson had never asked him if he was willing to give a statement, and that he had refused;

(ii) the appellant had referred to an incident which occurred on November 29, 2007 in which he was arrested by the police. He was questioned about a gun and was beaten and then taken to the Old Grange Police Station where he was again beaten. Eventually, upon the intervention of his uncle, he was allowed to leave; and

(iii) the appellant indicated that the Justice of the Peace had attempted to persuade him to sign the interview notes.

[160] On this issue, the judge directed the jury in the following terms:

> *"So what I ask you, do not fault the attorney if she omitted to do something or decided not to put these issues, and also, do not fault the accused because he might have forgotten something. But you have to bear in mind the fact that these issues were not*

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[95] Summing Up: Day 2 at page 22, line 44 to page 24, line 48.

> *put to these witnesses means that there is no explanation from these witnesses in relation to the issues not put. So although evidence is given by the accused on these issues, that evidence is admissible, you will have to consider what weight you will give to that evidence having regard to the fact that the witnesses were not confronted with these issues. So that is another direction of law which I wanted to give you.*[96]

[161] The judge's directions were therefore fully consonant with the approach in **Warren Thomas Jackson v The State**[97]. It was important that the jury understood that what was put to the witnesses was not evidence. They were instructed that guilt should not be inferred from an omission to put elements of an accused's case to the prosecution witnesses. The trial judge comprehensively addressed this issue. She provided the relevant context so that the jury could appreciate why the omissions in putting the appellant's case should not be held against him or defence counsel. In these circumstances, we are not persuaded that these directions were in any way deficient.

This ground of appeal is without merit.

FRESH EVIDENCE APPLICATION

[162] Mr. Busby filed an application to adduce further evidence of bad character on March 9, 2018. He however submitted that this application was contingent upon whether the court was minded to apply the proviso or whether the court had a lurking doubt about the safety of the conviction. In light of the manner in which we have resolved the issues in this appeal, it is unnecessary for us to rule on the application by the prosecution as we have not had recourse to the proviso and we do not have a lurking doubt about the conviction.

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[96] Summing Up: Day 2 at page 24, lines 36-48.
[97] Warren Thomas Jackson (n. 92).

DISPOSITION

[163] The appeal is dismissed. The conviction and sentence are affirmed.

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A. Yorke-Soo Hon
Justice of Appeal

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R. Narine
Justice of Appeal

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M. Mohammed
Justice of Appeal