THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. P 030 of 2017

BETWEEN

ANDY ALLAN

APPELLANT

AND

THE STATE

RESPONDENT

PANEL:

A. Yorke-Soo Hon, JA

R. Narine, JA

M. Mohammed, JA

APPEARANCES:

Mr. R. Rajcoomar, Ms. N. Bansee and Mr. N. Belmosa appeared on behalf of the Appellant.

Mr. N. Pilgrim appeared on behalf of the Respondent.

DATE OF DELIVERY: March 19, 2019.

JUDGMENT

Delivered By: M. Mohammed, JA.

INTRODUCTION

1. The appellant, Andy Allan, was charged with the offence of rape and was convicted by a jury on December 15, 2016. On June 8, 2017, he was sentenced to seventeen years imprisonment with hard labour. He has appealed his conviction.

THE CASE FOR THE RESPONDENT

2. The virtual complainant, DM, (the VC), was twenty-one years old at the time of the offence. She had known the appellant, who was then a sixty year old former police officer, since she was fifteen years old. She knew the appellant initially in the course of her playing the steelpan. The appellant had asked her to join a netball team which he was forming, and she did. She eventually dropped out of the netball team after an accident at her house which caused her to sustain burn injuries.

3. The VC stopped talking to the appellant for some time, since he would get upset whenever she became romantically involved with a man. After sustaining her injuries, the appellant visited her at the hospital and thereafter, they resumed talking. The appellant would take her to the hospital to retrieve her medication and he also gave her $1,000.00 each month to assist her in purchasing medicine or with other living expenses.

4. On March 27, 2010, the VC called the appellant and asked him to take her to her aunt's house, and then to her mother's house. He arrived at around 7:55 p.m. that night and acceded to her requests. The VC also needed to get her netball uniform which was at the appellant's house in Chaguanas. When they arrived at the appellant's house, he refused to retrieve the uniform for her and instead insisted that she go into his bedroom to try it on. At first, the VC refused but she eventually complied. While the VC was trying on the uniform, the appellant, who was outside of

the room, told her that he had found a skirt to fit her. The appellant pushed the door open and the VC covered herself with a skirt. The appellant was naked from the waist down. She asked the appellant what he was doing. He pushed her on the bed, came over her and held her hands above her head. The VC started cursing him and asked him to stop. The appellant kept saying, *"Just now."* The appellant released the VC's hand and began pulling down her underwear. The VC attempted to pull up her underwear. She sustained scratches on her hands and on her legs as a result of being restrained by the appellant. The appellant then put his penis into her vagina and began moving back and forth. The VC asked the appellant to stop and he replied, *"Just now."* After approximately two minutes, the appellant came off the VC and told her that he had ejaculated inside of her. The VC cursed at him. She asked him to take her home and told him that she would tell her boyfriend, Andrew Hall, also known as "Michael", what he did. The appellant told her that "she would not do that". He then repeatedly asked her if she was going to tell her boyfriend what had happened. The VC did not respond and cried instead.

5. The VC arrived home at around 9:47 p.m. and told her boyfriend that the appellant had raped her. Hall contacted the appellant on the telephone and confronted him with the accusation. At that time, the VC was crying. The appellant denied that he had raped the VC. Hall told the appellant that he intended to go to the police station to report the incident and the appellant told him to "go ahead" and said, *"If I get lock up, I will say I didn't do it and I will just pay money and come out."*

6. The VC reported the incident to WPC Allsop at the Chaguanas Police Station. On the following day, she was examined by Dr. Reddy at the Mt. Hope Hospital. Dr. Reddy's medical report revealed that the VC had sustained no injuries to her external genetalia.

7. On March 31, 2010, the appellant was arrested and taken into custody. When questioned by the police, he denied having sexual intercourse with the VC without her consent. He gave a statement which was authenticated by a Justice of the Peace. In the appellant's statement dated April 1, 2010, he said that in April, 2009, he and the VC decided to *"come very close at ah price"*. He gave her $1,000.00 each month until February, 2010. The agreement was that the VC would come

over to his house four times each month to *"play ourselves"*. The VC fulfilled her part of the agreement. On March 27, 2010, at around 9:30 p.m., the appellant picked up the VC at her house in Las Lomas and took her to his house in Chaguanas. While there, they entered his room and *"was dealing"* and when they were finished, the VC went outside and sat in his car. The appellant took her home and approximately one minute after doing so, he received a phone call from her boyfriend who said to him, *"Ah like what yuh do."* The appellant asked him what he was talking about and he replied, *"Yuh hold down D yuh hold down D."* The appellant asked to speak to the VC and she said to him, *"He smell something, he smell something."* The VC's boyfriend began quarreling with the appellant. The appellant told him to go to the police station and make a report. According to the appellant, the VC later called him on his phone and apologised.

8. The police officers conducted investigations at the appellant's house, in his presence. He was later charged for having sexual offence with the VC without her consent.

THE CASE FOR THE APPELLANT

9. At the trial, the appellant was self-represented. He elected to give evidence. He testified that he had consensual sexual intercourse with the VC in his bedroom on the evening of March 27, 2010. He indicated that the intercourse was part of an ongoing arrangement between himself and the VC whereby he agreed to pay her $1,000.00 per month in exchange for her sexual favours. According to him, this arrangement began after she had sustained a burn injury in an unsuccessful suicide attempt, after having problems with Andrew Hall. The VC told the appellant that *"no man would want her in her condition."* The appellant gave evidence that while they were having sexual intercourse on the night in question, the VC ignored a number of telephone calls from Hall. The appellant said that he ejaculated inside of the VC and she became upset. She expressed her concerns to him about becoming pregnant.

10. The appellant dropped the VC home. Hall later contacted him and accused him of raping the VC. He told Hall to go to the police station. The VC contacted the appellant later that night and said, *"I sorry, he woulda kill meh, like he smell something, that is why I had to say something."*

THE APPEAL

Ground 1: The Learned Trial Judge erred in law with regard to his directions on the mental requirements for the offence of rape, and in particular, his directions with regard to recklessness were inadequate.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

11. Mr. Rajcoomar submitted that the judge erred in law by failing to direct the jury regarding the presence or absence of reasonable grounds for the appellant's belief that the VC consented to the sexual intercourse, pursuant to **section 28 of the Sexual Offences Act, Chapter 11:28**.

12. Mr. Rajcoomar contended that the jury should have been directed to consider whether at the time of the incident, the appellant would have foreseen that the VC did not consent or whether his belief could, in light of the facts, be reasonable and mistaken. He relied upon the decisions in **R v Kimber**[1], **R v Adkins**[2] and **R v Taran**[3] in support of this submission. He argued that this misdirection was exacerbated by the judge's use of the term "possibility" in defining the awareness necessary for "reckless rape".

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

13. Mr. Pilgrim, in response, submitted that the judge's directions were entirely appropriate and in keeping with the decisions in **Marlon Roberts v The State**[4] and **R v Olugbuja**[5]. He submitted that the directions on "reckless rape" were proper in this case as the issue which arose was one of consent. He submitted that the issue of a potentially mistaken belief did not arise, either on the prosecution case or the defence.

[1] (1983) 2 All ER 316.
[2] [2000] 2 All ER 185, 191.
[3] [2006] All ER (D) 173.
[4] Cr. App. No. 19 of 2007.
[5] [1982] 1 QB 320.

14. Mr. Pilgrim also submitted that the judge was not bound to give a direction on mistaken belief. This was because, having regard to the evidence of the VC, the sexual intercourse occurred by brute force after clear verbal indications of the absence of consent. Further, the evidence of the appellant was that the sexual intercourse was the product of a long-standing negotiated and consensual agreement which only generated a complaint because of Andrew Hall's suspicions. The decisions in **R v Taylor**[6] and **Earl Williams v The State**[7] were relied on in support of these submissions.

THE LAW, ANALYSIS AND REASONING

15. **Section 4(1)(a)** of the **Sexual Offences Act Chapter 11:28** defines the circumstances in which consent, though present, is ineffectual:

> *[1] Subject to subsection (2), a person ("the accused") commits the offence of rape when he has sexual intercourse with another person ("the complainant")-*
>
> *(a) without the consent of the complainant where he knows that the complainant does not consent to the intercourse or he is reckless as to whether the complainant consents; or*
> *(b) with the consent of the complainant where the consent—*
> *(i) is extorted by threat or fear of bodily harm to the complainant or to another;*
> *(ii) is obtained by personating someone else;*
> *(iii) is obtained by false or fraudulent representations as to the nature of the intercourse; or*
> *(iv) is obtained by unlawfully detaining the complainant.*

16. The judge, on the issue of the mental requirements for the offence of rape, directed the jury in the following terms:

> *"But what if you find, what if the jury finds that there is a possibility that the Virtual*

[6] (1985) 80 Cr. App. R. 327.
[7] (1994) 47 WIR 380.

Complainant did not consent, in the mind of the Accused there is a possibility that she did not consent? What if you are not able to say that the Virtual Complainant did not consent, but the most you can say is that the Virtual Complainant might not have consented? The law says that if the Accused is aware that there is a possibility that the Virtual Complainant was not consenting, that is to say, that she might not have consented, if in those circumstances the Accused proceeds to have intercourse with her, he does so recklessly. That is to say, if he has intercourse being reckless as to whether the Virtual Complainant has consented. If he decided to press on, despite the fact that she might not be consenting, that is recklessness in terms of the mental element that we speak of.

…What we are saying is that recklessness amounts to a determination to have intercourse, that is to say pressing ahead, pressing on not caring whether the victim consents or not.

The mental element of the offence of rape may, therefore, be summarized as an intention to have sexual intercourse with the victim either, one, knowing that the victim does not consent, or two, being aware that there is a possibility that she does not consent but, nevertheless, pressing ahead.

…

…Rape is having sexual intercourse knowing that the female does not consent or being reckless and pressing on where she may not be consenting."[8]

17. The judge also said:

"The law says that if the Accused is aware that there is a possibility that the Virtual Complainant was not consenting, that is to say, that she might not have consented, if in those circumstances the Accused proceeds to have intercourse with her, he does so recklessly. That is to say, if he has intercourse being reckless as to whether the Virtual Complainant has consented. If he decided to press on, despite the fact that she might not be consenting, that is recklessness in terms of the mental element that we speak of."[9]

[8] Summing Up at page 11, lines 15-30; 33-42 and 47-49.
[9] Summing Up at page 11, lines 21-30.

18. The judge further directed the jury that:

> *"Now, in this crime of Rape, the Prosecution must prove three things, the Prosecution must prove, one, that the Accused penetrated the vagina of DM with his penis. Two, the Prosecution must prove that DM did not consent, and three, the Prosecution must prove that the Accused penetrated her vagina, either knowing that she did not consent, or being aware of the possibility that she did not consent but, nevertheless, pressing ahead."*[10]

19. In **R v Adkins**[11], the defendant was charged with rape. He admitted having had sexual intercourse with the complainant, but denied having raped her. His evidence at the trial was that the intercourse had been consensual. The judge directed the jury that the prosecution had to prove that the VC had not consented, and that the defendant had either known that she did not consent or that he had been reckless as to whether or not she was consenting. The defendant was convicted. On appeal against conviction, the appellant contended that in every case of rape when the defendant relies on consent, there is also an implicit defence that the defendant honestly believed that there was consent. Accordingly, it was submitted that a direction on honest belief in consent should be given as a matter of course whenever consent is in issue. Alternatively, it was argued, as a more limited submission, that whenever the question of reckless rape is in issue, the direction ought to be given. Roch, LJ, in giving the decision of the court, said at page 191:

> *"In our judgment, these cases demonstrate that Mr Trimmer is wrong in his primary submission that whenever the issue of consent arises there must be a direction as to honest belief.* ***Such a direction need only be given when the evidence in the case is such that there is room for the possibility of a genuine mistaken belief that the victim was consenting. In our view this accords with the basic principle that the jury should not be subjected to unnecessary and irrelevant directions. Similarly, it is only when the issue of honesty arises on the evidence that the requirements of s 1(2) of the 1976 Act apply. We also reject the alternative submissions. The question of honest belief does not necessarily arise where reckless rape is in issue. The***

[10] Summing Up at page 12, lines 28-35.
[11] Atkins (n. 2).

defendant may have failed to address his mind to the question whether or not there was consent, or be indifferent as to whether there was consent or not, in circumstances where, had he addressed his mind to the question, he could not genuinely have believed that there was consent.

Accordingly the question we have to ask ourselves is whether, on the evidence in this case, it was open to the jury to reach a verdict that the defendant could honestly, but mistakenly, have believed that there was consent. We are satisfied this was not a possible inference on the facts." [emphasis added]

20. In **R v Taylor**[12], the appellant was charged with the offence of rape. At the trial, the issue was whether the complainant had consented to the sexual intercourse which had admittedly taken place. The appellant was eventually convicted and sentenced to two years imprisonment. On appeal, counsel for the appellant submitted that the trial judge erred in failing to direct the jury that the appellant was not guilty if he genuinely believed that the complainant was consenting, although such belief might have been mistaken. On this issue, Lord Lane CJ said at page 330:

> *"It should be plainly understood at the outset that there is no general requirement that such a direction should be given in all cases of rape.* ***The nature of the evidence, and of course particularly the evidence given by the complainant and the defendant, will determine whether or not such a direction is advisable and whether to give such a direction would be fair. There must be room for mistake in the case before such a direction is required."*** [emphasis added]

21. Later on in his judgment, Lord Lane CJ, observed that once the jury arrived at the conclusion that the complainant had not consented and that she was telling the truth about that, there was little, if any, room for any further conclusion that the defendant might have been labouring under any honest but mistaken belief.

22. In this case, the jury would have had before them two sharply conflicting accounts, given by the VC and the appellant. It follows that once the jury were satisfied beyond reasonable doubt that

[12] Taylor (n. 6).

the VC did not consent to sexual intercourse with the appellant, they would have rejected the appellant's evidence. There would have been no factual scope to sustain any further conclusion that the appellant might have been labouring under any honest but mistaken belief.

23. As in the decisions in **Adkins**[13] and **Taylor**[14] referred to above, in these circumstances, there was no scope for a genuine but mistaken belief on the part of the appellant that the VC was consenting to sexual intercourse. Based on the evidence of the VC, it must have been clear to the appellant that she was not consenting and in the alternative, if he had no such knowledge, he must have been reckless as to whether she consented. The appellant's case was that the intercourse was part of an ongoing arrangement between himself and the VC whereby he agreed to pay her $1,000.00 per month in exchange for sexual favours. His case was not that he believed that the VC consented to sexual intercourse.

24. In our view, the judge's summing up on the issue of consent was accurate and adequate on the facts of this case. There is no general requirement that a direction on mistaken belief be given in all cases of rape. Such a direction is contingent on the facts of the case. In this case, the nature of the evidence given by both the VC and the appellant did not necessitate a direction on mistaken belief in consent. Had such a direction been given, it would have been artificial and misleading. Further, the judge's directions on "reckless rape" were entirely appropriate as the main issue in the case was that of consent and not a potentially mistaken belief in consent.

This ground is without merit.

[13] Adkins (n. 2).
[14] Taylor (n. 6).

Ground 2: The Learned Trial Judge erred in law when he permitted evidence of recent complaint.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

25. Mr. Rajcoomar submitted that evidence of recent complaint, which is statutorily inadmissible, was admitted through Andrew Hall's testimony of what the VC said to him upon arriving home after the incident in question. He also submitted that the judge's direction, that Andrew Hall's evidence could not confirm the VC's account or its accuracy, was inadequate and confusing. The judge failed to direct the jury that they ought to disregard the evidence of recent complaint completely. Mr. Rajcoomar further submitted that on the facts of this case, there were no directions capable of counteracting the prejudicial effect of this wrongly admitted evidence. The decisions in **Gabriel v The State**[15], **Anthony Diaz v The State**[16] and **White v R**[17] were relied on in support of these submissions.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

26. In response, Mr. Pilgrim submitted that although Hall's evidence might appear to be recent complaint under the definition in **Anthony Diaz**, it was not. Rather, it was in the context of the repetition of that allegation when Hall had called and confronted the appellant. He submitted that this made the evidence of the allegation admissible as a statement made in the presence and hearing of an accused, in order to show his reaction to it. In support of this submission, Mr. Pilgrim relied on the decision in **Earl Williams v The State**[18]. Mr. Pilgrim also noted the views of the editors of **Blackstone's Criminal Practice 2018 at F18.99-F18.101** on the effects of statements made in the presence of an accused:

> *"…**Although it is a salutary rule of practice, there is no rule of law requiring the production, before the content of the statement is given in evidence, of some proof***

[15] Cr. App. No. 30 of 2005.
[16] (1989) 42 WIR 425.
[17] [1999] 1 Cr. App. R 153.
[18] Earl Williams (n. 7).

of the accused's acceptance of the statement *(*Christie*, modifying the stricter rule suggested by the Court of Criminal Appeal in* Norton *[1910] 2 KB 496).*

…

If the statement is admitted, the question whether the accused's conduct amounted to an acknowledgement is a question for the jury. *If they find that the statement was acknowledged, in whole or in part, then they may take the statement or the relevant part of it into consideration. If they do not so find, they should be directed to disregard the statement altogether (*Norton*). In* Christie*, Lord Atkinson said (at p. 554) that, if the judge is of the view that no evidence has been given on which the jury could reasonably find that the accused had accepted the statement, he should direct the jury to disregard it.*

…

In Christie *[1914] AC 545, Lord Atkinson considered the various ways in which an accused person might accept an accusation put to him (at p. 554):*

> *He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when the statement was made amounts to an acceptance of it in whole or in part.* ***It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny his statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgement can be inferred.***
>
> *See also* Norton *[1910] 2 KB 496.*

In Christie*, C was charged with indecent assault on a young boy who, shortly after the alleged offence and in the presence of his mother and of a police officer who was on the spot, confronted C with the words 'That is the man,' and gave details of the assault. C replied 'I am innocent'. Although in the form of a denial, the response was regarded as one from which it was open to the jury to draw an inference of acceptance. Lord Moulton said (at p. 559):*

> *Going back to first principles … the deciding question is whether the evidence of the whole occurrence is relevant or not. If the prisoner admits the charges the evidence is obviously relevant. If he denies it, it may or may not be relevant. For instance, if he is charged with a violent assault*

and denies that he committed it, that fact might be distinctly relevant if at the trial his defence was that he did commit the act, but that it was in self-defence.

Acceptance by acquiescence was considered sufficient in* O *[2005] EWCA Crim 3082, where the accused stood by, smirking, while his friend explained when asked the reason for an attack that it had been racially motivated." [emphasis added]

27. Mr. Pilgrim submitted that the jury would have been entitled to find, if they believed that he said it, that the appellant's response was a curious answer and an unconvincing denial.

28. Further, Mr. Pilgrim contended that there was no unfairness to the appellant as the judge repeatedly cautioned the jury against using this evidence to confirm the VC's account of what had transpired. This was the classic use of the doctrine of recent complaint as mentioned in **Anthony Diaz**[19]. In the alternative, Mr. Pilgrim submitted that even if the judge erred in admitting evidence of the complaint, having regard to his cautions about using the evidence, there was no miscarriage of justice.

THE LAW, ANALYSIS AND REASONING

29. In this matter, the VC arrived home after the alleged incident and told her boyfriend, Hall, that the appellant had raped her. Hall contacted the appellant on the telephone and confronted him about the accusation. The appellant denied that he had raped the VC. Hall told the appellant that he intended to go to the police station to report the incident and the appellant told him to *"go ahead"*. The appellant was also alleged to have said *"If I get lock up, I will say I didn't do it and I will just pay money and come out."*

[19] Anthony Diaz (n. 16).

30. In our view, Hall's evidence of the telephone conversation between himself and the appellant was properly allowed by the judge. The prosecution did not rely on Hall's evidence to show consistency or to negative consent. More importantly however, although not technically a statement made **both** in the presence and hearing of the appellant, as argued by Mr. Pilgrim, the law states that a statement made in the hearing but not in the presence of an accused may be deemed sufficient to warrant its admission into evidence[20]. In any event, apart from that, the evidence in question was properly admissible by dint of the fact that it was a telephone conversation between Hall and the appellant, who was known by Hall for two years prior to the incident. The evidence was relied on by the prosecution as part of the broader narrative in order to show the appellant's reaction when confronted with the accusation. Notably, the appellant in his evidence admitted that the telephone conversation with Hall did take place, and to a large extent, the contents of that conversation.

31. We are mindful that the judge emphatically cautioned the jury against the use of Hall's evidence to confirm the VC's account. The judge said:

> ***"Now, Members of the Jury, before I move away from the evidence of Andrew Hall, I need to direct you in relation to that evidence and what it may be used for and what it may not be used for. I must caution you against looking at Andrew Hall repeating the complaint of rape and thinking that it amounts to confirmation of the commission of the offence. It does not. You may find Andrew Hall's evidence to be assistance on the issue of the nature of the relationship between the Accused and DM before the 27th March, 2010. But Hall also testified that DM came home and told him, "What happened." You must not think that this evidence provides confirmation of DM's evidence. It does not. Hall's evidence is, at best, a repetition of the complaint made by DM. It gives you, the other aspects of his evidence gives you an idea of the background circumstances of her leaving home in the company of the Accused on the evening of the 27th March, and the relationship between DM and the Accused.***

[20] Stone's Justices' Manual 2018; Part II: Evidence; at 2.113 – *"A relevant statement made in the hearing but not the presence of a plaintiff was held admissible: Neile v Jakle (1849) 2 Car. & K. 709."*

> ***Hall's evidence cannot confirm DM's account or its accuracy or otherwise. That repetition by Hall does not make her complaint true or accurate. You must look at the evidence of DM to determine the truth or accuracy of the complaint of rape."***[21] [emphasis added]
>
> *…*
>
> ***"This case stands or falls with the view that you take of the evidence DM. There is no other evidence which is capable of supporting her evidence of the absence of consent."***[22] [emphasis added]

32. In our view, having regard to these explicit cautions given to the jury, they would have been in no doubt as to how they were to treat with Hall's evidence.

This ground of appeal is without merit.

Ground 3: The Learned Trial Judge erred in law when he failed to protect the interest of the appellant by the appointment of a McKenzie friend.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

33. The appellant in this case was unrepresented. Mr. Rajcoomar submitted that the trial featured several issues of law, including that of recent complaint, consent, the treatment of the failure of mobile telephone providers to record data relating to phone calls and the treatment of medical evidence. In these circumstances, Mr. Rajcoomar submitted that it was necessary, in the interest of justice, for the court to appoint a "McKenzie friend" and to generally assist the appellant.

[21] Summing Up at page 16, lines 33-47; page 17, lines 2-7.
[22] Summing Up at page 49, lines 21-24.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

34. Mr. Pilgrim submitted that the judge was under no obligation to appoint a "McKenzie friend". He submitted that the legal issues faced by the appellant could not have been dealt with by a "lay assistant". He also submitted that there was no unfairness to the appellant in light of the fact that he was self-represented by deliberate choice.

THE LAW, ANALYSIS AND REASONING

35. This issue of law is being raised for the first time in a criminal appeal before this Court and it is incumbent on us to deal with it in some depth. Accordingly, we proceed to extensively quote the law on this issue.

36. In **R v Bow County Court, ex parte Pelling**[23], Lord Woolf MR said at page 754:

> *"The title 'McKenzie Friend' draws its name from the decision of the Court of Appeal in McKenzie v McKenzie [1970] 3 All ER 1034, [1971] P 33. The role of a McKenzie friend was first recognised in Collier v Hicks (1831) 2 B & Ad 663, 109 ER 1290. Lord Tenterden CJ in that case said:*
>
> > *'Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the Court as settled by the discretion of the justices.' (See 2 B & Ad 663 at 669, 109 ER 1290 at 1292.)'"*

37. The decision in **McKenzie v McKenzie**[24] concerned a contested divorce case. The husband had been legally aided but his legal aid was terminated. At the commencement of the hearing there was sitting beside him an Australian barrister, who was working for one of the firms of solicitors who had been acting for the husband. The barrister was there voluntarily, in order to assist the husband in conducting his case. The husband's case was complicated and lasted approximately

[23] [1999] 4 All ER 751.
[24] [1970] 3 All ER 1034.

ten days. However, the judge at first instance did not allow him to remain after he found out that his firm was no longer on the record. On appeal, the court was of the opinion that the husband was entitled to the assistance of the McKenzie friend. Sachs LJ in his judgment stated that the error made by the judge did not render the trial a nullity. However, he added that, *"where such an error takes place the onus rests on the opposite party to show that it did not cause prejudice".* Sachs LJ also stated:

> *'… all the assistance a litigant in person gets from a judge and from opposing counsel is not really the same thing as having skilled assistance at his elbow during the whole of a lengthy trial. In those circumstances it has not been shown that there was no prejudice to the husband on the adultery issue through lack of the assistance which he ought to have had. It is moreover always, to my mind, in the public interest that a litigant should be seen to have all available aid on conducting cases in court surroundings, which must of their nature to them seem both difficult and strange.' (See [1970] 3 All ER 1034 at 1039, [1971] P 33 at 42.)"*

38. In **R v Conaghan and Ors.**[25], Hallett LJ said at paragraphs 2, 9 and 14

> *"**2** It has become increasingly common in the Court of Appeal Criminal Division ("CACD") for the court to receive applications by unqualified third parties to represent an applicant and address the court, usually at renewed applications for leave hearings where public funding is exhausted. This trend has led to the following problems:* ***(i) third parties have submitted applications on a litigant in person's behalf where it has been unclear that they were acting in an applicant's best interests and or with their full authority; (ii) third parties have requested transcripts and other documents on behalf of a litigant in person and attempted to correspond with the office directly as if they were a legal representative; (iii) staff, particularly administrative staff, have been unsure about what information they can provide to third parties, particularly over the telephone.;(iv) third parties have advanced applications in which criticisms are made of trial lawyers, without consulting the trial lawyers as is required of fresh legal representatives by the judgment in R v McCook [2014] EWCA Crim 734; [2016] 2 Cr App R 30; (v) third parties with a personal interest in the proceedings, or with a cause they wish to advance, or simply***

[25] [2018] 4 WLR 58

with the best of intentions, have presented totally unmeritorious applications. They have thereby raised the hopes of an applicant, taken up a very considerable amount of time and resources of the court, and put an applicant at risk of a loss of time order pursuant to the judgment in R v Gray [2014] EWCA Crim 2372; [2015] 1 Cr App R (S) 27. In R v Gray the court declared, at para 3 that: "The only means the court has of discouraging unmeritorious applications which waste precious time and resources is by using the powers given to us by Parliament in the Criminal Appeal Act 1968 and the Prosecution of Offences Act 1985." ; (vi) third parties have taken years to advance an application, seemingly unaware of the approach this court takes to applications requiring significant extensions of time; (vii) third parties have advanced applications seemingly unaware of the approach this court takes to applications to advance fresh evidence, particularly those based on fresh expert evidence.

…

The Law and Practice

9 *Part 3 of the Legal Services Act 2007 lists and defines reserved legal activities.* ***Those who wish to conduct them are subject to stringent requirements.*** *Exercising a right of audience is a reserved legal activity, as is conducting litigation.* ***However, the court has an inherent jurisdiction to grant a right of audience on a case-by-case basis to any person who would not otherwise have a right of audience: see D v S (Rights of audience) [1997] 1 FLR 724. It is a discretion that should be exercised only in "exceptional" circumstances. To do otherwise would thwart Parliament's clear intention.***

…

14 *Having considered these developments and the Registrar's Practice Note, it is our view that: (i) the term "McKenzie friend" is not appropriate in the Court of Appeal Criminal Division. Terms such as "applicant's friend" or "applicant's helper" might well be more appropriate, but it would be wrong to express a concluded view pending the results of the consultation in the Civil and Family jurisdictions;* ***(ii) the court will only allow a non-qualified third party to address the court in exceptional circumstances, and this will be decided on a case-by-case basis;*** *(iii) if the Registrar has exceptionally granted permission for a non-qualified third party to act as a litigator, it does not follow that the court will also grant the third party a right of audience. It will only do so in exceptional circumstances; (iv) the Registrar's Practice Note is generally consistent with the current law and best practice in this area; (v) however, we recommend a number of possible improvements. First, we would invite the Registrar to consider whether the terminology is such that it can be properly*

understood by the majority of litigants in person. Second, we suggest the Registrar may wish to structure the guidance in such a way it better highlights the individual stages in the process. This should enable bodies (such as student law advisory bodies) to make an informed decision as to how far they can go in assisting a litigant before involving the services of a lawyer. Third, parties should be put on clear notice that an application should not be advanced beyond the single judge stage, following a refusal, without the applicant being fully advised as to the possible consequences." [emphasis added]

39. In this case, it is important to underscore that the appellant was self-represented **by choice**. On February 12, 2016, the judge advised the appellant about the convenience of having proper legal representation and said that on every occasion that the appellant was asked whether he wanted to be legally represented, he responded in the negative[26]. The judge had no power to force representation on him.

40. We do not approve of the adoption of the "McKenzie friend" approach in either the High Court or the Court of Appeal. In our view, the decision in **McKenzie[27]** and the principles relating to the "McKenzie friend", having been set out approximately fifty years ago, in 1970, are impractical in today's legal landscape in Trinidad and Tobago. In this jurisdiction, the vast majority of litigants are represented by counsel, whether privately retained or acquired through the Legal Aid and Advisory Authority. The primary focus of the Legal Aid and Advisory Authority is to provide legal advice and representation to those citizens of Trinidad and Tobago who are unable to privately secure the services of an attorney, usually due to financial constraints. In cases where litigants are insistent on self-representation, trial judges are, in our experience, quite mindful of their enhanced obligation in ensuring that those persons receive a fair trial.

41. Further, there have been significant developments in both substantive and procedural criminal law in the last fifteen years. With respect to substantive criminal law changes, legislation was introduced dealing with the admissibility of hearsay evidence and bad character evidence in the

[26] Notes of Evidence at page 28.
[27] McKenzie (n. 24).

Evidence (Amendment) Acts Nos. 5 of 2007 and **16 of 2009** respectively. There has also been a change in the approach to evidence of good character in jury trials which has been set out in several decisions of the Privy Council, more notably, in the decisions in **Teeluck and John v The State**[28], **Bhola v The State**[29] and **Hunter and Ors. v R**[30] Further, the decision in **R v Jogee and R v Ruddock**[31] revised the doctrine of joint enterprise, more specifically, the mental requirement for accessorial liability. In the realm of procedural criminal law, the advent of the Criminal Procedure Rules 2016 brought about changes in the practice and procedure to be followed in all criminal courts. In light of these developments, the reality exists that unqualified third parties seeking to address the court on behalf of unrepresented litigants would be ill-equipped to do so.

For these reasons, we find no merit in this ground of appeal.

Ground 4: The Learned Trial Judge's directions on lies as it related to material issues were inadequate and erroneous.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

(40) Mr. Rajcoomar contended that the judge's indication to the jury that the appellant might have lied about making or receiving telephone calls was highly prejudicial. This was particularly so given that the telephone calls, which were undocumented by both service providers, were contradicted by Hall's evidence. He submitted that the judge erred in law by not directing the jury to consider that the appellant's statements must be proved to be a lie by the prosecution beyond reasonable doubt before they can be given any weight.

(41) Mr. Rajcoomar submitted that the judge's directions on lies were inadequate in that he failed to direct the jury that the statements (i) must be deliberate; (ii) must relate to a material issue; (iii)

[28] [2005] UKPC 14.
[29] Privy Council Appeal 26 of 2005.
[30] [2015] EWCA Crim 631.
[31] [2016] UKSC 8; [2016] UKPC 7.

must have been motivated by guilt and an attempt to hide the truth; and (iv) must be clearly shown to be a lie by evidence such as an admission or evidence of an independent witness. The decision in **Bruce v The State**[32] was relied on in support of this submission.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

(42) In response, Mr. Pilgrim contended that the judge's directions on lies were appropriate in the circumstances of this case. He submitted that the directions cited by Mr. Rajcoomar were relative to lies not being relied on to establish guilt but to the credit of the accused, generally. It was submitted that the judge in his summing up instructed the jury that they could not use the lies to arrive at a finding of guilt and that lies could be told for several reasons unconnected to the issue of guilt.

(43) Further, Mr. Pilgrim submitted that the reference to lies in the appellant's statement arose when the judge was explaining to the jury why it was tendered in the context of the prosecution case. He submitted that the evidence in relation to the telephone records dealt strictly with the appellant's credibility and were not relied on by the prosecution to support an inference of guilt. It was called as rebuttal evidence after the prosecution had closed its case. The decision in **Fabien La Roche v The State**[33] was relied on in support of these submissions. In that case, Weekes JA (as she then was) said at paragraphs 66-67:

> *"[66]* ***The, perhaps unintended, effect of a Lucas direction is to raise the profile of lies told by an accused. There are occasions on which such lies can only really go to the issue of the accused's credibility and where this is so to erroneously give a Lucas direction gives the jury the false impression that such lies as they find are possibly capable of supporting the prosecution's case in the sense of being proof of guilt. The jurors may put the fact that the accused has told a lie into the mix in deciding the ultimate question.*** *As seen in Miah the issue becomes even more critical where*

[32] Cr. App. No. 31 of 2009.
[33] Cr. App. No. 32 of 2009.

provocation is left to the jury since the issue joined between State and Defence would be a very narrow one and any factor that unfairly tips the scale against the accused is to be avoided.

[67] ***We urge judges to carefully consider whether lies of the accused arising on the evidence warrant a Lucas direction or a more general direction on credibility arising from inconsistencies and where one is warranted*** *and the issue of provocation is live to tailor the direction to conform with that in Miah as cited above."* [Emphasis added]

THE LAW, ANALYSIS AND REASONING

(44) The judge in his summing up at pages 33-34 directed the jury on the issue of lies:

"Members of the Jury, if you accept the evidence contained in the phone logs, you may conclude that the Accused had lied when he spoke of the calls made by Andrew Hall to DM's phones, and the calls that he made to DM, the calls that the Accused made to DM after the accusation of rape had been made*.*

Even if you conclude that the Accused's evidence regarding those two sets of phone calls was false, that conclusion does not itself entitle you to convict the Accused of rape. The evidence regarding the phone calls may, depending on the view you take, it may be related to the circumstances under which the Accused had sex with DM on the 27th March, and her reaction after her boyfriend decided to take her to the police*.*

…This evidence does not itself show whether there was consent, but ***depending on what you make of it, this evidence may shed some light on the issue of whether they were voluntarily having sex and her boyfriend was constantly calling her, and whether after they had voluntarily had sex she was concerned that their sexual liaisons had been exposed****, and that the Accused would be reported to the police on the basis of that false report of rape that she had made because her boyfriend had become suspicious.*

If you find that there were no phone calls, you may conclude that she was not attempting to apologise or to inform the Accused about where she was being taken,

and that there had been no consensual sex. *The Prosecution must make you sure of the guilt of the Accused. You must go to the evidence presented to you by the Prosecution regarding the circumstances of the sexual intercourse between the Accused and DM, and you must determine whether on the basis of that evidence you are sure that the Accused had sexual intercourse with DM without her consent."* [emphasis added]

(45) At page 41 of his summing up, the judge gave the following directions:

"The Prosecution do not rely on this statement as part of its case. The fact that the Prosecution has put it in does not mean that they agree with what the Accused says in it. *In fact, Counsel for the Prosecution has expressly stated the Prosecution's contention that the statement of the Accused contains lies****. It is part of the evidence. It does not mean that the Prosecution relies on it for its contents. It is relevant for you to see the reaction or response of the Accused when the allegation of rape was first put to him by the police."*** [emphasis added]

(46) The judge, at page 49 of his summing up, directed the jury as follows:

"If you reject the case for the Accused, if you do not believe his case, you do not automatically convict him for that reason. ***Because a person may tell a lie, a person may make up a false defence for reasons which are not necessarily inconsistent with innocence. A person may do such things out of fear, because of nervousness or because he feels that he needs to bolster up a genuine defence."*** [emphasis added]

(47) At the trial, the appellant gave evidence that there were numerous telephone calls from Hall to the VC at the time of the incident. The prosecution succeeded in their application to introduce rebuttal evidence in the form of telephone records which showed that no phone calls were made by Hall to the VC at the relevant time. Prosecuting counsel indicated that the evidence was being relied on not to prove the appellant's guilt but *"to deal with a particular issue in his defence that the State was of the view that he had indicated incorrectly"*[34]

[34] Notes of Evidence at page 142.

(48) With the introduction of the telephone records into evidence, the judge was bound to assist the jury on how they were to deal with them. The judge correctly directed the jury that if they found the appellant's evidence regarding the telephone calls to be untrue, such a conclusion was not probative of guilt and that lies could be told for several reasons that had nothing to do with guilt. He correctly informed them that the telephone calls might be related to the circumstances under which the appellant had sexual intercourse with the VC and her reaction after her boyfriend decided to take her to the police. The judge went on to direct the jury that, if they found that there were no telephone calls made, they might conclude that the VC was not attempting to apologise to the appellant or to inform him as to where she was being taken, and that there had been no consensual sex.

(49) We find the judge's directions on the issue to be impeccable. A Lucas direction was not required in this trial. Had the judge given a Lucas direction, this would have had the deleterious effect of raising the profile of the lie as alluded to by Weekes JA (as she then was) in the decision in **Fabien La Roche v The State**[35]**.** The issue of lies arose only in relation to the appellant's credibility and was not relied on by the prosecution as supportive of guilt. In his directions on lies, read in totality, the judge was doing no more than directing the jury that they could use the telephone records as a tool in evaluating the appellant's credibility. In our view, these directions negated the danger of the jury using the lies as evidence of guilt.

This ground of appeal is without merit.

[35] Fabien La Roche (n. 33).

Ground 5: The Learned Trial Judge failed adequately or at all to direct the jury on distressed condition.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

(50) Mr. Rajcoomar submitted that the judge erred in law by giving the jury an inadequate direction regarding the evidence of distressed condition. He contended that the judge ought to have directed the jury on the need for special circumstances, for example, the VC being unaware that she was under observation immediately after the incident, in which case the jury ought to have been directed to attach little weight to the evidence. He submitted that in the absence of such a direction, prejudice accrued to the appellant, making his conviction unsafe. The decisions in **R v Venn**[36], **Elliot Alexander v The State**[37] and **R v Knight**[38] were relied on in support of these submissions.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

(51) Mr. Pilgrim submitted that the evidence of injuries and the fact that the VC was crying after the incident was not treated by the judge as evidence of distressed condition. It was submitted that the evidence was raised in the context of treating with a potential discrepancy between the VC's testimony and the medical evidence. Mr. Pilgrim submitted that there was no direction by the judge in which he linked those pieces of evidence as assisting in establishing guilt. The decisions in **Fitzroy Lessey v The State**[39] and **White v R**[40] were relied on in support of these submissions.

[36] [2003] All ER [D] 207.
[37] Cr. App. No. 21 of 1980.
[38] (1966) 50 Cr. App. R. 122.
[39] Cr. App. No. 14 of 2002.
[40] White (n. 17).

THE LAW, ANALYSIS AND REASONING

(52) In the decision in **R v Venn**[41], Lord Justice Potter said at paragraph 45:

> *"45. Historically, the rules concerning the admissibility of evidence as to the distress of a complainant were developed in the context of the requirement for corroboration in relation to sexual offences, which requirement has since been abolished. However, the observations as to the circumstances in which evidence as to distress may carry probative weight in such cases remain valid: see for instance R v Redpath [1962] 47 Crim App R 319 and R v Chauhan [1981] 73 Crim App R 232 which make clear that such evidence should carry no weight if it is only part and parcel of the making of a complaint. However, it may properly be afforded weight if the complainant is unaware of being observed, and if the distress is exhibited at the time of, or shortly after, the offence itself, in circumstances which appear to implicate the accused."*

(53) In the decision in **R v Knight**[42], Lord Parker CJ said at page 649, that despite what he said in **R v Redpath**[43],

> *"…there has been a tendency since then for judges to leave to the jury almost every case where a complainant is seen to be in a distressed condition, and in several cases since R v Redpath and, in particular, two cases to which we have been referred, R v Okoye and R v Luisi, I endeavoured to stress that the distress shown by a complainant must not be over-emphasised in the sense that juries should be warned that, except in special circumstances, little weight ought to be given to that evidence."*

(54) The judge in his summing up referred to the VC's evidence as follows:

> *"While dropping her home he kept asking her if he was going to tell Michael. She did not respond, she was crying. When she got home she ran to the house and she*

[41] Venn (n. 36).
[42] Knight (n. 38).
[43] (1962) 46 Cr. App. Rep. 319.

told her boyfriend what had happened. She said that while she was inside crying, her boyfriend called the Accused."[44]

(55) The judge went on to say:

"*The Accused asked DM whether she was trying to get away after, as she claimed, he had pushed her on to the bed and he had come over her. She said, "Yes." She said, "You had held on to my hands." She said that she had digs on her hands. She conceded that those things, those injuries or those digs did not find themselves in the medical report. She said that she had scratches also on her legs. She said that she told Ms Allsop about that and her boyfriend."*[45]

(56) We are of the view that evidence of the injuries which the VC said that she sustained as a result of the incident, namely, scratches on her hands and on her legs, coupled with her crying about the incident, was not treated by the judge as distressed condition and was not referred to as being potentially corroborative of her complaint. The medical report was silent as to the injuries which the VC said that she had sustained. Those pieces of evidence were therefore properly brought to the jury's attention in order to treat with the potential discrepancies in the VC's evidence and in the medical evidence. The judge neither over-emphasised the evidence nor suggested that they be given any particular probative weight. Further, there was no linking of the evidence to the finding of guilt. The judge properly directed the jury that:

"This case stands or falls with the view that you take of the evidence of DM. There is no other evidence which is capable of supporting her evidence of the absence of consent."[46]

"Conversely, it does not follow that signs of distress by a witness confirms the truth and accuracy of the evidence given. What I am saying is to see the person crying does not mean that the person is speaking the truth. Conversely, the fact that the person did not cry does not mean that the person was lying. Different individuals have

[44] Summing Up at page 20, lines 23-27.
[45] Summing Up at page 26, lines 16-24.
[46] Summing Up at page 49, lines 21-24.

different methods peculiar to themselves of coping with the situation."[47]

"In any event, as we have discussed, maintaining or losing composure is not necessarily a telltale sign of truthfulness or otherwise. It is still necessary to examine the content of the witness' evidence…"[48]

(57) In these circumstances, we find that the judge was not required to direct the jury on the distressed condition of the VC.

This ground of appeal is unmeritorious.

Ground 6: The Learned Trial Judge's directions were erroneous and inadequate in the circumstances of this case and resulted in the unbalanced treatment of evidence.

(58) Under this ground of appeal, Mr. Rajcoomar made three distinct complaints which would each be considered in turn.

Error with respect to directions on the appellant's cautionary statement

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

(59) Mr. Rajcoomar submitted that the judge erred in law by not directing the jury to consider whether the prosecution proved beyond reasonable doubt that the appellant's statement was false.

[47] Summing Up at page 17, lines 38-44.
[48] Summing Up at page 18, lines 7-11.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

(60) Mr. Pilgrim submitted that the judge's reference to lies and to the appellant's statement in his summing up was to explain to the jury why the prosecution might tender a statement which contradicted the VC's evidence. He submitted that the judge gave very careful directions on how the jury ought to treat with lies, if they found that the appellant told lies, and clearly directed them that the burden of proof fell on the prosecution.

THE LAW, ANALYSIS AND REASONING

(61) The judge gave the following directions on the appellant's cautionary statement:

> *"Now, what about the statement which the Accused gave to the police? When the Accused was met at the Chaguanas Police Station on 1st April, he told the police that he was willing to give a statement, and that statement was recorded and it was presented to you. The Prosecution do not rely on this statement as part of its case.* ***The fact that the Prosecution has put it in does not mean that they agree with what the Accused says in it. In fact, Counsel for the Prosecution has expressly stated the Prosecution's contention that the statement of the Accused contains lies.*** *It is part of the evidence. It does not mean that the Prosecution relies on it for its contents. It is relevant for you to see the reaction or response of the Accused when the allegation of rape was first put to him by the police."*[49] [emphasis added]

(62) Although the judge did not specifically direct the jury to consider whether the prosecution proved to the requisite criminal standard that the appellant's cautionary statement was false, he gave general directions on how they should treat with lies, if they found that the appellant did in fact tell lies. He also directed the jury that the burden of proof in all of these issues rested on the prosecution. The judge directed the jury that:

> *"Now, Members of the Jury, the burden or the responsibility of proving the case, the guilt of the Accused rests upon the Prosecution. This means that the Prosecution have the responsibility of proving the guilt of the Accused, establishing his guilt. You must*

[49] Summing Up at page 40, line 49 to page 41, line 12.

understand clearly that the Accused bears no burden of proving anything. Specifically, it is not his task or his responsibility to prove that he is innocent.

…

Now, we have just discussed the burden or the responsibility of proving the case and we have discussed that the Prosecution bears that responsibility. So how does the Prosecution discharge that responsibility? The Prosecution discharges its responsibility and proves its case if after you, the jury, have considered all of the evidence relevant to the charge, if you come to the conclusion that you are sure that the Accused is guilty. Nothing short of that will suffice."[50]

(63) At page 12 of his summing up, the judge directed the jury that:

"…in the context of the burden of proof that we have discussed, the Prosecution must satisfy you so that you feel sure that the intercourse between the Accused and DM was not consensual, and that it … occurred in the manner described by her, and not in the manner described by him."[51]

(64) The judge went on to say at page 49 of his summing up:

"If you reject the case for the Accused, if you do not believe his case, you do not automatically convict him for that reason. Because a person may tell a lie, a person may make up a false defence for reasons which are not necessarily inconsistent with innocence. A person may do such things out of fear, because of nervousness or because he feels that he needs to bolster up a genuine defence.

If you reject the case for the Accused, then you must return to the case for the Prosecution. *You must ask yourselves the question on the Prosecution's case, are you sure that DM is a credible and reliable witness? Are you sure, the duty being on the State, that she is speaking the truth about the incident of sexual intercourse on the 7th March, 2010, which is to say that the Accused had sexual intercourse with her without her consent?"*[52]

(65) The foregoing extracts of the summing up reveal that at several points in his summing up, the judge gave specific directions to the jury and impressed upon them that the burden fell on the

[50] Summing Up at page 8, line 48 to page 9, line 14.
[51] Summing Up at page 12, lines 22-27.
[52] Summing Up at page 49, lines 6-20.

prosecution to satisfy them so that they feel sure that the appellant had sexual intercourse with the VC without her consent. In these circumstances, there was no need for the judge to direct the jury to consider whether the prosecution proved beyond reasonable that the appellant's statement false. This was an essential implication of finding the prosecution case properly proved.

Error with respect to directions on the virtual complainant's occupation as an explanation of her calm demeanour while giving evidence

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

(66) Mr. Rajcoomar submitted that the judge erred when he directed the jury to consider the complainant's occupation as a "weed wacker" operator as an explanation for her calm demeanour during the delivery of her testimony. He submitted that this misdirection, coupled with the use of the phrase *"in the experience of our court",* prejudiced the appellant by leading the jury to infer that the complainant's demeanour was mainly as a result of her character. He argued that there may be several reasons why a witness might remain calm while giving evidence about a traumatic experience. He submitted, however, that by specifically referencing the complainant's occupation, the issue was framed for the jury in an influential, unbalanced and prejudicial manner.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

(67) Mr. Pilgrim submitted that the judge appropriately directed the jury on not resorting to analytical shortcuts, for example, the stereotype that because the VC did not cry during her testimony, this meant that she was not traumatised. He further submitted that the judge left the issue of the

VC's credibility entirely for the jury's consideration. The decision in **Feroze Khan v The State**[53] was relied on in support of these submissions.

(68) Mr. Pilgrim further submitted that the juxtaposition of the VC's occupation in treating with the issue of stereotypes was a permissible comment made by the judge, and in any event, the jury were advised that they could reject such comments. The decision in **Ancil Lambert v The State**[54] was relied on in support of this submission.

THE LAW, ANALYSIS AND REASONING

(69) The judge directed the jury that:

> ***"The experience of our court is that persons who have been victims of rape react differently to the task of speaking about it when they come to give evidence. Some people would display obvious signs of distress, other persons will not. The reason for this is that every individual has his or her own method of coping with issues of this nature. The fact that DM gave her testimony and her account of the events without any obvious emotion, the fact that she did not "break down" to use that expression, without appearing to break down or to lose her composure, it does not mean that the allegation is false, or that her evidence should be disbelieved.***
>
> *Conversely, it does not follow that signs of distress by a witness confirms the truth and accuracy of the evidence given. What I am saying is to see the person crying does not mean that the person is speaking the truth. Conversely, the fact that the person did not cry does not mean that the person was lying. Different individuals have different methods peculiar to themselves of coping with the situation.*
>
> ***Members of the Jury, in this regard you may find it to be of assistance to remember what DM stated as her occupation. She describes herself as a wacker woman. You would recall, I don't know how many of you have ever met a wacker***

[53] Crim. App. No. P-015 of 2013.
[54] Cr. App. No. 106 of 1998.

woman in your lives. It is not a common occupation for a female. I say that with the greatest of respect.

You would recall, additionally, the way in which she reacted on her evidence to the Accused, when he had had sex with her. On her evidence, she began to curse him. You may form the view that she is a relatively hardy individual and that this may account for the apparent ability to maintain her composure as she related the events to you."[55] [emphasis added]

(70) We find the judge's comments on the VC's occupation as a reason for her composure during the giving of evidence to be entirely permissible. The judge essentially directed the jury to be wary of the stereotypes associated with sexual offences matters. In particular, he directed the jury to be mindful of the fact that because the VC did not cry during her testimony, this did not mean that she was not traumatised by the incident. In **Feroze Khan v The State**[56], Weekes JA, as she then was, said at paragraphs 21-22:

"21. But in one instance, the impugned passages deal with the circumstance surrounding reports of sexual offences. The matters are general and common to both jurisdictions. ***It cannot be doubted that sexual offences are within their own particular category and that special attention needs to be paid by jurors to the evidence. The judge had the duty to draw the jurors' attention to certain stereotypes so that they would not apply them when considering the evidence of the virtual complainant.*** *A good example of this would be the need in most sexual offence cases to tell the jury that one would be unlikely to find many more witnesses than the virtual complainant him/herself, given the nature of the offence.*

22. ***In our opinion the judge's use of the expression "in the experience of the courts" did not deprive the jury of their freedom to assess the evidence. What he did, was to better equip them so to do by ensuring that they gave due consideration to all the factors that might impact on their eventual findings of fact.*** *It is telling that counsel for the appellant conceded that the substance of the individual directions was unexceptionable. What the trial judge said has been the*

[55] Summing Up at page 17, line 26 to page 18, line 6.
[56] Feroze Khan (n. 53).

experience of the courts, and each time in the plural, signifying the collective experience of the courts in the jurisdiction, has indeed been that experience." [emphasis added]

(71) In any event, the judge early on in his summing up directed the jury that they could reject any views which he might express:

> *"…Similarly, as I review the evidence in this case,* ***if I appear to express any views concerning the facts, or if I appear to emphasize a particular aspect of the evidence, you should not adopt any of those views unless, independently, you agree with them.***
>
> *If I do not mention something which you think is important, you should have regard to whatever that issue or that aspect of the evidence is. You should give such weight to it as you think appropriate.*
>
> *What I am attempting to communicate to you very clearly is that when it comes to the facts of this case, it is your judgment alone that counts."*[57] [emphasis added]

(72) Further, the judge at several points in his summing up left the assessment of the VC's credibility to the jury. One such example is as follows:

> *"So I have discussed with you that you must decide whether you are sure that DM did not consent to sexual intercourse with the Accused. That would require an assessment by you of DM's evidence.* ***I emphasize that that assessment is for you to make.*** *However, it is important that you do not bring to that assessment any preconceived views as to how a witness in a trial such as this should react to the experience."*[58] [emphasis added]

(73) We agree that there are many reasons why witnesses might remain calm during their testimony regarding a traumatic experience. However, we do not agree with Mr. Rajcoomar's contention that by specifically referencing the VC's occupation as one such reason, the issue was framed

[57] Summing Up at page 5, lines 22-33.
[58] Summing Up at page 17, lines 14-21.

before the jury in an unbalanced and prejudicial manner. The judge was bound to assist the jury on questions of fact and law, and left all of the material issues squarely for their evaluation.

(74) In line with **Feroze Khan**[59], we actively encourage trial judges to sensitise juries about the dangers of commonly held misconceptions and myths about the behaviour of sexual assault victims. A failure to do so, in light of the wide research literature and legal learning on the subject, and the common experience of the courts, could lead to a distorted picture being presented.

Error in direction with respect to the failure to cross-examine the virtual complainant as to her state of mind after her injury

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

(75) Mr. Rajcoomar submitted that the judge erred by directing the jury to accept that the VC was not cross-examined about her state of mind after her "burn accident" and in the circumstances leading up to the alleged agreement between herself and the appellant. He argued that this direction prejudiced the appellant as it eliminated a significant aspect of his defence.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

(76) Mr. Pilgrim contended that the judge was factually correct in both of his directions on the appellant's evidence. The factual directions were not contradictory. He submitted that what the appellant had put to the VC were two disjointed facts, (i) that she thought that she could not "get a man again" and (ii) that there was an arrangement *"to friend"*. He linked those pieces of evidence for the first time in his evidence. Mr. Pilgrim submitted that the judge in his summing up stated that the appellant never put to the VC that the feeling of not being able to *"get a man again"* **led** to the arrangement.

[59] Feroze Khan (n. 53).

(77) Mr. Pilgrim reiterated the principle that it is no part of a trial judge's function to hide inconsistencies in the defence case. He relied on the decision in **Marlon John v The State**[60] in support of this submission.

THE LAW, ANALYSIS AND REASONING

(78) The judge in his summing up said:

> *"**When those suggestions were put to DM by the Accused, there was no suggestion then that she and him came to this agreement because, this is my words, because she was feeling sorry for herself or because she was in despair, or because she was saying that no man would ever want her because of her condition.** The point I am making to you is that **when DM was cross-examined by the Accused, that was not suggested to her.**"*[61] [emphasis added]
>
> *"**The Accused put to her that when she got burnt that she was of the opinion that no man would ever want her again.** She said, "That is not true. When I saw how I was looking, I gave my boyfriend the option to leave." **The Accused then put to her that they had an agreement that they would friend together and that he would give her a $1,000 a month.**"*[62]

(79) In these directions by the judge, he was simply drawing the jury's attention to the fact that the appellant never put to the VC that the feeling of *"not being able to get a man again"* led to the arrangement between them whereby he would give her $1,000.00 per month in exchange for sexual favours. What was in fact put to the VC were (i) that she thought she *"could not get a man again"* and (ii) that there was an arrangement *"to friend"*[63]. In our view, these comments by the judge did not constitute a misdirection, as suggested by Mr. Rajcoomar. We wish to reiterate

[60] (2001) 62 WIR 314.
[61] Summing Up at page 22, line 48 to page 23, line 5.
[62] Summing Up at page 27, lines 20-24.
[63] Notes of Evidence at page 71.

what was said by this Court in the decision in **Marlon John v The State**[64], that is, it is not the function of a trial judge to hide the inconsistencies in the defence case.

Based on the foregoing, this ground of appeal is unmeritorious.

Ground 7: The Learned Trial Judge's directions on the statement of the appellant were erroneous and inadequate in the circumstances, and in particular, having regard to the appellant's good character.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

(80) Mr. Rajcoomar submitted that the judge erred in law by not directing the jury to consider the appellant's good character and its weight toward their findings regarding the appellant's credibility when giving pre-trial statements and his propensity to commit the offence charged. The decisions in **Clint Melville v The State**[65], **Teeluck and John v R**[66] and **Jagdeo Singh v The State**[67] were relied on in support of this submission.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

(81) Mr. Pilgrim submitted that the judge gave an appropriate good character direction with respect to both the credibility and propensity limbs. He submitted that the judge directed the jury that they could use the appellant's good character to evaluate his evidence and that it would not have been lost on the jury that the appellant's cautionary statement was entirely consistent with his evidence. Mr. Pilgrim sought to distinguish the decision in **Clint Melville**[68] from the present case. He argued that in **Clint Melville**, the appellant did not testify and his defence was only gleaned

[64] Marlon John (n. 60).
[65] Cr. App. No. T 10 of 2015.
[66] Teeluck and John (n. 28).
[67] [2005] UKPC 35.
[68] Clint Melville (n. 65).

through cross-examination. In that case, the judge erred by not linking the appellant's good character to the only admissible evidence of his defence, that is, his pre-trial statement.

42. Mr. Pilgrim further submitted that the appellant, on his evidence, paid the VC for sexual favours, in violation of section 17(b) of the Sexual Offences Act. He submitted that the judge in this case would have been perfectly entitled to withhold a good character direction in these circumstances and that the appellant derived a benefit from the judge's good character direction. The decision in **Hunter and Ors v R**[69] was relied on in support of this submission.

THE LAW, ANALYSIS AND REASONING

(82) The judge directed the jury on the credibility and propensity limbs of good character in respect of the appellant. The judge said:

> *"Now, before the addresses began on Tuesday, you may recall that the Prosecutor gave this Court confirmation that* ***the Accused has no convictions. What this means is that the Accused is what is called in law, "a person of good character." Now, of course, good character cannot by itself provide a defence to a criminal charge, but the absence of convictions on the part of the Accused is evidence which you should take into account in the following ways: First of all, the Accused has given evidence, and as with any man of good character, that good character supports his credibility, his believability. It means that it is a factor which you should take into account when you come to decide whether you believe or accept the evidence which the Accused has given.***
>
> ***Secondly, the fact that the Accused is a person of good character may mean that he is less likely than otherwise might be, to commit this offence of Rape at this stage in his life.***[70] [emphasis added]

[69] Hunter (n. 30).
[70] Summing Up at page 42, lines 5-22.

(83) The judge instructed the jury that they could use the appellant's good character to evaluate his evidence. That evidence fell squarely in line with what was said by the appellant in his voluntary cautionary statement. The validity of that statement was not brought into question at the trial. The appellant, in effect, adopted the contents of the statement as it related to the incident on the day in question. Accordingly, any omission of the judge to link the appellant's cautionary statement to his good character was of no consequence. On the facts of this case, the judge was under no obligation to direct the jury in the terms submitted by Mr. Rajcoomar. Even if there was merit in Mr. Rajcoomar's submission, in our view, given the strength and cogency of the VC's evidence, the judge's failure to give those directions would not have prejudiced the appellant.

(84) Mr. Pilgrim submitted that the appellant's conduct could have properly denied him a good character direction. In our view, the conduct alluded to by the appellant of paying the VC for sexual favours could reasonably be considered as reprehensible conduct.

(85) In **Hunter and Ors. v R**[71], Lady Justice Hallett DBE**,** in delivering the decision of the court said at paragraph 60:

> *"Where a defendant has no previous convictions but has admitted other reprehensible conduct the judge also has a discretion as to whether to give a direction and if so what kind."*

(86) At paragraph 68, Lady Justice Hallett DBE, in reiterating the binding principles derived from **R v Vye and Ors.**[72] and **R v Aziz**[73], said

> *"There are exceptions to the general rule for example where a defendant has no previous convictions but has admitted other reprehensible conduct and the judge considers it would be an insult to common sense to give directions in accordance with Vye. The judge then has a residual discretion to decline to give a good character direction."*

[71] Hunter (n. 30).
[72] [1993] 1 WLR 471.
[73] [1996] AC 41.

(87) Accordingly, we agree with Mr. Pilgrim's submission that the appellant benefitted from a good character direction when the judge could have properly exercised his discretion in omitting to give one.

This ground of appeal is without merit.

Ground 8: The Learned Trial Judge erred in law when he allowed to be admitted into evidence telephone records obtained by the State, in defiance of the Interception of Communications Act, on the basis that this Act did not apply to the proceedings.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

(88) Mr. Rajcoomar submitted that the judge erred in allowing the telephone records to be tendered into evidence. He submitted that this was in defiance of the **Interception of Communications Act**. In his oral submissions before this Court however, Mr. Rajcoomar conceded that nothing prevents a trial judge from requesting certain relevant documents. He submitted that this might be considered as ancillary to the provisions of the Act.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

(89) Mr. Pilgrim submitted that it was the appellant who requested the telephone records to prepare his defence and it was deployed without objection by him. He submitted that the judge committed no error in the admission of the telephone records as it was not done in violation of the **Interception of Communications Act Chapter 15:08**. According to Mr. Pilgrim, the telephone records were "communications data" within the definition section. He further submitted that the judge did not order disclosure of the telephone records but rather, they were voluntarily disclosed by the service providers.

(90) Mr. Pilgrim argued that even if the telephone records were unlawfully obtained, it was not inadmissible and the judge had a discretion to admit it. In support of this submission, he relied on the decision in **R v Khan**[74].

THE LAW, ANALYSIS AND REASONING

(91) We need not interrogate the scope of the **Interception of Communications Act** for the purposes of this appeal. That Act speaks to the regulation of and interception of telecommunications. We shall leave that issue for fuller consideration when it arises in a more appropriate case.

(92) The records in this case were disclosed in the conduct of a trial. We have gleaned from the Notes of Evidence that it was the appellant who requested the telephone records in order to prepare his defence[75]. The judge issued a subpoena to the service provider and a representative, Ms. Daniel, attended court on May 12, 2016. Ms. Daniel indicated that the service provider sought external advice as to the disclosure of records with respect to the **Interception of Communications Act**. The judge indicated that the request being made was outside the ambit of that Act[76]. On August 12, 2016, a representative from the service provider presented copies of the telephone records to prosecuting counsel and the appellant. Those records were not ordered by the court but were voluntarily disclosed.

(93) The prosecution also successfully applied to introduce certain telephone records as rebuttal evidence. It can be inferred from the Notes of Evidence that the appellant was asked by the judge if he had any objections to the application. He indicated that he had no objections[77].

[74] [1997] AC 558.
[75] Notes of Evidence at page 2 and at pages 130-131.
[76] Notes of Evidence at pages 46-47.
[77] Notes of Evidence at page 143.

(94) Underlying the **Interception of Communications Act** are privacy concerns and ensuring that those concerns are protected and not unduly encroached upon except under appropriate judicial supervision. A judge, engaging in a criminal trial process has the requisite powers in ensuring that a balance is struck with respect to those privacy concerns.

(95) In this case, the question of the admissibility of the telephone records is determinable by its relevance, notwithstanding how it was obtained. This is in line with the decision in **Kuruma, Son of Kaniu v R**[78], in which Lord Goddard held that the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue and if it is, the court is not concerned with how it was obtained[79]. However, in criminal cases, the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused person[80]. In this case, no arguments were proffered as to the improper exercise of the judge's discretion. We have reviewed the record of appeal and are of the view that the telephone records were properly admitted.

In the circumstances, we find no merit in this ground of appeal.

Ground 9: The Learned Trial Judge erred in law when he allowed the re-examination of the virtual complainant on the issue of the deceased's brother and exacerbated that error by denying the appellant the right to further cross-examine the virtual complainant on the issue.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

(96) Mr. Rajcoomar submitted that the judge erred in allowing the re-examination of the VC on the issue surrounding her deceased brother and in denying the appellant the right to further cross-examine her on this issue.

[78] [1955] A.C. 197.
[79] See also R v Sang [1980] A.C. 402, King v R (1968) 12 WIR 268 and R v Sargent [2001] UKHL 54.
[80] See Noor Mohamed v The King [1949] A.C. 182 and Harris v. Director of Public Prosecutions [1952] A.C. 694.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

(97) Mr. Pilgrim submitted that the judge did not err in permitting re-examination on the issue surrounding the VC's deceased brother. He submitted that this occurred because the prosecutor sought clarification on the issue which arose for the first time in cross-examination, which might have caused some confusion in the minds of the jury. He argued that after re-examination on the issue, the appellant sought to provide some clarification, which he could not do at that stage.

(98) Mr. Pilgrim submitted that even if the application was to cross-examine the VC on the issue, the judge might have legitimately ruled that the evidence was collateral and that there ought not to be any further evidence on it. He submitted that even if the judge erred in law, it did not affect the fairness of the trial, as the material was not at all prejudicial.

THE LAW, ANALYSIS AND REASONING

(99) In the cross-examination of the VC, it was put to her that she agreed to have sexual intercourse with the appellant on the condition that he pay her $1,000.00 each month. The VC denied that such an agreement existed between herself and the appellant. She said that the appellant told her that he wanted to help her financially on the request of her then deceased brother[81].

(100) At the end of the cross-examination of the VC, prosecuting counsel was allowed to re-examine her on the issue of her deceased brother. The VC recalled the appellant telling her that he was walking through Chaguanas late one night when he heard the voice of her deceased brother asking him to help her[82]. She affirmed that her brother was deceased at that time.

[81] Notes of Evidence at page 71.
[82] Notes of Evidence at page 73.

(101) At the end of the re-examination, the appellant enquired whether he could "respond to that"[83]. It appears from the Notes of Evidence that he was not allowed to make any response to the re-examination.

(102) In our view, the judge did not err in allowing prosecuting counsel to address the issue that arose in cross-examination as to the VC's deceased brother. Prosecuting counsel was entitled to address this issue which arose for the first time in cross-examination. Further, from the record, it does not appear that the judge denied the appellant the opportunity to further cross-examine the VC. We agree with Mr. Pilgrim's submission that it appeared that the appellant himself wanted to clarify the issues in an address before the jury and the judge, recognising that this was procedurally impermissible, did not entertain the appellant's request. In the circumstances, we find that no prejudice accrued to the appellant as a result of him being denied the opportunity to respond to the re-examination of the VC on the issue of her deceased brother.

This ground of appeal is without merit.

Ground 10: The Learned Trial Judge erred when he commented adversely on the appellant during the trial and in the presence of the jury.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

(103) Mr. Rajcoomar submitted that the judge erred when he commented adversely on the appellant during the trial and in the presence of the jury. He cited several instances of these alleged adverse commentaries.

[83] Ibid.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

(104) Mr. Pilgrim submitted that the instances of reprimand cited by the appellant was fair criticism of his conduct of the trial. It was submitted that the interventions of the judge were not inappropriate. The decisions in **Cannonier v Director of Public Prosecutions**[84] and **Michael v R**[85] were relied on in support of this submission.

THE LAW, ANALYSIS AND REASONING

(105) During the course of the trial, there were several instances where the judge intervened to inform the appellant of proper court procedure and etiquette. Examples of these interventions are highlighted below:

(a) *"Q: So you never know me as a police officer?*
Soondarsingh: the witness answered the question.
Q: Now what I'm going to show the court that you are a liar.
Court reprimands Mr. Allan and advises him to just ask his questions."[86]

(b) *"Court advises D that there are several procedural problems with the way he is seeking to pose his questions:*

(I) D reading from a document that is not in evidence and reading out the content of the document which is not in evidence in the case.
(II) If the document was not authored and/or written by the witness and he is not aware of who it was written by there is a hearsay problem.
(III) Questions cannot be posed to John about something that James wrote. John cannot answer as to why James did something.
Court advises D that he cannot put any entry in the station diary to the witness."[87]

(c) *"Court advises D that he is misquoting the evidence and that cannot be done."*[88]

[84] (2012) 80 WIR 260.
[85] [2010] 1 WLR 879.
[86] Notes of Evidence at page 10.
[87] Notes of Evidence at page 12.
[88] Notes of Evidence at page 13.

(d) *"Court advises D that he is making several suggestions one after the other without allowing the witness to respond. Following each contention with another contention. D is reminded that he is not there to give a speech nor is this an opportunity to go off."*[89]

(e) *"Court cautions D and advises witness to respond to the proposition."*[90]

(f) *"Court advises D that we are not at the Magistrates' Court and that D needs to draw anything he wishes to say to the Court's attention first."*[91]

(g) *"Court agrees and advises D that he has been warned previously about giving speeches. D will not be permitted to abuse the rules of evidence in the way that a lawyer could not and cannot. D will not hide behind ignorance in the court room and abuse the court room…"*[92]

(106) Mr. Pilgrim directed the Court to the decision in **Cannonier and Ors v Director of Public Prosecutions**[93], a decision of the Court of Appeal of the Eastern Caribbean States. In that case, counsel for Cannonier submitted that the judge's interventions during the closing speech of Cannonier's trial counsel were improper and gave the jury the impression that he was hostile to trial counsel, to Cannonier, and to Cannonier's case more generally. According to him, the denigrating nature of the interventions was such that a reasonable observer having attended the closing arguments would have left the court feeling that Cannonier had not received a fair trial. On this issue, Mitchell JA said at paragraph 101:

"[101] In my view, a reading of the trial transcript indicates that the judge's intervention was caused by counsel's inadvertent use of the expression 'tampered tape' instead of 'tamper-tape'. The first would have suggested to a listener that the tape had been tampered with, while the correct expression would have

[89] Notes of Evidence at page 16.
[90] Notes of Evidence at page 40.
[91] Notes of Evidence at page 66.
[92] Notes of Evidence at page 70.
[93] Cannonier (n. 84).

suggested that it was a tape used to prevent tampering with an exhibit. ***While the judge might have tempered his language, an accused is entitled to a fair trial, not to an unblemished one. I am satisfied that this intervention, as with the previous ones complained of, did not fall into one of the categories listed in Michel's case[56] which might render a trial unfair, thus: (a) those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury; (b) where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence; and (c) where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way.*** *For the foregoing reasons I would also dismiss this ground of appeal."* [emphasis added]

(107) We do not find the judge's comments to the appellant to be inappropriate or hostile. The judge's comments were instructional and necessary, particularly because the appellant was self-represented, on his own volition. The judge was simply adhering to the duties conferred upon him in dealing with a self-represented defendant. The judge exhibited great care and patience in ensuring that the appellant received the full panoply of necessary procedural guidance as an unrepresented defendant, without in any way compromising the fairness of his trial. The judge's method of dealing with the unrepresented appellant was a model of fairness and is to be commended. In our view, his interventions were not remotely of the impermissible character as set out by Mitchell JA in **Cannonier and Ors v Director of Public Prosecutions**[94] and did not render the trial unfair.

This ground of appeal is without merit.

[94] Ibid.

DISPOSITION

(108) The appeal is dismissed and the conviction and sentence are affirmed.

_____

A. Yorke-Soo Hon. J.A.

_____

R. Narine. J.A.

_____

M. Mohammed, J.A.