

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCRA2019/0011

BETWEEN:

LEE CRAMP

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Warren Cassell and Mr. Pete-Semaj McKnight for the Appellant
Mr. Anthony Armstrong, Director of Public Prosecutions with Mrs. Shannon Jones-Gittens for the Respondent

2020: September 28 & 29;
2021: April 20.

Criminal appeal — Appeal against conviction — Rape — No case submission — Whether judge erred by preventing defence counsel from making a no case submission — Whether judge misdirected himself and jury on evidence of a date rape drug rohypnol which was not before the court — Lucas direction — Whether judge erred in law by failing to distil and give an appropriate Lucas direction to the jury, which made the trial manifestly prejudicial — Whether judge failed to adequately put defence's case by neglecting to highlight salient issues during summing up to jury, thus rendering the conviction unsafe — Judicial

intervention — Whether judge improperly interrupted defence counsel during cross-examination so as to effectively undermined defence's case

The appellant, Mr. Lee Cramp, was a British policeman vacationing in Antigua where he met the virtual complainant, Ms. H, who was a second year nursing student at the American University in Antigua via the social media website, Tinder. They later made arrangements to meet in person via text. Ms. H was a virgin at the time and had made it clear to Mr. Cramp that there would be no sex upon their meeting. One evening, Ms. H picked up Mr. Cramp in her car and they journeyed to her home. They were having wine on her balcony, then Ms. H went inside to change into comfortable clothing and thereafter they began watching a movie from her laptop. When Ms. H took a further sip of her wine she thought it tasted strange. Mr. Cramp told her he had put vodka in the wine. She tried another sip and felt dizzy. Ms. H had no recollection of what happened next until she awoke the next day naked in bed with Mr. Cramp and there was bleeding from her vagina. A few days later she recalled having fallen off the bed with Mr. Cramp on top of her while she was shouting 'no'. A report was made to the police and Mr. Cramp was arrested, charged and convicted of rape. His case was that the sexual intercourse was consensual. The prosecution's case was that Ms. H, having become dizzy and unconscious, was in no position to give consent and that Mr. Cramp was reckless as to whether or not she consented.

Being dissatisfied with his conviction, Mr. Cramp appealed to this Court on several grounds from which the following issues arise: (i) whether the learned judge erred by preventing defence counsel from making a no case submission; (ii) whether the learned judge misdirected himself and the jury on evidence of a date rape drug, rohypnol, which was not before the court; (iii) whether the judge erred in law by failing to distil and give an appropriate Lucas direction to the jury, which made the trial manifestly prejudicial; (iv) whether the judge failed to adequately put the defence case by neglecting to highlight salient issues during his summing up to the jury, thus rendering the conviction unsafe; and (v) whether the trial judge improperly interrupted the defence during cross-examination in such a way that he effectively undermined the defence's case.

Held: dismissing the appeal and affirming the conviction, that:

1. Despite counsel for the appellant being hindered by the learned judge's attitude of incredulity that he was making a no case submission, it is easily discernible from the transcript that the learned judge nonetheless understood the gist of defence counsel's no case submission, which was that the evidence of penetration did not come from Ms. H but came from Mr. Cramp and therefore the prosecution had not proven that penetration took place. Additionally, the judge's invitation for the jury to step out of the courtroom for three minutes despite having been asked for a ten minute recess by defence counsel was allegorical, rather than confining each to

such time. It cannot therefore be said that defence counsel was prevented from making his no case submission.

2. There is no rule that the evidence of penetration in a rape case cannot come from the defendant. The fact that the evidence came from Mr. Cramp did not impair its cogency. Moreover, having regard to the nature of the evidence and the defence of consent, a submission of no case, embracing either a definite or unspecified time limit, would not have added value to its chances of success. There was therefore no basis upon which the judge could have withdrawn the case from the jury on the basis of a no case submission and the learned judge was correct in so finding.
3. Although a reasonable inference could be drawn from the evidence as to the deleterious effect of the drink on Ms. H and her capacity, nowhere in the transcript of summation did the learned judge make any reference to rohypnol in his charge to the jury. In circumstances where the learned judge never mentioned the 'date rape drug rohypnol' in his charge to the jury, the complaint that he misdirected the jury on the evidence of the drug, cannot be sustained.
4. A full Lucas direction is usually given by the judge whenever lies are relied on by the prosecution, or might be used by the jury, to support evidence of guilt as opposed to merely reflecting on the defendant's credibility. It is necessary to give a Lucas direction when on some collateral matter, and due to some change in evidence or account by the defendant, there is scope for drawing an inference of guilt from the fact that the defendant had told lies. The learned judge gave two Lucas directions. The first was in the context of Mr. Cramp's initial assertion that he and Ms. H did not have sex. The other related to Mr. Cramp saying he did not remember what happened. The learned judge's directions were full and contextualized in light of the evidence. The jury were given the important direction that if they were sure that Mr. Cramp lied, the mere fact that he lied is not, in itself, evidence of guilt, as a defendant may lie for innocent reasons. The terms of the Lucas directions were therefore adequate, fair and in keeping with an appropriate Lucas direction in the circumstances.

R v Lucas [1981] QB 720 applied; **R v Wilsher** [2021] EWCA Crim 121 considered; **R v Wainwright** [2021] EWCA Crim 122 considered.

5. A trial judge is under no obligation to rehash each and every argument advanced by counsel. However, a failure to mention an item of evidence in final instructions to the jury, to which reference has been made during the course of trial, could result in the conviction being unsafe if that item is the foundation of the defence advanced. The foundation of the defence in this case is consent. The matters relied upon in

support of the ground that the trial judge did not put the defence adequately to the jury do not engage the foundation of the defence. The judge's direction encapsulated the essential controversy of whether or not Ms. H was in a state where she was capable of giving consent. There is no doubt that the trial judge clearly and adequately directed the jury on the defence of consent. Accordingly, the judge did not fail to adequately put the defence to the jury so as to render the conviction unsafe.

R v Daley [2007] 3 SCR 523 considered.

6. Excessive or inappropriate judicial intervention may compromise the fairness of a trial. However, the mere fact that a judge intervenes excessively or inappropriately does not necessarily lead to a conviction being quashed. The decision for the court is whether the nature and extent of the interventions have resulted in the appellant's trial being unfair. The interruptions by the learned judge, though many, are not of the quality warranting appellate interference. In some of the examples relied on by defence counsel, the learned judge sought to clear up ambiguities and to make corrections where the evidence was being misquoted or mistaken. In other cases, the interruption was unnecessary. It cannot be concluded, however, that the interruptions were such that defence counsel was unable to present his case properly. The learned judge therefore did not undermine the defence case, neither did the interruptions render the trial unfair or the conviction unsafe.

R v Hamilton [1969] Crim LR 486 considered; **R v Hulusi** (1973) 58 Cr. App. R 378; **R v Inns (Gavin)** [2018] EWCA Crim 1081 considered.

JUDGMENT

- [1] **BAPTISTE JA:** She was an American in Antigua. A second year nursing student at the American University there. He was a British policeman vacationing in Antigua. They met via the social media website Tinder and exchanged messages, some of which were flirtatious in nature. They were both 22. One evening she drove to collect him and they journeyed to her home. She lived alone. Vodka and wine were available. She was *virgo intacta*.
- [2] The night before, she had made it clear that there was to be no sex. They had wine on her balcony, she then changed into comfortable clothing and they settled down to view the movie American Pie from her laptop in her lounge. She took a further

sip of wine and thought it tasted strange. Lee Cramp said he had put vodka in the wine. She tried another sip and felt dizzy. She remembered little else until waking up next day naked in bed with Cramp, except a few days later she recalled she had fallen off the bed with Cramp on top of her while she was shouting 'no'.

- [3] On awakening the next morning, both Ms. H and Cramp were naked on the bed and there was bleeding from her vagina. She was no longer *virgo intacta*. Something had happened. Ms. H had no recollection of what happened except that the first drink she had, tasted different and the second sip made her dizzy. A report was made to the police and Cramp was arrested, charged and convicted of rape. His case was that the sexual intercourse was consensual. The prosecution's case was that Ms. H was in no position to give consent and that Cramp was reckless as to whether or not she consented.
- [4] Ms. H's recollection from start to finish was that she had made it plain the night before that there would be no sex. Furthermore, shortly after she had the second sip of wine she became dizzy and was unconscious about what happened during the rest of the night except having flashes of recollection. The prosecution's case was that she was therefore not capable of consenting.
- [5] Cramp firstly denied that sexual intercourse took place but then, shortly thereafter, said they had sex, with Ms. H playing a leading role in initiating and carrying out the act of sexual intercourse. According to him, she went on top of him and inserted his erect penis into her vagina and bounced up and down on it so much that they both fell off the bed. Also they were both conscious and not drunk.
- [6] During the trial, there was evidence that Cramp placed what he said was vodka in Ms. H's wine while she was momentarily absent, away in the bedroom. The Director of Public Prosecutions (the "DPP") contended that whatever was placed in her wine is immaterial, what really matters is the outcome within minutes of taking a sip. Ms. H was medically examined 10 days after the sexual intercourse. The examination

revealed multiple abrasions and ulcers to the genitalia. There were also multiple ulcers to the anus and perianal region. The doctor opined that the injuries to the genitalia were consistent with significant trauma.

The appeal

The no case submission

[7] Cramp has advanced several grounds in his appeal against conviction before this Court. The first ground I will consider is the complaint that the learned judge erred when he prevented defence counsel from making a no case submission. At the close of the prosecution's case, and in the presence of the jury, Mr. Cassell, Cramp's counsel, informed the learned judge that he was going to make a no case submission. Mr. Cassell asserts that he was denied that opportunity. Counsel also complains that the learned judge commented on the evidence in a way that could be interpreted as determining an issue of fact and as being prejudicial to the fair determination of the defence. Mr. Armstrong, the DPP, rejects the assertion that Mr. Cassell was prevented from making a no case submission and contends that the transcript does not lend support to that complaint. He submits that Mr. Cassell did make a no case submission. Both counsel pointed to the transcript in support of their arguments.

[8] Volume 4 of the transcript, page 54 is revealing. Mr. Cassell informed the court that he intended to make a no case submission and requested a ten minute recess before proceeding therewith. The learned judge invited the jury to step outside for three minutes. The jury went out. The transcript continues:

“THE COURT: Mr. Cassell, where are you coming from with the thought that you can make a submission on no case grounds for this case?

Mr. CASSELL: My Lord –

THE COURT: I expect a certain (indiscernible) how can you begin to suggest (indiscernible) very clear that any sexual intercourse (indiscernible). That there is no case ... (indiscernible).

Mr. CASSELL: We intend to indicate that in the no - case submission with due respect.

THE COURT: I'm sorry; (indiscernible) lay it out now in a short (indiscernible) sentence. How can you invite a submission of no case (indiscernible) seriously wrong with that.

Mr. CASSELL: Because, My Lord, from the evidence of the prosecution there is no evidence, there is nothing to -- from Ms. [H] indicating that there was penetration.

THE COURT: He said they had sex.

Mr. CASSELL: But, My Lord --

THE COURT: I'm sorry. He said it, it's there, and it's in his text messages.

...

Mr. CASSELL: That evidence must come from the prosecution's witness, My Lord, and when put to her she said, no, that is not the case.

THE COURT: But, Mr. Cassell, (indiscernible) there. The evidence is plain with respect to intercourse.

Mr. CASSELL: Well, My Lord, I realize it would have been an exercise in futility in regard to how the [c]ourt (indiscernible).

THE COURT: (indiscernible), Prepared Statement, Line 134, She took my penis in her hand and guided it into her vagina. We then had sex with me - - she then had sex with me. That was the (indiscernible).

Mr. CASSELL: My Lord, that is --

THE COURT: Thank you. Is there anything else you want to say?

Mr. CASSELL: Nothing else.

THE COURT: Thank you. Jury back, please."

- [9] From this exchange, Mr. Cassell submits that the defence was denied the right to make a no case submission. Further, instead of granting the ten minute recess requested or indicating a lesser time would be granted, the learned judge in the presence of the jury responded thus: 'THE COURT: Well, why don't -- ladies and gentlemen, if you'd like to step outside for three minutes, please.' Mr. Cassell makes

the rather startling submission that by asking the jury to step out for three minutes, the judge sent a clear message to the jury that he was not prepared to entertain any arguments on behalf of the defence. In addition, the judge ran the risk of closing the mind of the jury to any evidence in support of the defendant's case. Mr, Cassell concludes that on this ground alone, the defendant was deprived of a fair trial, having been stultified in his attempt to make a no case submission, which it was his right to do. Counsel invites this Court to uphold the appeal and quash the conviction.

[10] Mr. Armstrong asserts that the record of transcript bears out that a no case submission was made, the thrust of which was that there was no evidence of penetration coming from Ms. H's counsel, and further points out the fact that the evidence of penetration having come from the accused in this case does not negate its value or cogency. Further, the learned judge did not cut out Mr. Cassell's submission within a specific time. It was Mr. Cassell, when invited whether he had anything else to say, who said no. The reference to 3 minutes and 10 minutes by the learned judge and defence counsel respectively, was allegorical rather than confining each to such time. Mr. Armstrong also submits that there was overwhelming evidence of penetration; there was evidence that the crime was committed; the evidence was not tenuous, and on the evidence, and as a matter of law, this ground of appeal is unmeritorious.

[11] From reading the transcript, it is clear to me that the learned judge found it incredulous, given the evidence, that Mr. Cassell would even have considered making a no case submission. This is borne out by the judge's comments including: 'where are you coming from with the thought that you can make a submission on no case grounds for this case?' and '[h]ow can you invite a submission of no case (indiscernible) seriously wrong with that.' Given the evidence, the learned judge's incredulity is understandable. It is clear that the learned judge's attitude to the no case submission as seen in the transcript, made it difficult for Mr. Cassell to advance his submission. In the circumstances, when asked whether he had anything else to say, Mr. Cassell said no.

[12] I am not of the view that Mr. Cassell was prevented from making a no case submission. He was however hindered in advancing it by the learned judge's attitude to the submission. From reading the transcript, it is however easily discernible that the learned judge had the gist of the no case submission; which essentially was that the evidence of penetration did not come from Ms. H but came from Cramp. Like Mr. Armstrong, I am of the view that nothing says that the evidence of penetration could not come from what Cramp had said. The fact that the evidence came from what Cramp said did not impair its cogency. Given the evidence at the trial, and that the salient issue was that of consent, I agree with Mr. Armstrong that the no case submission was misplaced.

[13] Mr. Cassell's argument with respect to the interpretation the jury would have placed on the learned judge's response to the request for a ten minutes recess to make the no case submission, is quite fanciful, highly speculative and devoid of any basis. I am of the view that the reference to ten and three minutes by counsel and the learned judge was just allegorical, rather than confining each to such time. In any event, having regard to the nature of the evidence and the defence of consent, a submission of no case, embracing either a definite or unspecified time limit would not have added value to its chances of success. There was no basis upon which the judge could have withdrawn the case from the jury on the basis of a no case submission.

[14] For the reasons given, the ground of appeal relating to the no case submission is dismissed.

Misdirection as to evidence of rohypnol

[15] Another ground of appeal advanced is that the learned judge misdirected himself and the jury on evidence of a date rape drug, rohypnol, which was not before the court. Mr. Cassell complains that the learned judge in his summation spoke extensively about Ms. H being drugged when, in fact, the prosecution did not put

forward any evidence that she was drugged. Counsel argues that Ms. H never testified that she was drugged and nowhere in the evidence was it suggested that the date rape drug rohypnol was used. There was no toxicology report.

- [16] In support of this ground Mr. Cassell relies on two extracts from the learned judge's summation. Mr. Cassell stated that on 23rd May 2019 when the jury asked for clarity, the learned judge stated at line 9, page 7 of volume 5 of the record of appeal : 'The question for you is, are [you] sure he drugged her? If sure he'll be guilty of rape.'
- [17] Mr. Armstrong submits that this ground is baseless and argues that the record of transcript clearly shows that the learned judge did not make any reference to rohypnol in his direction to the jury. Further, nowhere in the two extracts relied on by Mr. Cassell are the words 'date rape drug rohypnol' used. Mr. Armstrong further submits that Mr. Cassell has conflated the word 'drugged' as used by the judge with the words 'date rape drug rohypnol' to which the judge made reference in his sentencing remarks.
- [18] Mr. Armstrong submits that on the evidence it was perspicuous that Ms. H's wine was laced with something that she did not put in or had any knowledge of and, that this was done in her absence. Whatever it was and according to Cramp, it was vodka, it undoubtedly made her amnesiac that night with only having flashes of resemblance of what took place that night.
- [19] The learned DPP further states that the use of the word 'drugged' may or may not have been the ideal nomenclature by the judge in trying to capture Ms. H's experience as told to the jury. He submits however that given the evidence at the trial, it was felicitous so as to convey to the jury in layman's language, an ideal word, in local parlance that sufficiently captured what transpired after Ms. H had a second sip of her wine. In the circumstances, he invites this Court to view this ground as being devoid of merit.

[20] I note that in the first extract relied on, the judge dealt with the issue of consent and submission and stated that if Ms. H had been drugged to render her memoryless and unable to resist, then it could not have been freely given. In the other extract, the judge told the jury: '[t]he question for you is, are [you] sure he drugged her?'. In my judgment, the two extracts relied on in support of the ground that the judge misdirected himself and the jury on the evidence of a date rape drug rohypnol, show that Mr. Cassell's reliance is misplaced as nowhere in the extracts are the words 'date rape drug rohypnol' ever used. Nowhere in the transcript of summation did the learned judge make any reference to rohypnol in his charge to the jury. In circumstances where the learned judge never mentioned the 'date rape drug rohypnol' in his charge to the jury, the complaint that he misdirected the jury on the evidence of a 'date rape drug rohypnol', cannot be sustained.

[21] The evidence is also clear from Ms. H that the first drink of wine tasted strange, the second one made her dizzy and the drink had an effect on her memory. Cramp stated that he had poured vodka in her wine. It is evident that a reasonable inference could be drawn as to the deleterious effect of the drink on her and her capacity to have given consent. The ground of appeal is accordingly dismissed.

The Lucas direction

[22] Cramp also appealed on the ground that the learned trial judge erred in law by failing to distil and give an appropriate Lucas direction to the jury, which made the trial manifestly prejudicial. It was also argued that the learned judge failed to direct the jury on all three limbs of the Lucas direction. Learned counsel asserts that the prosecution primarily relied on a text message from Cramp to prove their case that the sex was not consensual. Cramp had initially denied having sex. He then admitted and gave an explanation. Counsel submits that the explanation should be included in the Lucas direction to allow the jury to have the juxtaposition in order to determine whether he told a deliberate lie or whether the explanation introduced the issue of doubt.

[23] Counsel states that the second ground where the judge failed to give an adequate Lucas direction went to the collateral issue, which was whether Cramp drugged her and whether this was used to vitiate consent. This should have been overtly emphasised by the judge. I note that in the oral arguments, counsel stated that the introduction of whether or not Ms. H had been drugged should not have been placed in the Lucas direction as it was not the case of the parties.

[24] Counsel submitted that the jury ought to have been directed firstly on whether they were sure that Cramp was in fact lying or whether it was a matter where he was confused or mistaken; since giving a random person a ride several or many years ago is not by itself evidence that they are lying as to the person's name or even memory or features. Only if the jury are convinced Cramp lied on the out of court statement should they then go on to consider whether the lies were for innocent reasons and if not; only then can the lie support the prosecution's case.

[25] The learned judge gave the jury a Lucas direction on two occasions. On the first occasion, the trial judge directed the jury that in the text messages on Sunday 24th May 2015 he said 'I say have sex' and on Monday 25th May 2015 he said 'before I go I want to have sex'. Then on Wednesday 27th May 2015 he said when Ms. H asked if they had sex, 'no we definitely didn't, I know that much'. The judge continued:

"Though a matter for you, you may conclude that the first two messages show he was pretending that he had not already had sex with [Ms. H], and the third was a lie. How should you approach that you may conclude he was lying to [Ms. H] they had not had sex?

- i. First, you have to be sure he lied. If he did not or may not have done, for example if he might have misunderstood the question, or misremembered, or if what he said may be the truth, then your inquiry ends.
- ii. Second, if you are sure he did lie, then the mere fact that he lied is not in itself evidence of guilt. This is because a defendant may lie for innocent reasons, for example out of panic, or sheer stupidity,

or embarrassment, rather than to hide guilt. So you must look to whether there is or may be an innocent explanation for any lie.

- iii. Third, however if you are sure that he did not lie for an innocent reason, and that the lie relates to an important issue in deciding his guilt, then lies by the defendant are independently capable of supporting her allegation of rape. In particular, a lie which relies on her not being able to remember if she had sex may support he knew she would not remember, which, though a matter for you, you may conclude can only be if he knew he had drugged her.”

[26] In his charge to the jury, the learned judge also said that Cramp said in texts on Wednesday 27th May 2015, ‘I remember going back to the dockyard and then we got back to yours and then I can’t remember, and later, ‘it’s all a big blur’: Though a matter for you, you may conclude his saying to [Ms. H] by text he can’t remember is a lie’. He further directed the jury that they may approach this possible lie in the same fashion as for the texts pretending that they did not have sex.

[27] As Mr. Armstrong correctly points out that the learned judge gave a Lucas direction on two occasions. On the second occasion, the learned judge directed the jury in similar terms as the first. Here, he placed it in the context of Cramp saying he cannot remember what had happened as distinct from the first where he placed the direction in the context of the appellant saying initially they did not have sex.

[28] Mr. Armstrong submits and I agree, that it can be seen from those two extracts that the learned trial judge gave tailor-made and full Lucas directions which were also contextualized in light of the evidence. He also submits that the directions were helpful and fair as the learned judge said on both occasions that, if they are sure that Cramp lied, the mere fact that he did lie is not, in itself, evidence of guilt. That is because a defendant may lie for innocent reasons for example out of panic, or sheer stupidity, or embarrassment rather than to hide guilt. This was consistent with what was said in **R v Lucas**¹.

¹ [1981] QB 720.

- [29] A full direction in accordance with **Lucas** is usually given by the judge whenever lies are relied on by the prosecution, or might be used by the jury, to support evidence of guilt as opposed to merely reflecting on the defendant's credibility. This direction is to the effect that a lie told by a defendant can only strengthen or support evidence against the defendant (but cannot by itself prove guilt) if the jury are satisfied that the lie was deliberate, it related to a material issue and the motive for the lie is a realisation of guilt and fear for the truth. The jury must be reminded that there may be reasons for the lies which are not connected with guilt of the offences charged. In this context, the jury should, in appropriate cases, be reminded that people sometimes lie, for example, in an attempt to bolster a just cause or out of shame or out of a wish to conceal disgraceful behaviour from their family.
- [30] Put in summary form only, a Lucas direction is usually not necessary if there is no distinction between the issue of guilt and the issue of lies. But is necessary when on some collateral matter, and due to some change in evidence or account by the defendant, there is scope for drawing an inference of guilt from the fact that the defendant had told lies.²
- [31] The learned judge gave two Lucas directions. The first was in the context of Cramp's initial assertion that they did not have sex. The other relating to Cramp saying he did not remember what happened. I do not agree that the terms of the Lucas directions were inadequate. The learned judge's directions were full and contextualized in the light of the evidence. The Lucas direction was fair. The jury were given the important direction that if they were sure that Cramp lied, the mere fact that he lied is not in itself evidence of guilt as a defendant may lie for innocent reasons. The directions given were quite in keeping with the appropriate Lucas direction. This ground of appeal accordingly fails.

² See *R v Wilsher* [2021] EWCA Crim 121 at p.57; *R v Wainwright* [2021] EWCA Crim 122 at per Fulford LJ at p.22.

Summing up of appellant's case to the jury

- [32] Another basis of Cramp's appeal is that the learned judge failed to adequately put his case by neglecting to highlight salient issues during the summing up to the jury, thus rendering the conviction unsafe. Learned counsel argues that the judge failed to highlight seminal points which arose from Cramp's unsworn statement from the dock, especially why he answered Ms. H the way he did. He states that the judge should have warned the jury that the medical report did not support the guilt or innocence of Cramp. The doctor was unable to link the date of the injuries, which culminated from the rough sex, to the date of the incident. There was inconsistency in that Ms. H said she had severe pain but could have ran or sprinted to the car. Learned counsel complained, rather than considering what was highlighted and directing the jury accordingly, the learned judge said: '[d]on't expect me to be performing an analysis of all the evidence for you.'
- [33] While recognising that a trial judge is duty bound to put the case for the defence faithfully to the jury, Mr. Armstrong contends that a perusal of the transcript gives no support to the ground of appeal. He points out that Cramp's case was a straightforward one – that the sexual intercourse was consensual. The learned judge went through Cramp's entire caution statement. He also summarised the cases of both parties towards the end of the summation. Mr. Armstrong submits that there is nothing in the transcript showing that the learned judge did not put the defence adequately to the jury or neglected to highlight salient issues. The judge dealt extensively with the perceived weaknesses in the prosecution's case as elicited by the defence during the trial.
- [34] A trial judge is under no obligation to rehash each and every argument advanced by counsel. The foundation of Cramp's defence was consent. The ground that the trial judge did not put the defence adequately to the jury is not borne out by the matters relied on. They do not engage the foundation of the defence. No doubt, a failure to mention an item of evidence in final instructions to which reference has been made could result in the conviction being unsafe if that item is the foundation

of the defence advanced;³ but this is certainly not the case here. There is no doubt that the trial judge directed the jury clearly on the defence of consent. The defence was adequately put to the jury. The judge's direction encapsulated the essential controversy of whether or not Ms. H was in a state where she was capable of giving consent. The jury would have been very clear as to what the defence was.

- [35] The judge directed the jury that if they were sure that Ms. H was not consenting, were they also sure that Cramp knew that she was not consenting or did not care whether or not she was consenting? If he did believe or honestly believe that she was consenting even though he was reasonably mistaken in that belief, then he must be acquitted. The judge further told the jury that when considering that question, they should bear in mind his case that she only had three glasses of wine and was fully in control of her senses, so he believed she gave herself freely to him and was positively consenting. This ground accordingly fails.

Interruptions by the judge during cross-examination

- [36] Lastly, I consider the ground that the trial judge improperly interrupted the defence during cross-examination in such a way that he effectively undermined the defence's case. Also, the interruptions, in effect, invited the jury to disbelieve the defence which even the usual direction, that the jury should ignore judicial comments if they disagree with them, is rendered nugatory, and made it impossible for defence counsel to do his duty in putting the defence case.
- [37] The law on the issue of judicial intervention is well established. Excessive or inappropriate judicial intervention may compromise the fairness of a trial. In **R v Hamilton**,⁴ Lord Parker CJ made the following statement of principle: 'it is wrong for a judge to descend into the arena and give the impression of acting as advocate'. Whether his interventions in any case give grounds for quashing a conviction is not only a matter of degree but depends on to what the interventions are directed and

³ R v Daley [2007] 3 SCR 523 at p.55.

⁴ [1969] Crim LR 486.

what their effect may be. Interventions to clear up ambiguities, intervention to enable the judge to make certain that he is making an accurate note are perfectly justified. But the interventions which give rise to quashing a conviction are really three - fold: (the Hamilton grounds).

[38] Firstly, there are those interventions which invite the jury to disbelieve the evidence of 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. The second ground giving rise to a quashing of a conviction is whether the interventions have made it impossible for counsel for the defence to do his duty in properly presenting the defence. The third case is where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way.

[39] The mere fact that a judge intervenes excessively or inappropriately does not necessarily lead to a conviction being quashed. The decision for the court is whether the nature and extent of the interventions have resulted in the appellant's trial being unfair.⁵ There will always be a spectrum where complaints of this kind are made, which requires the appellate court to judge whether an otherwise properly conducted trial was unfair to the point that the convictions are to be regarded as unsafe. Relevant considerations include, but are not limited to, the strength of the prosecution's case on the one hand, the nature of the interruptions, the extent to which counsel may have been prevented from presenting the appellant's case in the way in which he or she judged was in the appellant's best interests, whether the interruptions may have adversely influenced the jury against the appellant, whether the appellant could properly say he had not had a fair trial and whether informed members of the public would so consider.

[40] In **R v Inns (Gavin)**⁶ at paragraphs 34 to 38, Singh LJ set out some uncontroversial principles with respect to judicial interruption:

⁵ R v Hulusi (1973) 58 Cr. App. R 378.

⁶ [2018] EWCA Crim 1081.

“34. Secondly, ours is an adversarial system, not an inquisitorial one. The role of the judge is therefore to act a neutral umpire, to ensure a fair trial between the prosecution and defence. The judge should not enter the arena so as to appear to be taking sides. These are well established principles of our law.

35. Thirdly, there is nothing wrong in principle with the trial judge asking questions of witnesses in order to assist the jury. That indeed is one of the fundamental functions of the trial judge. For example, this may be done to clarify a point that may arise on the face of a document or in immediate response to an answer that has just been given by a witness. Otherwise, it may often be preferable for the judge to wait until the end of the evidence given by that witness, or at least the end of the evidence-in-chief. Often things that are not clear may become clearer once the evidence-in-chief has been completed.

36. Fourthly, since ours is an adversarial system it is for the prosecution to prove its case and it will have the opportunity to cross-examine the defendant if he or she chooses to give evidence. It will often be unnecessary for the judge to ask any questions during the defendant's evidence-in-chief because it should be for the prosecution to cross-examine the defendant. It is certainly not the role of the judge to cross-examine the defendant.

37. Fifthly, it is particularly important that the defendant should have the opportunity to give his or her account to the jury in the way that she or he would like that evidence to come out, elicited through questions from their own advocate. If there were constant interruptions of the evidence-in-chief there will be a risk that a defendant will not be able to give his or her account fully and in a manner they would wish to put before the jury.

38. Sixthly, this is not affected by the fact that the defence account may appear to be implausible or even fanciful. If it is truly incredible, the prosecution can reasonably be expected to expose its deficiencies in cross-examination and the jury will see through it. If anything, unwarranted interventions by a judge may simply prove to be counterproductive.”

[41] With these principles in mind, I will examine the complaints. Mr. Cassell posits that during the cross-examination of the prosecution witnesses, the learned judge improperly interrupted the defence by intervening on several occasions. Counsel

stated that over 80 interruptions were made during the course of cross-examination, 60 of which were unnecessary. I have perused the matters relied on by Mr. Cassell. While some of the interruptions were for purposes of clarification and context, like whether Ms. H told the court that she was screaming loudly or whether she told Cramp that she was bleeding from her vagina, others were quite unnecessary.

- [42] For instance Mr. Cassell asked Ms. H: '[s]o you said about 10 minutes while we were watching the movie. Do you still maintain that you have never seen any part of the movie?' Instead of allowing her to answer, the learned judge intervened and said: '[s]he hasn't said that. She just said that she was dizzy at the time that the movie started in to play. So therefore she wasn't concentrating on what was in it. So it's all a memory exercise, not that she didn't watch any of the movie.'
- [43] When Mr. Cassell asked Ms. H whether she was aware that American Pie is about teenagers and sex, she replied that she did not watch much TV growing up so she was not aware. Counsel then asked, '[a]re you Amish?' The learned judge interrupted and told Mr. Cassell to be sensitive about asking inappropriate questions about her religious beliefs.
- [44] Mr. Armstrong argues that counsel's criticism of the judge is not made out by the extracts provided. The extracts show that the learned judge's interventions were to clarify questions being asked by defence counsel and also to draw attention to where evidence was misquoted or misleading. Mr. Armstrong pointed out that it was not the number of interruptions but what was sought to achieve by them.
- [45] I have reviewed the extracts relied on in support of the ground of improper judicial interruption and having regard to the relevant principles enunciated earlier, the interruptions, though many, are not of the quality warranting appellate interference. In some of the examples, the learned judge sought to clear up ambiguities and to make corrections where the evidence was being misquoted or mistaken. In other cases, the interruption was unnecessary. It cannot be concluded, however, that the

interruptions were such that defence counsel was unable to present his case properly. The learned judge did not undermine the defence case; neither did the interruptions render the trial unfair or the conviction unsafe. This ground fails.

Conclusion

[46] For all the reasons given, the appeal stands dismissed and the conviction is affirmed.

I concur.

Gertel Thom

Justice of Appeal

I concur.

Paul Webster

Justice of Appeal [Ag.]

By the Court

Chief Registrar