**[2019] JMCA Crim 12**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 103/2012**

**BEFORE: THE HON MR JUSTICE BROOKS JA**
**THE HON MRS JUSTICE MCDONALD-BISHOP JA**
**THE HON MR JUSTICE F WILLIAMS JA**

**NEVILLE BARNES v R**

**Donald Gittens for the applicant**

**Jeremy Taylor and Mrs Venice Blackstock-Murray for the Crown**

**25, 26 July 2017 and 22 March 2019**

**F WILLIAMS JA**

**Background**

[1] The applicant, Neville Barnes, by this application, has sought permission to appeal against his convictions for the offences of burglary and larceny, rape and indecent assault, and the sentence of 40 years' imprisonment at hard labour imposed on him for the offence of rape. At the conclusion of the hearing of the application, we had reserved our decision in order to consider the submissions of learned counsel on both sides.

[2] The applicant was tried in the Home Circuit Court between 17 and 26 September 2012 and on 2 October 2012, before Cole-Smith J and a jury. By a unanimous verdict, the jury found the applicant guilty of all three counts on the indictment. He was sentenced to 10, 40 and three years' imprisonment at hard labour, for the offences of burglary, rape and indecent assault respectively, with the stipulation that the sentences were to run concurrently.

**The case for the prosecution**

[3] At the applicant's trial, the virtual complainant testified that she had been awakened by a man entering her bedroom some time between the night of 20 June 2005 and the morning of 21 June 2005. She testified that, when the man, who she says was the applicant, had entered her bedroom, the lights in the house were turned off but that her bedside lamp was turned on. She was able to observe that the man was wearing a pair of navy blue cotton causal shorts, with no shirt, and that he had a pair of briefs drawn "half across his face". She also testified that, during the incident, he took her from her bedroom to the kitchen. She further testified that there were two outside lights which were on and which shone into the house, and that while she and the applicant were in the kitchen, the applicant had turned on the kitchen light. She testified that during the encounter, which had lasted for about three hours, the applicant had sexual intercourse with her without her consent three times, indecently assaulted her and stole $3,000.00 from her.

[4] The virtual complainant further gave evidence that she had attended an identification parade on 4 August 2005, at the Half-Way-Tree Police Station, where she

identified the applicant as the man who had broken into and entered her dwelling house on the night in question and there assaulted and robbed her.

[5] She stated that at one point during her ordeal, the applicant had instructed her to sit on a couch facing him in the study of the house. She gave evidence that there was an outside veranda light shining into the house. She stated that at that time there was nothing on his face. She was, in these circumstances, able to see parts of him. She described him to the trial court as being "lean, more on the small part". She also testified that he was about 5' 10" tall and of dark complexion. She stated that, while he was raping her, she observed that his hands, chest and torso were very hairy. She also described the hair on his head as being low cut and said that he looked to be about 40 years old.

[6] The virtual complainant also testified that, during the incident, the applicant spoke to her several times and she replied. From this she had been able to identify him by voice on the identification parade. She stated that there was a slight gruffness to his voice and that he did not pronounce the initial 'h' sound in words beginning with that letter. She stated that that clearly stood out in her memory when he had asked her "how many siblings do you have?", dropping off the "h" sound in "how" and "have".

[7] The virtual complainant also gave evidence that she was menstruating at the time of the incident and that she had informed the applicant of this fact. She stated that, after the incident, a sanitary napkin and tampon, which she had been wearing on the night of the incident, were submitted to the rape unit for deoxyribonucleic acid

(DNA) analysis to be conducted. She testified that she also submitted for DNA analysis the pyjama shorts and blouse that she had been wearing on the night in question. All these items were given to the police officer to whom she made a report of the incident.

[8] She testified that, after the incident, she noticed that a piece of the protective grille at one of the windows of the house had been sawn off and that there were foot and hand prints on the wall leading to her parents' bathroom.

[9] She gave evidence that at the identification parade she had requested four of the nine men on the parade to remove their shirts (the men standing under numbers nine, eight, three and two). She stated that there was a protest from the men and that she then requested that they all hold out their hands. She stated that the men complied with that request. It was her evidence that she then asked that the men standing under numbers two and nine say "how many siblings do you have?" She stated that she had already decided whom to identify before she asked both men to repeat the question. She further gave evidence that she then asked those two men to take off their shirts. There was a protest from the attorney-at-law in attendance but the men complied with the request. She then identified the man standing under number 9 to be the man who had committed the offences against her on the night in question. In court, the applicant was identified to be the man who had been standing under number 9.

**DNA evidence presented**

[10] The prosecution sought to rely on the results of the analysis of the DNA evidence. The samples that formed the basis of this evidence were recovered from a

pair of underpants and from buccal swabs alleged to have been obtained from the applicant, along with items belonging to the virtual complainant. The expert evidence on the DNA analysis came primarily from three forensic analysts: Miss Sherron Brydson, Mr Compton Beecher and Dr Wayne McLaughlin.

**Summary of Miss Brydson's evidence**

[11] Miss Brydson gave evidence that she is a government analyst attached to the Forensic Science Laboratory and that she had worked as an analyst there since 1992. She testified that she conducted autosomal STR (short tandem repeat) testing on samples from items contained in several sealed envelopes received from the police. She tested the samples for the presence of blood and semen. The contents of the envelopes were as follows: (i) envelope "A" – a sanitary napkin and a sanitary-napkin wrapper; (ii) envelope "B" – a yellow and grey pyjama blouse; a pair of plaid pyjama shorts and a white tampon; (iii) envelope "C" -buccal swabs taken from the virtual complainant; (iv) envelope "D" – vaginal swabs taken from the virtual complainant; (v) envelope "E" - a pair of underpants alleged to have been taken from the applicant; and (vi) envelope "F"- which contained buccal swabs said to have been obtained from the applicant (both "E" and "F" received some time after she had received the other items).

[12] She explained that DNA is the basic unit or ingredient of an individual. She went on to explain that it is composed of two strands, one from each parent. She testified (at page 219, lines 2-4 of the transcript) that: "[a]n individual's DNA is unique to that individual unless that person is an identical twin or triplet". She went on to explain where DNA is found and to also explain some of the technical terms and features of

DNA analysis – such as "markers" or "loci" and stated that, at the time of testing for this case, the Forensic Science Laboratory used eight markers in testing for the presence of DNA. Also explained was the process involved in DNA testing. The eight markers are referred to as a "profile".

[13] This expert witness, from her records, indicated to the court that the virtual complainant's buccal swabs were used as a control sample. Further, from her analysis, she did not detect any blood or semen on the pyjama shorts, but found that there was a mixture of semen and human blood on the pyjama blouse. She did not detect any semen on the tampon, but found a mixture of human blood and semen on the sanitary napkin. She testified that there had been no blood or semen present on the wrapper for the sanitary napkin, neither was semen detected on the vaginal smears made from the vaginal swabs. She had found neither blood nor semen on the pair of underpants taken from the applicant.

[14] She further testified that the tampon, vaginal swab and buccal swab provided a full profile, matching the sample taken from the virtual complainant, and that a partial profile was found on the sanitary napkin and on the pyjama blouse. She testified that these partial profiles originated from at least two individuals, and that the virtual complainant and the applicant shared components or alleles identified in these two partial profiles. She also gave evidence indicating that she had found a mixed profile on each of the following items: (i) the pyjama blouse and (ii) the sanitary napkin. (A mixed profile occurs where at least two sources of DNA are obtained from the particular item analysed). She noted that those samples shared most of the components of the profile

obtained from the virtual complainant and some components of the profile obtained from the buccal swab from the applicant.

[15] Miss Brydson was later further examined by the Crown in order to admit, through her, evidence of an analytic report compiled by her, using the findings from her own DNA analysis and the report produced by Mr Beecher. From her findings, she concluded that the virtual complainant could not be excluded as a major contributor to the mixed profile obtained from a second area of the pyjama blouse and that the applicant could not be excluded as being the minor contributor to the mixture.

[16] She asked Dr Wayne McLaughlin of Caribbean Genetics to do further analysis on several items– specifically Y-STR analysis, a more sensitive test, which targets male DNA, as that type of analysis was not done at her laboratory at the time.

**Summary of evidence of Mr Compton Beecher**

[17] Mr Compton Beecher gave evidence that he was a forensic scientist employed to the Ministry of National Security, Forensic Science Division. He had analysed the buccal swabs taken from the applicant. From his findings, he had developed a random match probability of 8.2 in 100 million individuals or about one in twelve billion individuals. He explained that the "random match probability is essentially the probability that someone else in the population would have the same DNA profile" as the one that he had identified (page 273 of the transcript).

**Summary of evidence of Dr Wayne McLaughlin**

[18] Dr McLaughlin testified that he was a professor of molecular biology and a forensic DNA scientist working in Y-chromosome analysis or Y-STR analysis (that is, analysis focusing on what is known as a short tandem repeat on the Y chromosome, which only picks up male contribution - even in a mixture of both female and male DNA). The Y chromosome is specific to the male.

[19] He stated that he received certain items from Miss Brydson and had tested them. These included: (i) a sanitary napkin from the virtual complainant (from this item he obtained a full profile); (ii) a sample from the sanitary napkin which was alleged to have contained semen (on this item he found no profile or marker); (iii) a pyjama blouse (from which he obtained a partial profile of 13 of the 16 markers); (iv) a sample from the pyjama blouse (this item was not tested); (v) a sample from a pair of underpants taken from the applicant (from which he obtained a full profile of the applicant); (vi) DNA extract from an oral swab also taken from the applicant (from which he obtained a partial profile of nine of the 16 markers); and (vii) oral swabs allegedly taken from the applicant (this did not give a profile).

[20] In his evidence, he stated that he found that the profiles obtained were consistent among the different samples. He also noted that the 16 DNA markers obtained from the analysis of the pair of underpants matched exactly the markers obtained from a section of the sanitary napkin. He also informed the court that all male relatives of the applicant would have the same Y profile discovered in his tests. From

his findings, he concluded that the applicant could not be excluded as the contributor of the DNA evidence analysed.

**The defence**

[21] The applicant made an unsworn statement from the dock. He denied any knowledge of the incident and stated that on the night in question he had been at home with his mother, sister and son. He stated that he did not know why he had been placed on an identification parade if the virtual complainant had not seen the face of her assailant. He also stated that, whilst he was at the Constant Spring Police Station, swabs were taken from his mouth without his consent.

**Application for permission to appeal**

[22] On 6 May 2016, a single judge of this court refused the applicant leave to appeal against his convictions and sentences. As is his right, he renewed that application before us. On 25 July 2017, counsel for the applicant sought leave to argue supplemental grounds of appeal filed on 25 January 2017, in addition to the grounds originally filed. That request was granted on the hearing of this application. Counsel however, subsequently abandoned several of the grounds of appeal. Consequently, these are the supplemental grounds that counsel for the applicant contends have merit:

> "1. [Ground abandoned]
>
> 2. While adequate directions were given to the jury that the matter of the fairness of the identification parade was entirely for them, the learned trial judge failed to direct the jury specifically that it was unfair for the complainant to have required the Applicant and one other volunteer to speak and unclothe before she had indicated that she had

settled upon someone whom she intended to identify, and then wanted those things to be done only to confirm her decision.

3. The learned trial judge erred in telling the jury that at one stage the attorney for the suspect at the parade started to protest but the policeman in charge of the parade told him to put his request in writing, as this was an inaccurate representation of the evidence (as it appeared on page 122 line 22) that could have wrongly impressed the jury that the failure of the attorney to put any request into writing was evidence of the fairness of the parade (Page 421 lines 17 and 18 of the Transcript), and this error was reinforced by a direction (on page 422 line 2 to 4) that could have misled the jury to believe that the presence itself of the attorney on behalf of the suspect was enough to secure the fairness of the identification parade.

4. Further, the aforesaid error could have misled the jury to believe that it was only on one occasion that the attorney had protested, as the jury would not have been expected to analyse minutely the meaning of the expression at one stage and the meaning of the expression started to protest, which if analysed minutely, might be unobjectionable, but taken at first glance or at first hearing, could give the impression that the protest was only on one occasion and was only a start which was not continued or completed when in fact and to the contrary, there were at least three occasions on which the attorney protested according to the evidence of the policeman.

5. [Ground abandoned]

6. [Ground abandoned]

7. [Ground abandoned]

8. [Ground abandoned]

9. [Ground abandoned]

10. [Ground abandoned]

11. [Ground abandoned]

12. [Ground abandoned]

13. The learned trial judge erred in law in not withdrawing the case from the jury on account of the unsatisfactory and inadequate nature of the identification evidence which the crown relied on to buttress the circumstantial evidence which the judge correctly directed them could not stand alone. (Page 481 line 11 to 17)

14. In so far as the jury could and may be presumed to have accepted the fairness of the identification parade as being conclusive of the guilt of the Applicant, that decision by the jury is unreasonable in regard to the evidence.

15. In so far as the jury could and may be presumed to have accepted that the voice identification was adequate for conviction, in circumstances where the elements of that identification could apply to an overwhelming number of men, and despite the useful directions of the learned trial judge (page 497), that decision by the jury is unreasonable in regard to the evidence.

16. The learned trial judge, having correctly directed the jury as she did regarding the DNA evidence, should have directed the jury that the identification evidence was wholly unsatisfactory and have withdrawn the case from the jury and ruled that there was no case to answer.

17. In particular, in the directions on voice identification, (page 497 line 6 to page 498 line 4), she should have directed the jury not just as to the issues affecting voice identification, but that those issues in this case were not reasonably capable of being resolved against the accused.

18. The learned trial judge erred in directing the jurors that there was no rule that the complainant should have identified the accused before she requested him and a volunteer to speak, which is true, but in not directing them thereafter that while there is no such rule it was nevertheless a principle of fairness, which is also true, that she should have so identified before so requesting.

> 19. The learned trial judge directed the jury in a manner that was potentially and prejudicially confusing when she first directed them that she did not know of any rule that the complainant should have identified the accused before asking him and another to speak, then directed them that they should disregard that direction (page 501 lines 20-24) then (at page 502 line 11-18).
>
> 20. The sentence of 40 years imprisonment on the count for rape was excessive."

[23] The following were the original grounds of appeal, filed 12 October 2012:

> "(1) Unfair trial:- That based on the evidence as presented, the sentences are harsh and excessive and cannot be justified under law.
>
> (2) That the evidence and testimonies upon which the learned trial judge relied on [sic] for the purpose to convict me lack facts and credibility thus rendering the verdict unsafe in the circumstances.
>
> (3) That the learned trial judge failed to temper justice with mercy, thus rendering the verdict [sic] manifestly excessive."

**Issues**

[24] The issues raised in the grounds of appeal overlap considerably and can properly be addressed by summarising and treating with them as follows:

(i) whether the learned trial judge erred in directing the jury on the procedural fairness of the identification parade (supplemental grounds 2, 3, 4, 18 and 19).

(ii) whether the learned trial judge failed properly to direct the jury on how to treat with the voice identification evidence (supplemental grounds 15 and 17).

(iii) whether (especially in the light of the DNA evidence) the evidence linking the applicant to the crimes could be said to have been wholly unsatisfactory (supplemental grounds 13, 14 and 16).

(iv) whether the sentence of 40 years' imprisonment at hard labour imposed for the offence of rape was manifestly excessive (supplemental ground 20).

[25] It may be said that ground (ii) of the original grounds (which are very broadly framed) undergirds issues (i), (ii) and (iii); and that grounds (i) and (iii) of the original grounds relate to issue (iv) (sentencing).

**Issue (i): whether the learned trial judge erred in directing the jury on the procedural fairness of the identification parade**

**Summary of submissions for the applicant**

[26] The applicant's counsel complained, *inter alia*, that the learned trial judge had erred, in that, although she had directed the jury that their duty was to decide on the fairness of the identification parade, she did not further direct them that the virtual complainant's request for the applicant and another person on the parade to repeat a particular question and to remove their shirts were breaches of the identification parade rules.

**Summary of submissions for the Crown**

[27] On behalf of the Crown, this issue was addressed by Mr Taylor's contending that the request of the virtual complainant was permissible and well within the ambit of the rules governing identification parades. As such, the learned trial judge could not properly have directed the jury that these requests were breaches of the rules.

**Discussion**

[28] This complaint must be evaluated in the context of: (i) the requirements of the Identification Parade Rules promulgated under the Jamaica Constabulary Force Act (the Rules); (ii) what, on an identification parade, is permissible under the Rules; and (iii) the directions given to the jury.

[29] The learned trial judge, commencing at page 422 of the transcript, line 15, gave the following directions to the jury in relation to the treatment of the identification parade:

> "An identification parade is a fair test of a person's appearance and for a person to identify the person by their looks and the volunteers are selected on their appearance, height, complexion and body built [sic]."

[30] In further explaining the purpose of an identification parade, the learned trial judge directed the jury at page 424 of the transcript that:

> "...the purpose of an identification parade is to ensure that a witness has demonstrated his or her ability to pick out the accused from a sufficient number of persons without assistance. There are rules governing the conduct of identification parades. These rules require that **'Every**

**precaution shall be taken to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed to the suspected person in particular instead of indifferently to all persons paraded, and to make sure that the witnesses' ability to recognise the accused has been fairly and adequately tested.'**

The rule goes on to say that it is desirable that arrangements for the parade are not made by the officer in charge of the case; that the witness be prevented from seeing the prisoner before the parade and must be given no assistance by way of photographs or descriptions. She said she was not shown any. The suspect, in a line up, must be placed among not less than 8 persons who are so far as possible of the same age, height, general appearance and position in life as the suspect; that the suspect be allowed to select his own position in the line, and that he be allowed to have his attorney or friend present. You heard Sergeant Needham and he said he, the accused, helped to select the volunteers. **It is a matter for you, Madam Foreman and members of the jury, if you think the parade was fair.** It is the duty of the officer in charge of the parade to ensure that the regulations are strictly observed and where the Prosecution is relying solely on the identification of the accused, that is an identification parade, **nothing should be done or left undone to impugn or impinge on the absence of fairness of the parade. However, the regulations are not mandatory and so a breach of the regulations does not render [it of] no effect, but weakens the weight of that evidence of identification**. **In our courts the rules are not mandatory but procedural and any breach to the rules would go to the weight of the evidence and not to the validity of the parade**. **It is for you, Madam Foreman and members of the jury, to decide whether, in all the circumstances, to say if the identification was fair**, **and it gave the witness an opportunity to independently and fairly and without any assistance identify the person whom she says committed the alleged offence**." (Emphasis supplied)

[31] From the above-cited paragraphs, it is evident that the directions were aimed at focussing the minds of the jury and highlighting to them that their primary role was to determine the fairness of the procedure employed in the conduct of the identification parade. It was made clear to them that the conduct of the parade should strive to eliminate the risk of wrongful or assisted identification. Further, the directions served to bring to the minds of the jury the fact that the weight to be accorded to the identification evidence is directly impacted by the fairness of the parade.

[32] As the learned trial judge pointed out to the jury in her directions to them, the Identification Parade Rules are procedural and not mandatory. Therefore, where any breach arises, the duty of a judge is to direct the jury on the breach in order to allow them to determine its effect on the cogency of the identification evidence. (See, for example, **Regina v David Thompson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 39/1999, judgment delivered on 6 March 2000).

[33] The Book of Rules (Amendment) Identification Regulation "Code D" Code Of Practice For The Identification Of Persons By The Jamaica Constabulary Force (Code D) was accepted by both counsel during the hearing of the appeal, as stipulating the current practice and procedures to be employed during the conduct of identification parades. It is dated 13 October 2009. However, we had before us no clear evidence as to when the code came into operation. So far as is relevant, it reads as follows:

> "17. If the witness wishes to hear any identification parade member speak, adopt any specified posture or move, the witness shall first be asked whether he can identify any person(s) on the identification parade on the basis of

> appearance only. When the request is to hear members of the identification parade speak, the witness shall be reminded that the participants in the identification parade have been chosen on the basis of physical appearance only. Members of the identification parade may then be asked to comply with the witness' request to hear them speak, see them move or adopt any specified posture.
>
> 18. If the witness requests that the person he has indicated remove anything used, for the purposes referred to in paragraph 10, to conceal the location of an unusual physical feature, that person may be asked to remove it."

[34] Code D permits a witness to make a certain request of a suspect in making an identification. In this case, the virtual complainant testified that, during the incident, she had observed and taken particular note of her assailant's hands, torso and voice. When the request of the virtual complainant at the identification parade is viewed in light of the fact that this case was not based on facial identification, then the requests of the virtual complainant must be seen as being justifiable. These requests would have been necessary to aid the virtual complainant's ability to identify her assailant in accordance with the features and characteristics she had been able to observe during the encounter. Accordingly, no breach would have resulted from the request made of the applicant and another participant in the parade and so the learned judge would properly have directed the jury to determine the fairness of the parade.

[35] However, even if there was a breach, reflected in the failure of the sergeant conducting the parade to ascertain and address the matters mentioned in rule 17 of Code D (that is, as to whether the witness could otherwise identify the person and that the identification ought to be made on the basis of physical features), it is the fairness of the overall conduct of the parade that is of greatest moment. In the case of **R v**

**Michael McIntosh and Anthony Brown** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 229 and 241/1988, judgment delivered on 22 October 1991, Forte JA (as he then was) made the following observations at page 7 of the judgment:

> "What must be the important consideration for the jury is whether in all the circumstances the identification parade was fair, and gave the witness the opportunity to independently and fairly and without any assistance identify his assailant."

[36] Even if there is some doubt concerning exactly when Code D came into operation, and it was not in effect at the time, then the Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force (which was promulgated on 7 September 1988), would be the relevant rules. Those rules effectively rescinded previously-existing rules relating to the Jamaica Constabulary Force, made under section 28 of the Jamaica Constabulary Force Consolidation and Amendment Law 1935 or any laws amending that Act. If the identification parade rules of 1988 were still then in effect, the requests of the virtual complainant in the instant case would seem to have been properly made pursuant to rule 7.14 of the 1988 rules. The rule reads as follows:

> "7.14 It may sometimes happen that a witness desires to see the suspect with his hat on or off, and there is no objection to all the persons paraded being thereupon asked to wear or remove their hats. Where there may be something peculiar in the suspect's walk or speech, there is no objection to the persons paraded being asked to walk individually, or to speak. When any such request is made by a witness, the incident shall be recorded."

[37] It cannot fairly be said that the conduct of the parade in the instant case was unfair. The requirement for the learned judge to direct the jury on the most important aspects of dealing with the identification parade would therefore have been satisfied.

[38] Accordingly this issue must be resolved against the applicant, as it does not afford him a real chance of succeeding on his appeal against his convictions.

[39] For the avoidance of doubt, we wish to indicate that the resolution of this issue has also encompassed particular consideration of grounds 3 and 4 of the grounds filed on 25 January 2017. Those grounds seek to challenge the fairness of the identification parade based on the interaction between the applicant's attorney-at-law on the identification parade and the sergeant who conducted the parade; and, ultimately, the learned trial judge's treatment of these matters in her summation. No submissions were advanced in respect of these grounds. However, we have nonetheless perused the transcript against the background of these particular grounds and, having done so, find the complaint captured in the said grounds to be without merit, the learned trial judge's summation having been fair in all material respects.

**Issue (ii): whether the learned trial judge failed properly to direct the jury on the treatment of the voice identification evidence**

**Summary of submissions for the applicant**

[40] The pith of the applicant's submissions on this issue was that any possible cogency of the voice identification evidence was negatively affected by the failure of the trial judge to give a **Turnbull** warning (see **R v Turnbull and others** [1976] 3 All ER 549) specifically in relation to that voice identification evidence. Counsel argued that

any possible reliability of the voice identification was significantly diminished by the few words that the applicant was asked to say on the identification parade. Those few words, counsel further argued, would not have allowed for a proper voice identification to be made.

[41] In the light of those factors, counsel contended, the conviction ought to be set aside - especially in circumstances in which the applicant could not properly have been convicted solely on the DNA analysis evidence. Counsel, in his submissions, had commented that the learned judge had effectively withdrawn the DNA evidence from the jury.

[42] Counsel also argued that, in light of all these considerations, the no-case submission should have been upheld.

**Summary of submissions for the Crown**

[43] The Crown's submissions on this issue were rather nuanced. Mr Taylor, whilst conceding that there had been an absence of **Turnbull** directions specifically directed to the voice identification evidence, however submitted that, any perceived weakness in the identification evidence would have been buttressed by the DNA evidence. Further, he submitted that the learned trial judge had properly directed the jury that they could not convict solely on the basis of the DNA evidence (that position having been the law at the time), and so the safety of the conviction was not undermined. Alternatively, Mr Taylor submitted that, in any event, the disapproval of the cases of **R v Ogden** [2013] EWCA Crim 1294, and **R v Grant** [2008] EWCA Crim 1890, in the later cases of **R v**

**FNC** [2015] EWCA Crim 1732, and **R v Tsekiri** [2017] EWCA Crim 40, would now allow a conviction to soundly stand exclusively on DNA evidence. On that premise, counsel submitted that a no-case submission could not properly have been upheld on the basis of any inherent weaknesses in the identification evidence and the trial judge would still have had a duty to leave the case to the jury (relying on **Larry Jones v R** (1995) 47 WIR 1).

**Discussion**

[44] This complaint, as well, must be viewed against the terms of the directions actually given to the jury and in the light of the totality of the evidence that was before the court.

[45] At page 415 of the transcript, commencing at line 22, the learned trial judge gave to the jury directions on the identification evidence. It is of importance to note that those directions addressed identification evidence generally. They were not restricted to visual identification, but could also include voice identification. The learned trial judge stated that:

> "In this case against the accused, it depends, to some extent, on the **correctness of his identification** as the person who committed the offence. The complainant had told you that the accused is the person and the accused is saying that is not him, she is mistaken. I must, therefore, warn you of the special need for caution before convicting the accused in reliance on the **evidence of identification**. That is, because it is possible for an honest witness to make a mistaken identification. There have been wrongful convictions in the past as a result of such mistakes." (Emphasis added).

[46] At page 496, line 13 to page 498, line 4 of the transcript, the learned trial judge also gave the following directions:

> "…Now, you have to consider the identification by voice by the witness, of the accused. She said she was with him over a period of three hours. She asked two men on the Parade to say "How many siblings do you have" and she said she identified the accused voice when he said those words, so **you must look at whether you can rely on the voice I.D. You will have to make assessment of the strength and weakness of voice I.D. A weakness of it, she said, she did not know him before, never heard the voice before, until that night**. These are clear witnesses [sic]. On the other hand, she had a prolonged contact with him of about three hours, during which she spoke to him at various times. She said his voice had two distinct qualities; slight gruffness and dropping of his 'h's. Madam Foreman and members of the jury, you will have to consider all this, because you heard the accused who said- he gave an unsworn statement and some time has elapsed between her I.D. and now. **You must also consider whether from the number of words he said, she would have been capable of making the voice I.D**. Because, remember, learned counsel for the defence, ask [sic] her why she didn't point out the accused before she had asked him to do the voice I.D. and she said she knew who she was going to point out. You have to consider now, whether she was being thorough or she wanted to be sure or right up to the point where she asked him to say the words she was not sure, bearing in mind that she told you that at a particular point she knew who she was going to identify. **So, you have to decide what you make of her evidence.** You have to consider it and come to reasonable conclusions.
>
> Now, Madam Foreman and members of the jury, **you have to make an assessment of the strength and the weakness of the identification by voice, whether you can rely on it**." (Emphasis added)

[47] In relation to the concern that the learned trial judge gave a warning in the terms required by **R v Turnbull** directed to the general identification evidence, but

omitted to also relate that warning specifically to the voice identification evidence, it is important to observe a number of matters. For one, as observed at paragraph [45] of this judgment, the learned trial judge gave a general warning on identification, which would have covered voice identification, it being one of the methods of identification. For another, in the case of **Regina v Clarence Osbourne** (1992) 29 JLR 452, at page 455, Carey P (Ag), opined that the possibility of a witness being mistaken exists. However, there were, he said, other considerations. He observed:

> "Common sense suggests that the possibility of mistakes and errors exists in the adduction of any direct evidence, in the sense of evidence of what a witness can perceive with one of five senses. But that can hardly be a warrant for laying down that a Turnbull type warning is mandatory in every sort of situation where identification of some object capable of linking an accused to the crime or perhaps some attribute or feature of his speech capable of identifying him as a participant, forms part of the prosecution case."

[48] Further, Gordon JA, in the oft-cited case of **R v Rohan Taylor et al** (1993) 30 JLR 100, subsequently opined that "the directions given must depend on the particular circumstances of the case." He further stated at page 107:

> "In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so as to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the

> voice, the greater the necessity there is for m[o]re spoken words to render recognition possible and therefore safe on which to act."

[49] To similar effect is the later case of **Ronique Raymond v R** [2012] JMCA Crim 6 (in which McIntosh JA cited the authority of **Siccaturie Alcock v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 88/1999, judgment delivered 14 April 2000), approving the principles required for reliance to be properly placed on voice identification evidence, as set out in **R v Rohan Taylor et al**. At paragraph [30] of **Ronique Raymond v R**, the court acknowledged that evidence of voice recognition could be accepted in circumstances in which there was sufficient opportunity for the witness to hear and become familiar with the voice of the assailant at the time that the offence was committed.

[50] We note the reliance that Mr Gittens sought to place on the dictum by Morrison JA (as he then was) in **Donald Phipps v R** [2010] JMCA Crim 48, to the effect that:

> "[137]...in cases of voice identification the judge should at the very least give to the jury a **Turnbull** warning..."

[51] However, as the learned judge of appeal himself observed in the same paragraph, such a warning should be:

> "suitably adapted to the facts of the particular case before him….While much of the standard Turnbull warning will probably be appropriate in most cases, the actual warning given in a particular case should nevertheless take into account the fact that some aspects of that warning may carry less, but sometimes more, importance in cases of voice identification….what is important is that the warning given in each case should reflect all the nuances of the particular case".

[52] So that, any perceived strictness of the requirement for the application of the dictum of Morrison JA in **Donald Phipps v R**, must vary according to and be determined by the particular facts and circumstances of each case and the other available evidence in such a case.

[53] Accordingly, there can be no broad-brush approach mandating that a full **Turnbull**-type direction is required in every case in which there is voice identification evidence. In the instant case, the directions of the learned trial judge (in particular the portions in bold previously cited at paragraph [46]), highlighted both the strengths and weaknesses of the voice identification evidence. Those directions were made in a context in which the jury had already been generally directed that "it is possible for an honest witness to make a mistaken identification". It was clearly put to the jury that they had to decide whether the circumstances of the identification allowed for a positive identification to be made. Further, in this case, as is evident from the testimony of the virtual complainant, reliance was placed on the voice identification, not by itself, but as supplementing the visual identification.

[54] It is also important to note, as part of the particular circumstances of this case, the totality of facts in relation to the opportunity to recognize the voice of the person the virtual complainant said was the applicant. Although at the identification parade the applicant and a volunteer were asked to repeat "only" one question, a careful reading of pages 17-43 of the transcript reveals, in contrast, that there was a fairly extensive conversation between the virtual complainant and the man that she testified was the applicant. In addition to saying several other things, the man instructed her, for

example, to remove her tampon, open the kitchen door, asked several times "where is the money?"; spoke of his girlfriend; and told her not to tell the police of the incident. The jury, as the learned trial judge pointed out to them, would also have had the opportunity of hearing whether there was any gruffness in the applicant's voice and any dropping of "h's" by the applicant as he gave his unsworn statement.

[55] The circumstances of this case do not support the submission that the case should have been withdrawn from the jury on the basis of the weakness of the voice identification evidence. The learned trial judge, in our view, fulfilled her duty in leaving to the jury both the weaknesses and strengths of the voice identification evidence for their consideration in arriving at their verdict (see **Larry Jones v R**).

[56] Additionally, the case of **Galbraith v R** [1981] 2 All ER 1060, has firmly entrenched the position that:

> "…where the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or on other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the accused is guilty, then the judge should allow the matter to be tried by the jury."

[57] Considering this issue against the background of the requirements of **Galbraith v R**, it will be seen that the totality of the identification evidence in this case could not be said to have been so tenuous that the case ought properly to have been withdrawn from the jury. That totality consisted of: visual and voice identification evidence being

buttressed by the evidence of the DNA analysis, which we will now give particular attention.

**The DNA evidence**

[58] The jury was directed that they could not convict solely on the basis of the DNA evidence (page 458 of the transcript, lines 6 to 22). The learned trial judge directed the jury on the need for them to consider the totality of the evidence in the case for the prosecution. She stated (at page 454, lines 1-13) that:

> "The categories of evidence on which the Prosecution relies, are evidence of the complainant's observation of her attacker, the identification parade, items belonging to the complainant and the DNA recovered therefrom, who [sic] on the pants of the accused, and the DNA recovered there; the buccal swabs of the accused and the DNA recovered therefrom and the examination and comparison of the results obtained. The Prosecution places particular emphasis on the identification parade, and accumulative results of DNA examination carried out."

[59] It is very important for it to be noted that the conclusion from the DNA analysis was that the applicant could not be excluded as a contributor to the profile obtained from an area of the sanitary napkin. This was the conclusion of two of the experts. The experts' giving their conclusions was preceded by detailed evidence from them on matters such as frequency and random occurrence ratios. Dr McLaughlin, in particular, testified to using an international database of 3,561 males and that there were no other profiles in the database than the profile that he found. The frequency was therefore 0.0000. In light of all this evidence, there was, in our view, undoubtedly sufficient evidence before the jury, along with the other evidence in the case, on which they

could properly have found (and, in our view, properly so found) that the applicant was the person who committed the offences against the virtual complainant on the night in question.

[60] A perusal of the summation of the learned trial judge shows that, after what might fairly be considered to be a careful summary of the DNA evidence, the following particular direction, among others, was given (at page 490, lines 1-15 of the transcript):

> "I must remind you, that you should not interpret the finding of the full findings of markers, the sanitary napkin to mean the accused is the person who raped the complainant as the doctor told you, the same profile would be present in all his male relatives extending as far back as 10 thousand generation. It will mean, without more, any of these male relatives could be responsible for the deposit on the napkin. The test does not tell you the male did not [sic] deposit the semen, it only tells you it is not excluded. Furthermore means, their value is less discriminating than that obtained from those with the profile".

[61] A similar direction, exhorting caution on the part of the jury, is also to be found at page 481, lines 11-17 of the transcript as follows:

> "Now, this information from the analysis is indeed of limited value and while not excluding the accused, certainly does not identify him as one of the contributors in the mixed or partial profiles so, we cannot rely on this finding by Miss Brydson alone to come to the conclusion as to the guilt of the accused."

[62] The learned trial judge, at page 495, line 21 to page 486, line 10, further directed the jury on the DNA evidence as follows:

> "Now, [if] the DNA evidence stood alone, you could not convict on it on any count. The DNA evidence is not alone

> capable of proving the identity of the person who entered the house that night. All it can do, depending on your judgment of the evidence of Miss Brydson, Mr. Beecher and Dr. McClaughlin is to narrow down a group of men who could have left similar material on the sanitary napkin and pajamas of the complainant. At least all male relatives of the complainant [sic] could have done it, but it does not stand alone and you will consider its value carefully and use it as a part of the evidence, when you consider each count individually in the case as a whole".

[63] In the face of these directions, we find ourselves unable to agree with the submission that the matter of the DNA evidence was effectively withdrawn from the jury. In our view, as the Crown submitted, the issue of the DNA evidence, with all its possible shortcomings, was fully put to the jury for their consideration, and the DNA evidence, along with the other evidence in the case, formed a sufficient basis on which the jury properly could have convicted. One important consideration that was available on the evidence to the jury for their deliberation was, as Mr Taylor submitted, the fact that, although the applicant's defence was one of alibi, the DNA evidence pointed to the possibility of his DNA being found on items intimately associated with the virtual complainant. In the light of the virtual complainant's evidence, this DNA would have been deposited during the course of the commission of the offence of rape. There was no explanation coming from the applicant in respect of this very important element of the prosecution's case against him – either at the close of the Crown's case; or at the end of the entire case.

[64] The significance of the DNA evidence is important: In the case of **R v Doheny; R v Adams** [1996] EWCA Crim 728, Lord Justice Phillips observed as follows:

> "The reality is that, provided there is no reason to doubt either the matching data or the statistical conclusion based upon it, the random occurrence ratio deduced from the DNA evidence, when combined with sufficient additional evidence to give it significance, is **highly probative**." (Emphasis added)

[65] Additionally, although cases such as **R v Grant**, **R v Ogden** and **Regina v Michael David Byron** [2015] EWCA Crim 997 had raised doubts about the correctness or soundness of convictions based solely on DNA evidence deposited on an article left at a scene of a crime, subsequent cases have sought to limit the application of those cases. So that, in the case of **R v FNC**, for example, the English Court of Appeal observed, *per curiam* (taken from the headnote) as follows:

> "There is a clear distinction on the authorities between cases in which DNA was deposited in the course of the commission of an offence and cases in which DNA was deposited on an article left at the scene. However, it must be open to question, in the light of the recent marked improvements in the techniques of analysis of DNA, whether the authorities from which that distinction derives were correctly decided and whether the fact that the DNA was on an article left at the scene of the crime ought to be sufficient to raise a case to answer where the match is in the order of one in a billion..."

[66] In **R v Tsekiri**, which considered **R v Ogden** and applied **R v FNC**, it was said (at paragraph [12] of the case) of **R v Ogden** that:

> "...**Ogden** must be treated as a case on its particular facts which does not give rise to any principle of general application."

[67] It is apparent, therefore, that considerable doubt has now been cast on the correctness of the decisions in cases such as **R v Grant**, **R v Ogden** and **R v Byron**.

Or, at the very least, in more recent cases, the courts have seen it fit to limit these decisions to their particular facts and circumstances. Against this background, it would be, at best, inadvisable (if not irresponsible), for us to give effect to those earlier decisions that are now being questioned, while not recognizing and applying those, such as **R v Tsekiri** and **R v FNC**, that, with the advance of technology in the area of DNA analysis, seem to reflect the current learning. To the extent that it is necessary to do so, therefore, we accept the approach reflected in these later cases.

[68] In relation to that aspect of the evidence of Dr Wayne McLaughlin (see paragraph [20] hereof) that all male relatives of the applicant would have the same Y profile discovered in his tests, Mr Gittens sought to capitalize on this by seeking to drive home the possibility of a mistaken identification. However, any fair consideration of this submission should also take into account the following advice given by the court in **R v FNC** at paragraph 29:

> "As in *Adams (No 2)*, it will be open to the defence at the trial to call evidence that he has a brother (if indeed he has one) or adduce other evidence to show that the defendant was not in London at the time. The jury will then, as in *Adams (No 2)*, have to consider all the evidence…."

[69] Against the background of this advice, it is important to observe that at the trial of this matter, the applicant led no evidence that he had a brother or any living adult male relative. Neither did he lead evidence that he was not in the parish of Saint Andrew (where the virtual complainant was raped) at the time of the commission of the offence. (Although he stated in his unsworn statement that he was at home with his family at the material time, no address was given).

[70] Accordingly, the DNA evidence, properly understood, was a powerful and important part of the totality of the evidence against the applicant at his trial, helping to seal his fate by almost assuring his conviction.

[71] There is, therefore, in our view, no merit in the submission that this issue formed a basis on which to interfere with the applicant's conviction. None of the grounds concerning conviction having been made out, the applicant's application for permission to appeal against conviction must therefore be refused.

**Issue (iii) whether the sentence imposed was manifestly excessive**

**Summary of submissions for the applicant**

[72] Counsel argued that the sentence of 40 years' imprisonment imposed for the offence of rape was manifestly excessive and disproportionate vis-à-vis the usual range of sentences imposed for this offence. Counsel also argued that, although he was not propounding that a purely mathematical approach was required, it would seem that the learned trial judge, having stated that she had taken the applicant's prior 7 years spent on remand into consideration, would have intended to impose a term of 47 years' imprisonment. Counsel argued further that the learned trial judge ought not to have interpreted the applicant's facial expression (that is, his smiling at times during the trial) as demonstrating a lack of remorse, in deciding on the sentence that was ultimately imposed.

**Summary of submissions for the Crown**

[73] Counsel for the Crown submitted that the learned trial judge had appropriately sentenced the applicant to 40 years. That sentence, he submitted, fell within the legally-permissible maximum and minimum sentences that could be imposed pursuant to section 6(1)(a) of the Sexual Offences Act (which would be the now-applicable legislation) and the legislation in force when the offence was committed (the Offences against the Person Act).

**Discussion**

[74] The antecedent report for the applicant disclosed that, at the time of sentencing, he was 37 years old and had been employed as a gardener up to the time of his arrest. The applicant was also stated to be illiterate; as having one previous conviction recorded against his name and as being the father of one child.

[75] The extent of the plea in mitigation offered on behalf of the applicant was to request that the court take into consideration the period of seven years and two months which the applicant had spent in custody prior to his trial.

[76] We have noted that the sentencing comments of the learned trial judge are indeed limited and fail to reflect the full extent of her thought process in determining the sentence that she imposed. We are aware that the sentence in question would have been handed down prior to the promulgation of the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017; and also prior to the delivery of the highly-instructive authority of **Meisha Clement v R**

[2016] JMCA Crim 26 which reviews numerous authorities and reiterates and enounces the principles that should guide a court in approaching sentencing. That fact notwithstanding, there are authorities, such as **R v Everald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered on 5 July 2002, that pre-date the trial giving rise to this appeal, and that offer helpful guidance on sentencing. Regrettably, such guidance was not followed in this case.

[77] Section 6(1)(a) of the Sexual Offences Act states the now-applicable sentence for rape. It provides that:

> "A person who-
>
> (a) commits the offence of rape (whether against section 3 or 5) is liable on conviction in a Circuit Court to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years:

[78] Further, section 6(2) provides as follows:

> "(2) Where a person has been sentenced pursuant to subsection (1) (a) or (b) (ii), then in substitution for the provisions of section 6(1) to (4) of the Parole Act, the person's eligibility for parole shall be determined in the following manner: the court shall specify a period of not less than ten years, which that person shall serve before becoming eligible for parole."

[79] Thus, if this was the applicable legislation, an appropriate sentence for the offence of rape should fall somewhere within a maximum of life imprisonment and a minimum of 15 years, with a possibility of parole coming only after a prisoner has served at least 10 years' imprisonment. The sentence of 40 years imposed by the

learned trial judge does fall within that broad range, albeit a period to be served before eligibility for parole was not specified.

[80] It is important to note, however, that these offences occurred in 2005 and the Sexual Offences Act, 2009, did not in fact come into effect until 30 June 2011. We were unable to obtain a copy of the indictment, despite several efforts. However, given the fact that the incident occurred in 2005 and the applicant was charged in the same year, it is likely that the applicant would have been prosecuted, not under the Sexual Offences Act; but under section 44 of the Offences against the Person Act. That section, as it read before the effective date of the Sexual Offences Act, was as follows:

> "44.-(1) Whosoever shall be convicted of the crime of rape shall be guilty of felony, and being convicted thereof, shall be liable to imprisonment for life."

[81] Unlike section 6 of the Sexual Offences Act, that section indicates no minimum sentence for the offence of rape. Neither does it permit or require the specifying of a minimum period to be served before eligibility for parole. We will deal with the orders for sentencing according to the law as it stood at the time the Offences against the Person Act was still in operation.

[82] We observe that, as submitted by counsel for the applicant, the sentence does not fall within the usual range of sentences imposed for the offence of rape in other cases. We will consider whether this departure from the norm was warranted. Further, the comments of the learned trial judge fail to reflect the reasons that informed the decision for the sentence imposed. As opined by Morrison P in **Meisha Clement v R**,

at paragraph [43], our task in reviewing a sentence of a lower court is to determine whether the sentence imposed below:

> "(i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[83] We remind ourselves as well of other dicta outlined in **Meisha Clement v R** in relation to principles applicable to the sentencing procedures of the court where, at paragraph [26], Morrison P stated that:

> "[26] Having decided that a sentence of imprisonment is appropriate in a particular case, the sentencing judge's first task is, as Harrison JA explained in **R v Everald Dunkley** [(unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered on 5 July 2002], to 'make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any other factors that will serve to influence the sentence, whether in mitigation or otherwise'. More recently, making the same point in **R v Saw and others** [[2009] EWCA Crim 1, para. 4], Lord Judge CJ observed that 'the expression, starting point' ... is nowadays used to identify a notional point within a broad range, from which the sentence should be increased or decreased to allow for aggravating or mitigating features'.
>
> [27] In seeking to arrive at the appropriate starting point, it is relevant to bear in mind the well-known and generally accepted principle of sentencing that the maximum sentence of imprisonment provided by statute for a particular offence should be reserved for the worst examples of that offence likely to be encountered in practice[20]. By the same token, therefore, it will, in our view, generally be wrong in principle

> to use the statutory maximum as the starting point in the search for the appropriate sentence.
>
> ....
>
> [29] But, in arriving at the appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence….
>
> [34] ...However, in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial..."

[84] It must be observed that the sentence for the offence of rape that was imposed in this case, does not satisfy the criteria set out at paragraph [43] of **Meisha Clement v R** in that, the sentencing process, on the face of it, does not reveal an application of the relevant principles of sentencing; and the sentence appears to fall way outside the normal range of sentences imposed for this offence. Additionally, the learned trial judge, in sentencing the applicant, failed to identify either a sentencing range or a starting point. The sentence therefore reflects an error in principle, entitling this court to intervene (see **R v Kenneth John Ball** (1952) 35 Cr App R 164 at page 165, per Hilbery J).

[85] However, happily, we are not without guidance as to the general range of sentences in cases of rape. In the case of **Oneil Murray v R** [2014] JMCA Crim 25, Morrison JA (as he then was), at paragraph [23], reviewed a wide range of rape cases, summarizing and comparing their various circumstances and the sentences imposed. In that judgment, Morrison JA made the following observation:

> "[23] In our view, these cases, which span a period of close to 15 years, suggest a sentencing range of 15-25 years' imprisonment, with 20 years perhaps most closely approximating the norm, on convictions for rape after trial in a variety of circumstances..."

[86] Thus, the sentencing range for rape has been accepted to be 15 to 25 years, unless the circumstances are such to take the case outside that range. (That this is the current range has recently received this court's affirmation in the case of **Daniel Roulston v R** [2018] JMCA Crim 20, at paragraphs [18] and [19]). That range and the usual starting point of 15 years are also recommended in the sentencing guidelines. We are of the view, however, that there are certain features of this case that make the usual range of sentences for the offence of rape inapplicable in this case and that the learned judge, though ultimately imposing a manifestly excessive sentence, did not err merely by going beyond the upper limit of the usual range, as the discussion that follows will illustrate.

**The appropriate starting point**

[87] In determining an appropriate starting point, it is important for us to bear in mind (as Morrison P reminded us in **Meisha Clement v R**), that maximum sentences ought to be reserved for the most serious cases. We note that in today's Jamaica sexual offences are, regrettably, quite prevalent. Experience has shown that sexual offences routinely constitute the majority of cases tried by circuit courts. We have had regard to the duration of the ordeal that the applicant inflicted on the virtual complainant and to the number of times the virtual complainant was violated. In fact, we observe in passing that the applicant could properly have been indicted for three counts of rape

arising out of this incident. These factors make a starting point of 15 years (the bottom of the range) inapplicable. We find a starting point of 18 years to be appropriate.

**Aggravating factors**

[88] The circumstances of this case are egregious in that the applicant broke into the virtual complainant's home during the night, breaching the sanctity of her home and violating her in what she should have been able to regard as the safety and security of her bedroom. The applicant raped her in different sexual positions. During the rape she was subjected to sexual and other indignities. Among these indignities was the fact that the virtual complainant was menstruating at the time of the incident, however the applicant was not deterred when that fact was pointed out to him.

[89] Further, the commission of the offence, on the evidence of the virtual complainant, seemed to have involved some element of premeditation, including the fact that entry to the premises was gained by the sawing off of a part of an iron grille and that the applicant had been watching her or looking at her as she used a computer before going to bed, no doubt to determine the best time to break in. Additionally, pages 53-54 of the transcript disclose that two dogs that were always left loose were, after the incident, found locked up in their kennel, apparently led there with a can of dog food with holes punched in it. The brand of dog food was one that the virtual complainant's family did not give to their dogs. Those facts suggest that the dogs were deliberately locked away by a stranger to the household.

[90] Another disturbing consideration is that, on the virtual complainant's testimony, when she asked the applicant why he was raping her, he callously responded (at page 37, line 20): "[b]ecause I choose you". This could reasonably be construed as a show of power, intended to convey to the virtual complainant the inevitability of the fate that had befallen her, simply because he willed it. On the evidence of the virtual complainant, the applicant commanded her to give him good loving like she gives her boyfriend. He also commanded her to say words to him in effect requesting him to have rough intercourse with her. He demanded that she say the words louder, when she did not do so loudly enough for him. He also asked her if she wanted him to impregnate her (using less forensic language). On the evidence, the applicant also asked the virtual complainant if anyone had ever "gone down" on her and whether she wanted him to "go down" on her. At some point he also forced or tried to force his tongue into her mouth. The virtual complainant tried to dissuade him from raping her by asking him why he was doing what he was doing. His response was, on the evidence (at page 30, lines 21-22 of the transcript): "I know what I am doing is wrong but is just soh it goh in Jamaica". At least twice during her ordeal she asked the applicant to have mercy on her, which request was ignored.

[91] Support for considering at least some of these matters as being of an aggravating nature may be found in the case of **Milberry, Morgan and Lackenby v R** [2002] EWCA Crim 2891. In that matter, the English Court of Appeal considered advice given to it by the Sentencing Advisory Panel ("the Panel") proposing a revision of the then-current sentencing practice in respect of the offence of rape. In endorsing that

advice, the court considered the case of **R v Billam** [1986] 1 All ER 985 (cited by Mr Taylor). The court gave guidance that lower courts may properly consider the following factors, among others, to be aggravating factors in rape cases,:

> "Aggravating Factors
>
> 31. The Panel identify nine aggravating factors, the first five of which are the same as those identified in Billam. ...
>
> 32. The nine factors which the Panel identifies with which we agree are as follows:
>
> 'i. the use of violence over and above the force necessary to commit the rape
>
> ii. use of a weapon to frighten or injure the victim
>
> iii. **the offence was planned**
>
> iv. an especially serious physical or mental effect on the victim; this would include, for example, a rape resulting in pregnancy, or in transmission of a life-threatening or serious disease
>
> v. **further degradation of the victim, e.g. by forced oral sex or urination on the victim (referred to in Billam as 'further sexual indignities or perversions')**
>
> vi. **the offender has broken into or otherwise gained access to the place where the victim is living** (mentioned in Billam as a factor attracting the 8 year starting point)
>
> vii. the presence of children when the offence is committed (cf. Collier (1992) 13 Cr App R (S) 33)
>
> viii. the covert use of a drug to overcome the victim's resistance and / or obliterate his or her memory of the offence
>
> ix. a history of sexual assaults or violence by the offender against the victim'…" (Emphasis added)

[92] It seems to us that, despite the difference between the legislative provisions and starting points in the English jurisdiction, on the one hand, and ours, on the other, these factors, which are not exhaustive, might also properly be considered in this jurisdiction. The highlighted factors in the quotation above were clearly present in the instant case.

[93] All these factors, present in this particular case, were absent from the case of **Paul Maitland v R** [2013] JMCA Crim 7, relied on by Mr Gittens, which, in our view, shows this case as having more aggravating features than that case.

[94] It is not unreasonable to infer that the whole experience must have caused the virtual complainant severe psychological trauma, although not much physical violence was used in this case. On the evidence, she was at times shaking with fear during her ordeal. We bear in mind, however, that the applicant was also tried, convicted and sentenced separately for the other offences which he committed while in the house, and so we do not take those offences into consideration in determining an appropriate starting point or as aggravating factors.

[95] Another possible aggravating factor that could have caused an addition of years to the starting point is that the applicant had a prior conviction. However, since the antecedent report does not disclose the nature of the offence for which he was convicted, it would not be fair to the applicant to place much weight on it. It could possibly be a conviction for some unrelated offence. Additionally, although we do not wish to seem to be discounting the importance of an observation by a trial judge, we

also are reluctant to set much store by what the learned judge interpreted as the applicant's lack of remorse from her observation that he had been smiling at various periods during the trial. His doing so could have been due to any number of factors and cannot, by any objective test, conclusively be said to have been caused by a lack of remorse.

[96] These aggravating factors would increase the starting point of 18 years by 15 years to 33 years. We are of the view, therefore, that the learned judge, whilst being correct in going beyond the usual upper limit of 25 years, imposed a sentence that was manifestly excessive – that is, 40 years.

**Mitigating factors**

[97] In relation to the mitigating factors, there was force, but not much physical violence used against the virtual complainant over and above the commission of the offence. But, as previously noted, this is to be balanced against the psychological trauma that the virtual complainant must have suffered. The applicant was also said to have been employed as a gardener up to the time of his arrest. In our view, these factors would not be sufficient to significantly reduce the appropriate number of years. However, taking them into account, along with the consideration that he ought, for all intents and purposes, to be taken not to have had any relevant previous convictions, it is fair and reasonable for two years to be taken off his sentence, thus reducing the contemplated sentence from 33 to 31 years.

**Time spent in custody on remand**

[98] The applicant had spent seven years and two months in custody for which he should receive full or substantially-full credit. (See, for example, **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ) and **Meisha Clement v R**). The sentence ought to be decreased to 23 years and 10 months. No grounds of appeal were filed, and no arguments were advanced to us in respect of the sentences for burglary and larceny and indecent assault.

[99] We therefore make the following orders:

1. The application for leave to appeal against conviction is refused.
2. The application for leave to appeal against the sentence for the offence of rape is granted.
3. The hearing of the application for leave to appeal against the sentence for the offence of rape is treated as the hearing of the appeal.
4. The appeal against sentence for the offence of rape is allowed.
5. The sentence of 40 years' imprisonment imposed for the offence of rape is set aside. Substituted therefor is the sentence of 23 years' and 10 months' imprisonment at hard labour.
6. The sentences for burglary and larceny and indecent assault are affirmed.

7. All the sentences are to be reckoned as having commenced on 2 October 2012 and are to run concurrently.