[2020] JMCA Crim 31

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 1/2011

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA (AG)

DWAYNE BROWN v R

Miss Melrose Reid instructed by Melrose G Reid & Associates for the applicant

Miss Kathy-Ann Pyke and Miss Kelly-Ann Francis for the Crown

16 March and 31 July 2020

SIMMONS JA (AG)

[1] On 11 November 2010, after a trial before a judge and jury in the Circuit Court for the parish of Saint Catherine, Mr Dwayne Brown (the applicant), was found guilty on an indictment charging him with the offence of rape. On 3 December 2010, he was sentenced to 15 years' imprisonment at hard labour.

[2] The defence was consent and as such, the main issue was that of credibility. The prosecution relied on two witnesses: DJ (the complainant) and her mother. The applicant gave sworn evidence.

The application for leave to appeal

[3] The applicant filed an application (dated 30 December 2010), in this court, for leave to appeal conviction and sentence on the following grounds:

> "1. Unfair trial.
>
> 2. The Legal Aid Lawyer failed to effectively disapprove [sic] [the complainant's] story, [proving] it false.
>
> 3. The attorney also did NOT challenge certain details which prove that there were [contradictions] based on my instructions and statements."

He indicated that "[f]urther grounds of appeal [were to] be filed by the Legal Aid [attorney] assigned to [him] by the Court of Appeal".

[4] The application was considered by a single judge of appeal on 28 December 2012. It was refused on the basis that the learned trial judge gave full submissions on the case for the prosecution and the defence, and had adequately addressed the inconsistencies and discrepancies in the evidence and the issue of honest belief. The single judge of appeal also noted that the sentence which was imposed by the court was not excessive, bearing in mind the age difference between the complainant and the applicant, and the fact that he had a previous conviction for carnal abuse.

[5] The applicant therefore renewed his application for leave to appeal his conviction and sentence before this court.

The case for the Crown

[6] On 15 April 2009, the complainant, who was 17 years old, accompanied the applicant to a location for the purpose of a video shoot. She had met the applicant via

social media when she responded to a message sent by him inquiring of her interest in being a model. The applicant spoke with the complainant's mother and arrangements were made for the complainant to attend.

[7] After the shoot ended, the applicant told the complainant that he liked her body and style. He held on to her and asked if she would have sexual intercourse with him. She told him "no". The applicant then held her down and when she began to cry, told her that she should cooperate as there was no one nearby to help her. Out of fear, she complied, and he had sexual intercourse with her in two positions. She cried throughout. When it was over they parted ways. The complainant called her mother and told her that she was raped by the applicant. She gave her mother a full account of what had occurred after arriving home. She was taken to the Hunts Bay Police Station where a report was made.

[8] As indicated, the complainant's mother also testified on the Crown's behalf. She confirmed that the complainant had called her in a trembling voice indicating that she was raped by the applicant. She also stated that the complainant gave her a full account of her ordeal in the evening when she arrived home.

The case for the applicant

[9] The applicant gave sworn testimony. He stated that the complainant had consented to sexual intercourse. He said that it was his honest belief that she was consenting to the act.

[10] His evidence was that on the day in question he and the complainant went to the location which was situated by a river. She did not take any swimwear to the shoot, and so he told her to change into whatever she had. He fixed her hair and face. He also told her to apply lotion and began taking pictures. At this time, the complainant was in her underwear. He told her that she would make a good model.

[11] He decided to change the location and whilst proceeding further down the river, he began asking the complainant about personal matters and her sexual history. He performed oral sex on her, inserted his finger into her vagina and also kissed her. When he was about to have sexual intercourse with the complainant, she "placed her hand on [his] hand that [he] was using to insert his penis as if to stop [him]". He stopped and the complainant told him "we didn't agree to have sex". He told her that "[he] won't be long [he] just wanted to feel how inside of her felt". He also told her that it would not hurt. The complainant "then said okay", and released his hand, so he proceeded. They had sexual intercourse in "various positions".

[12] The complainant indicated to him that she was afraid of becoming pregnant and asked for money to buy pills. He told her that he did not have any money. She then asked him for her payment for the shoot and he told her that "she wasn't going to get pay same time". The complainant got upset and accused him of tricking her and refused to continue with the video shoot. He told her that he had gotten carried away because she had a nice body.

The grounds of appeal

[13] As mentioned previously, the applicant in the notice of appeal (dated 30 December 2010), indicated that further grounds of appeal would be filed. At the hearing of the renewed application for leave to appeal, the original grounds were abandoned and permission was sought by counsel for the applicant, Miss Melrose Reid, to argue four supplemental grounds of appeal, which read as follows:

> "GROUND 1 - The learned trial judge (LTJ) failed to adequately deal with the inconsistencies and discrepancies in [the] case, resulting in the Jury arriving at a guilty verdict.
>
> GROUND 2 - The learned trial judge failed to adequately address the legal issue of honest belief, resulting in [the applicant's] conviction.
>
> GROUND 3 - The LTJ's disparaging remarks about Defence Counsel not putting certain questions to witnesses, gravely prejudiced the Applicant, leading to the jury convicting him, and also, to the Applicant filing two grounds of Appeal with respect to his Counsel's incompetence.
>
> GROUND 4 - The Sentence for Count 2 (being rape) is manifestly excessive."

[14] Permission was granted for these grounds to be pursued.

Submissions

Ground 1 – The learned trial judge failed to adequately address the inconsistencies and discrepancies, resulting in the jury arriving at a guilty verdict

For the applicant

[15] Miss Reid submitted that the learned trial judge, having outlined the numerous inconsistencies and discrepancies in the complainant's evidence, failed to show how they

were linked to her credibility. The court's attention was directed to the complainant's evidence in relation to the position in which sexual intercourse took place, the clothing the applicant was wearing, and her failure to mention that she had asked the applicant for money to purchase the emergency contraceptive pill. Counsel stated that it was not enough for the learned trial judge to state "I believe those are major inconsistencies" (see the summation at page 31 lines 13-14). Counsel stated that this was so as some of the inconsistencies were not cleared up by the complainant, and the learned trial judge failed to address that issue in his summation. For example, the complainant's statement to the police and at the preliminary enquiry spoke to sexual intercourse in a different position than that described in evidence.

[16] Reference was made to **Taibo (Ellis) v R** (1996) 48 WIR 74 where Lord Mustill stated that "in a marginal case such as this the evidence needed to be scrutinised, and not simply rehearsed, if a verdict founded on it was to be safe".[1] Counsel also referred to **Anand Mohan Kissoon and Rohan Singh v The State** (1994) 50 WIR 266, in which George CJ referred to the following passage from **The State v Mootoosammy and Henry Budhoo** (1974) 22 WIR 83:

> "It is axiomatic that it is the exclusive function of the jury to assess the credibility or otherwise of evidence before them and to [weigh] it. As was said by O'Halloran J, in *R v Flett* (1943) 2 DLR 656... 'The jury are judges of *all* the facts and not only some of the facts.' In my opinion, a judge should

[1] Page 84

> endeavour to ensure that the jury [realises] the adverse weakening effect unexplained substantial and significant contradictions should have on the credibility of a witness and the weight of his evidence."

[17] Reference was also made to **R v Shippey and Others** [1988] Crim LR 767.

[18] By way of example, counsel stated that although the learned trial judge mentioned two discrepancies in the evidence of the complainant's mother and that of the complainant, he stated at page 31 of the summation lines 22-25:

> "So, it's for you to say if you consider it, that inconsistency, a major or minor one or how you would treat with it."

[19] This direction, she said, was inadequate in a case such as this where the main issue was consent and an assessment of the credibility of the witnesses was central to its determination. Counsel further argued that the learned trial judge ought to have shown how the inconsistencies and discrepancies affected the credibility of the complainant.

[20] It was submitted that where there are material inconsistencies, any clarification or explanation for them must emanate from the witness. It is not the duty of the judge, or the Crown in its closing submissions, to posit explanations. Reference was made to **R v Curtis Irving** (1975) 13 JLR 139 and **R v Noel Williams and Joseph Carter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 51 and 52/1986, judgment delivered 3 June 1987 in support of that submission.

[21] She stated that based on **R v Byron Young and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 65, 66, 67 and 134/1990, judgment delivered 16 March 1992, where material inconsistencies and/or discrepancies are left unresolved, any finding by the jury would be based on speculation.

[22] Counsel also took issue with the definition of discrepancies given by the learned trial judge at page 7 of the summation lines 11-13 on the basis that it was too narrow. He said:

> "Discrepancies may arise because witnesses don't remember in the same detail all that happen on a particular occasion."

The narrowing of the definition to "forgetfulness", counsel submitted, failed to take into account instances in which witnesses give conflicting evidence in respect of the same subject matter. She further argued that the learned trial judge failed to address the issue of discrepancies in a way which would have assisted the jury in their deliberations to properly analyse the law in conjunction with the facts of the case. In other words, he ought to have directed them to consider how the inconsistencies and discrepancies may have impacted the witnesses' credibility.

For the respondent

[23] Crown Counsel, Miss Kelly-Ann Francis, submitted that although the learned trial judge may not have explained the effect of each of the inconsistencies and discrepancies, he was careful to highlight where they occurred. Indeed, she said, at the commencement of the summation, he gave adequate directions on how to identify discrepancies and inconsistencies and the effect which they may have on a witness' credibility. She stated

that although the word "credibility" was not used, the following section of the summation contained adequate directions:

> "[I]n deciding what evidence to accept and what to reject, you may accept what a witness has said if you are satisfied that the witness has spoken the truth. On the other hand, you should reject the evidence of any witness whom you do not believe…"

She stated that the learned trial judge, after highlighting a particular inconsistency, also reminded the jury that he had previously given directions on inconsistencies and how they should treat with them.

[24] It was also submitted that the inconsistencies in the evidence of the complainant were not material, and as such, would not have affected her credibility. With respect to the position in which the complainant had indicated that sexual intercourse had taken place, counsel argued that the learned trial judge referred to the evidence of the applicant and left the matter for the jury's determination. On the issue of whether the applicant was wearing pants or shorts at the time of the incident, counsel said that the learned trial judge reminded the jury that the applicant had stated that he was wearing pants.

[25] Crown Counsel stated that the learned trial judge's directions in respect of discrepancies could not be faulted and were in keeping with the guidance issued by the court in **R v Carletto Linton and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4 and 5/2000, judgment delivered 20 December 2002, which was referred to in **Demone Austin and Others v R** [2017] JMCA Crim 32. The directions given to the jury as to the determination of materiality and whether any

explanation was given for the discrepancies, as well as their discretion to accept or reject that explanation, were proper. In any event, it was submitted, the discrepancies did not go to the root of the case, and as such, this ground of appeal ought to fail.

Ground 2 – The learned trial judge failed to adequately address the legal issue of honest belief, resulting in the applicant's conviction

For the applicant

[26] Miss Reid submitted that the jury ought to have been directed that if they believed the applicant's account of the events, then that account could cause him to have the honest belief that the complainant was consenting to sexual intercourse. Reference was made to page 42 lines 5-25 and page 43 lines 1-15 of the summation. Specific reference was made to the following passage which counsel said was fundamental to the issue:

> "She said to me that we didn't agree to have sex, I said I won't be long I just wanted to feel how inside of her felt. I also told her it wouldn't hurt. She then said okay. And released my hand, so I proceeded." (See the summation at page 43 lines 7-11)

[27] It was submitted that the learned trial judge failed to explain the law in respect of honest belief. He chided defence counsel about what he had not put to the witness and spoke sarcastically about honest belief, which threw grave doubt on the applicant's evidence (see the summation pages 56-58). Reference was also made to **United States v Cadet Jacob D Whisenhunt** Army 20170274, United States Army Court of Criminal Appeals, judgment delivered 3 June 2019, where the conviction of a cadet who was

charged for raping another cadet was overturned. In doing so, the court expressed the following views:

> "... [I]t is hard to conclude beyond a reasonable doubt that appellant could complete the charged offenses without cooperation or detection.
>
> It is even harder to conclude beyond a reasonable doubt that appellant would anticipate that [the woman] would not make any reflexive noise or movements upon being awakened, which would have alerted multiple others to his criminal activity."

For the respondent

[28] It was submitted that the learned trial judge adequately addressed the issue of honest belief and as such this ground of appeal is also devoid of merit. Reference was made to **R v Aggrey Coombs**, (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 9/1994, judgment delivered 20 March 1995, in which Wolfe JA (as he then was) addressed this issue. It was submitted that the direction given by the learned trial judge in the instant case was in accordance with the guiding statement issued by Wolfe JA. The learned trial judge, in the instant case, stated as follows:

> "Now, if an accused man honestly believes that the complainant was consenting whether or not that belief is based on reasonable grounds, he cannot be guilty of the offence of Rape."[2]

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[2] See the summation page 14, lines 23-25 and page 15, lines 1-2

He then proceeded to remind the jury of the applicant's evidence that at first, the complainant held on to his hand as if to stop him and then released it after he spoke to her. He also reminded them that the applicant had stated in his evidence that he honestly believed that the complainant was consenting.

[29] That reminder, it was submitted, came after the learned trial judge had reviewed, in totality, the evidence for both the prosecution and the defence. More importantly, it came directly after he had dealt with the evidence of the applicant. The learned trial judge directed them to examine the evidence in order to determine whether they believed the applicant's evidence that the complainant had consented to the act.

[30] In the circumstances, it was submitted that the learned trial judge did not err and there was no merit in this ground of appeal.

Ground 3 – The learned trial judge's disparaging remarks about defence counsel not putting certain questions to witnesses, gravely prejudiced the applicant, leading to the jury convicting him, and also, to the applicant filing two grounds of appeal with respect to his counsel's incompetence

For the applicant

[31] It was submitted that the learned trial judge's language in his summation conveyed to the jury that they should not believe applicant's evidence. This, counsel argued, prejudiced the case against the applicant resulting in his conviction. Reference was made to his directions to the jury at pages 56-57 of the summation.[3] Those comments, counsel

[3] See paragraph [82] of this judgment

submitted, were inappropriate as counsel for the applicant may not have been instructed in relation to the matters referred to by the trial judge. Reference was made to **Mears (Byfield) v R** (1993) 97 Cr App R 239 at 243 in which the Privy Council stated that the test of whether a judge's comments amounted to a usurpation of the jury's functions was one that was "too favourable to the prosecution".

[32] It was submitted that the learned trial judge's summation was biased in favour of the prosecution and disrespectful to counsel for the defence. If the learned trial judge had reason to doubt the applicant's evidence, a Lucas warning ought to have been given (see **R v Lucas** [1981] 2 All ER 1008). Reference was also made to **Broadhurst v R** [1964] 1 All ER 111, where Lord Devlin stated:

> "It is very important that a jury should be carefully directed on the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends of course on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness.

> This is the sort of direction which it is at least desirable to give to a jury."[4]

For the respondent

[33] Miss Pyke submitted that where a party fails to put his case to the witness for the other party it can be the subject of comment. Reference was made to **Walter Berkley Hart v R** (1932) Cr App Rep 202. Reference was also made to the text Archbold: Criminal Pleading, Evidence and Practice, 2008, where it was stated that:

> "[i]f, in a crucial part of the case, the prosecution intend to ask the jury to disbelieve the evidence of a witness for the defence it is right and proper that the witness should be challenged when in the witness-box or, at any rate, that it should be made plain while the witness is in the box that his evidence is not accepted."[5]

That principle was also stated in Phipson on Evidence, 12th Edition, at paragraph 1593.

[34] Crown Counsel submitted that the comments made by the learned trial judge caused no prejudice to the applicant. He treated with the evidence of the applicant as he did with the evidence for the prosecution. This, counsel stated, is evidenced in the learned trial judge's summation at page 2 lines 10—14, where he said "[i]n this case the [applicant] chose to give evidence and that evidence should be judged by precisely the same and fair standard as you apply to any other evidence in this case".

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[4] Pages 119-120

[5] Paragraph 8-116

[35] His use of the word "alas" in his summation at page 56 line 17, did not necessarily connote disbelief. The use of the term "low and behold [sic]" at page 58 line 11, was not prejudicial, as it was evident that the learned trial judge had thought that the complainant's evidence that the applicant had asked for her advice on how not to do what he did to her to another girl was quite strange. He used those words as a preface to his recap of the applicant's evidence that he had in fact asked for the complainant's advice.

[36] The learned trial judge also directed the jury on how to treat with his comments or opinion, when he said at page 6 lines 2—17:

> "...during the course of summing up I may make comments or express an opinion on the facts or as to the significance of the piece of evidence. Do not accept my views, unless you agree with them.... if I mention something which you think is important, you should have regard to it, and give it such weight as you think it deserves. As judges of the facts, it is your views that are important, in other words…you should ignore my views or comments on the facts except...as you think them sensible and helpful."

[37] It was also submitted that the learned trial judge did not chide counsel in his summation. His comments were directed at the new information which came from the applicant in his evidence that had not been suggested to the complainant whilst she was in the witness box. Those comments, it was submitted, were accurate and true to the evidence in the case.

[38] The learned trial judge critically analysed the case for both parties in the same manner with the aim of assisting the jury in their determination. Despite his strong opinions, the last thing the learned trial judge sought to do was to remind the jury before they left for deliberations that the applicant had nothing to prove. He also reminded them that in the final analysis, they should return to the prosecution's case and to "see if on this evidence you can feel sure before you can say guilty" (see page 60 lines 18- 19.

[39] In the circumstances, when the summation is viewed in its entirety, the learned trial judge did not overstep his bounds and his comments were not prejudicial to the applicant's case.

Ground 4 – The sentence for rape is manifestly excessive

For the applicant

[40] Miss Reid referred to the principles of sentencing as enunciated in **Bernard Ballantyne v R** [2017] JMCA Crim 23 and **Meisha Clement v R** [2016] JMCA Crim 26. She submitted that, in light of the jurisprudential movement with respect to the clarity and the arithmetical working out of sentences, the learned trial judge erred in not setting out the basis on which he arrived at the sentence imposed on the applicant, which was excessive. Reference was made to **Samuel Blake v R** [2015] JMCA Crim 9 in which a sentence of four years' imprisonment for having sexual intercourse with a person under 16 years was upheld.

[41] In the case at bar, where no weapon was used and there was no physical injury, counsel submitted that an appropriate sentence would have been in the range of four to five years.

For the respondent

[42] In addressing this ground, counsel referred to the judgment of Morrison P in **Meisha Clement v R**, at paragraph [20], where he stated:

> "It is a common place of modern sentencing doctrine that, in choosing the appropriate sentencing option in each case, the sentencing judge must always have in mind....the four 'classical principles of sentencing'. These are retribution, deterrence, prevention and rehabilitation... In **R v [Evrald] Dunkley** [(unreported), Court of Appeal, Jamaica, Resident Magistrate's Criminal Appeal No 55/2001, judgment delivered 5 July 2002], P Harrison JA (as he then was) explained that it will be necessary for the sentencing judge in each case to apply these principles, 'or any one or a combination of...[them], depending on the circumstances of the particular case'. And ultimately, taking these well established and generally accepted principles into consideration, the objective of the sentencing judge must be, as Rowe JA (as he then was) explained in **R v Sydney Beckford and David Lewis** [(1980) 17 JLR 202], '[to] impose a sentence to fit the offender and at the same time to fit the crime'."

[43] It was submitted that the learned trial judge took those principles into account in arriving at his sentence. His discourse captured his thoughts on the principles of deterrence, prevention and even the possibility of rehabilitation. Before passing sentence he indicated that he found nothing redeeming about the applicant which would mitigate a long sentence. In other words, there was nothing to suggest that the applicant could be rehabilitated. In arriving at that conclusion, he also considered the fact that the

applicant had been convicted on 7 February 2007 for the offence of carnal abuse. At that time, he was 29 years old and was given a suspended sentence (see page 70 lines 17-20). Yet, at the age of 31, he was again before the court for a similar offence involving a minor.

[44] Where retribution is concerned, the imposition of a long sentence speaks for itself. In doing so, the fact that the applicant had a previous conviction was also considered. The learned trial judge stated at page 69 line 23 to page 70 line 7:

> "That is what you did to this young girl. You lured her, like a venomous spider, into your web and proceeded to ravish her and then spoke so glibly and over-confidently in court about how she gave it all up to you... this is your modus it seems."

[45] Although not referred to as aggravating and mitigating factors, it is evident that the learned trial judge employed the right approach. He spoke of the danger of the applicant's crime to society in the context of his wide reach on the internet. He stated at page 69 lines 6-23:

> "You know what makes your crime, Mr. Brown, what makes your crime so personally offensive to me and I think makes your crime such a danger to society? Because, you were operating so insidiously through the facility of a website, so that the persons exposed to you were not confined to your small area of Portmore. In fact, the victim came from Kingston... So, anybody could have fallen victim to your website seeking persons to come to be models, and that I find to be a most insidious way of, like a spider, ensnaring young women, luring them into your venomous web."

[46] Counsel submitted that the sentence of 15 years was imposed as a means of deterrence, so that the applicant would realise that his actions have consequences and also to send a message to the wider society. The learned trial judge's description of the offence as very "insidious" and "irksome" established not only that he regarded the extent of the applicant's reach on the internet as an aggravating factor, but that he was also seeking to deter others from committing a similar crime.

[47] Crown Counsel submitted that the most important consideration is whether the sentence imposed by the learned trial judge was arrived at in keeping with the relevant sentencing principles and that the sentence fell within the range permissible by the statute. In this case, it is clear that the learned trial judge took into account a combination of three sentencing principles, as well as the aggravating factors surrounding this offence. He did not find any mitigating factor. Crown Counsel submitted that the learned trial judge, having found no mitigating factor, was not required to create one.

[48] It was submitted that, in the circumstances, the sentence imposed was proper and ought not to be disturbed even if this court would have passed a different sentence. The learned trial judge had the opportunity of observing the applicant, heard his history, and imposed a sentence which he deemed to be appropriate.

[49] The sentence was not manifestly excessive and fits the offender and the crime for which he was convicted. Counsel also reminded the court that at the time of sentence, the formal procedure outlined in **Meisha Clement v R** and the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts (the Sentencing

Guidelines) were not in existence. Counsel also requested that the sentence be reckoned as having commenced as at the date of its imposition.

Should there be a re-trial?

[50] It was submitted by counsel for the applicant that there should be no retrial as this would give the prosecution another chance to cure the evidential deficiencies in its case. Such a course would be an injustice to the applicant. Reference was made to **Au Pui-Kuen v Attorney General of Hong Kong** [1980] AC 351 and **Nicholls v R** [2000] All ER (D) 2305 in support of that submission.

[51] There were no submissions from the Crown in relation to this issue.

Delay

For the applicant

[52] It was submitted that the delay in the hearing of this application was a breach of the applicant's constitutional right to a fair hearing within a reasonable time and that he should be compensated by a reduction in his sentence. Reference was made to **Melanie Tapper and another v R** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 28/2007, judgment delivered 27 February 2009; **Curtis Grey v R** [2019] JMCA Crim 6; and **Techla Simpson v R** [2019] JMCA Crim 37 in support of that submission. Counsel for the applicant stated that if this application had been heard in a reasonable time, the applicant, if he was successful, would have been released some time ago. It was submitted that in the event that the application for leave to appeal is refused, this court should reduce his sentence by two years.

For the respondent

[53] Crown Counsel agreed that the applicant's sentence, based on the principle in **Techla Simpson v R**, ought to be reduced. It was suggested that a 30% reduction would be appropriate as the applicant would have been eligible for parole after serving 30% of his sentence (see section 6(1) of the Parole Act).

[54] Counsel also made the point that by virtue of section 6(1) of the Parole Act, the applicant would have been eligible for parole after five years.

Discussion and analysis

[55] The grounds of appeal posited by Miss Reid raised three issues with regard to the learned trial judge's directions to the jury. They complained that those directions were ineffectual/unsatisfactory insofar that:

(1) he failed to indicate that the inconsistencies and discrepancies may have affected the credibility of the crown's witnesses, especially the complainant;

(2) he failed to point out to the jury the aspects of the applicant's evidence, if believed, which might have caused him to believe that the complainant was consenting to sexual intercourse; and

(3) he prejudiced the applicant by his comments in relation to counsel's "failure" to cross-examine the witnesses in relation to matters raised during the applicant's testimony.

[56] Another complaint was that the sentence imposed was manifestly excessive.

Failure to adequately deal with the inconsistencies and discrepancies in the case, resulting in the jury arriving at a guilty verdict

[57] Miss Reid submitted that the learned trial judge dealt with the question of discrepancies and inconsistencies by simply outlining the legal position but provided no assistance to the jury as to how they should deal with them. She also complained that the definition of discrepancies at page 7 lines 11 to 13 was not as fulsome as it ought to be.

[58] In **Demone Austin and Others v R**, which was referred to by counsel for the Crown, Morrison P, in his consideration of the directions of the learned trial judge on that issue, relied on the suggested approach in **R v Carletto Linton and Others**, where Harrison JA stated:

> "Discrepancies occurring in the evidence of a witness at trial ought to be dealt with by the jury after a proper direction by the trial judge as to the determination of their materiality.
>
> The duty of the trial judge is to remind the jury of the discrepancies which occurred in the evidence, instructing them to determine in respect of each discrepancy, whether it is a major discrepancy, that which goes to the root of the case, or a minor discrepancy to which need not pay any particular attention. They should be further instructed that if it is a major discrepancy, they the jury, should consider whether there is any explanation or any satisfactory explanation given for the said discrepancy. If no explanation is given or if one given is one that they cannot accept they should consider whether they can accept the evidence of that witness on the point or at all... Carey, P (Ag.) as he then was, in **R v Peart and Others** [(unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 24 and 25/1986,

judgment delivered 18 October 1988], said of discrepancies, at page 5:

> 'We would observe that the occurrence of discrepancies in the evidence of a witness, cannot by themselves lead to the inevitable conclusion that witness' credit is destroyed or severely impugned. It will always depend on the materiality of the discrepancies'."[6]

[59] The learned trial judge dealt with this issue from page 2 line 22 to page 10 line 6 of his summation.

[60] The applicant's first complaint was that the definition of discrepancies at page 7 lines 11 to 13 the summation is too narrow: "Discrepancies may arise because witnesses don't remember in the same detail all that happen [sic] on a particular occasion". At this juncture we wish to highlight the difference between an inconsistency and a discrepancy as those terms are oftentimes been used interchangeably. An inconsistency occurs when there is a difference in the evidence of a particular witness in respect of the same subject. A discrepancy arises where the evidence of witnesses in relation to a particular thing is different.

[61] We would have been inclined to agree with the view posited by Ms Reid if that was all that was said by the judge. The trial judge went on to state at lines 13-19:

> "One witness' recollection may be vivid and clear, while that of another may be dull and hazy. The disparity in testimony

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[6] Page 16

> of witnesses recognizes that in observation, recollection, and expression the abilities of individuals vary."

He went on to state at page 8 lines 3-6 that:

> "... discrepancies and inconsistencies may occur because the witnesses are indeed not speaking the truth or are just being plain unreliable."

[62] He then proceeded to define the term "inconsistencies". He also pointed out that discrepancies and inconsistencies may be major or minor. He stated:

> "Now, in any case where you find that there is a discrepancy or inconsistency you are to ask yourselves whether the discrepancy or inconsistency is a major or minor one. That is, is it serious or slight, material or immaterial? If it is one you consider to be minor, that is slight or immaterial you may well decide to ignore it. You may ignore it if you say to yourselves it is so slight as not to affect the credibility of the witness. If, however, it is one you consider to be major, you are to give the matter your very serious consideration bearing in mind any explanation that has been given by the witness or the fact that there has been no explanation."[7]

[63] In our view, those directions cannot be faulted.

[64] The learned trial judge then proceeded to examine the evidence of the complainant in some detail. Inconsistencies in the complainant's evidence regarding who removed her clothes; whether the applicant had asked her if he could perform oral sex on her; the

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[7] Page 9 lines 8 – 21

position in which intercourse took place; and whether the applicant was wearing shorts or pants, were highlighted for the jury's consideration. He also referred to the discrepancies between the evidence of the complainant and that of her mother. Those discrepancies concerned whether clothing was to be provided for the complainant for the photo shoot. The complainant's evidence was that she did not discuss it with her mother. Her mother, on the other hand, stated that the complainant told her that clothing would have been provided. Another discrepancy was between the complainant's evidence that she did not tell her mother that another girl was present, and her mother's evidence that she had in fact said so.

[65] At that stage, the learned trial judge again directed the jury's attention to the inconsistencies in the complainant's evidence and described those relating to the removal of her clothes and the position of sexual intercourse as "major" (see page 35 lines 13-14). He also referred to the inconsistency in her evidence relating to the clothing of the applicant and whether they had a discussion about oral sex. At the end of that exercise, the learned trial judge stated:

> "But I remind you as well, that even the [applicant] said that he was wearing pants. So, it's for you to say if you consider it, that inconsistency a major or minor one or how you would treat with it."[8]

[8] Page 36 lines 22 - 25

[66] Where the issue of the removal of the complainant's clothing is concerned, the learned trial judge stated:

> "…she said I cooperated... I removed all my clothes. But when she was cross examined by learned counsel for the [applicant] man she said, well, first he got her to agree with that evidence that she had earlier give [sic], I took off my clothes, not the [applicant], and then he put to her 'did you on a previous occasion say that the [applicant] removed your clothing' and she said 'yes' and she herself agreed that both statements were inconsistent and remember I pointed to you what she last said to the [Crown Counsel] in re-examination, that the true position, that it was her who took off her clothing. And remember when the [applicant] gave his evidence... he also said that it was [the complainant] who removed her clothing. So it is for you, Mr. Foreman and Members of the Jury, to say if you find there is any inconsistency there. "[9]

[67] The evidence in relation to the position in which sexual intercourse took place was also addressed by the learned trial judge who stated:

> "She said they did both positions and she told you what she said that he did that second. Well, you may or may not find, Mr. Foreman and members of the jury, that that is an inconsistency and if you so find, remember how I instructed you to treat with it. But, I will come to the evidence of the [the applicant] shortly. But, remember he himself said they had sex in several or various positions. I believe those are the major inconsistencies."[10]

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[9] Page 33 lines 1-20

[10] Page 35 lines 5-14

[68] Looking at the summing-up, as a whole, the approach of the learned trial judge was in accordance with that suggested in **R v Carletto Linton and Others** which guided this court in **Demone Austin and Others v R**. The learned trial judge directed the jury's attention to the differences in the evidence of the complainant during examination-in-chief and cross-examination, and those between her evidence and that of her mother. He also directed their attention to the difference between what the complainant said in her statement to the police and her evidence. He specifically stated where those inconsistencies and discrepancies arose. He also indicated which ones remained unresolved. This came after he had given clear directions on how to treat with differences in the evidence of a particular witness as well as those between witnesses.

[69] We agree with Miss Francis that the learned trial judge carefully scrutinized the evidence and gave proper directions to the jury on how to treat with the inconsistencies and discrepancies. The summation was completed in two hours so those initial directions to which the trial judge consistently referred would have been fresh in the minds of the jury.

[70] The learned trial judge did not simply rehearse the evidence. Unlike the situation in **Taibo v R**, the Crown's case could not have been described as either weak or confusing. The major inconsistencies, in our view, concerned the removal of the clothing and the position of sexual intercourse. When the applicant's evidence is juxtaposed with that of the complainant, the jury had enough material for their consideration and had received sufficient directions from the learned trial judge on which they could assess her credibility.

[71] Accordingly, we find that there is no merit in this ground of appeal.

The learned trial judge failed to point out to the jury the aspects of the applicant's evidence, if believed, which might have caused him to honestly believe that the complainant was consenting to sexual intercourse

[72] The learned trial judge in dealing with this issue indicated to the jury that there was no dispute that sexual intercourse took place and that the question was whether the complainant had consented to the act. His directions on what constitutes consent cannot be faulted.

[73] Counsel for the applicant has submitted that the directions were inadequate as the learned trial judge failed to point out to the jury the actions of the complainant which may have led him to honestly believe that she was consenting.

[74] The applicant's evidence, as recounted by the learned trial judge, was that he and the complainant kissed. He said: "She was kissing me back". The learned judge continued:

> "He said I went between her legs and was about to start having sex with her …I went between her legs and was about to start having sex with her while inserting my finger in her vagina, she placed her hand on my hand that I was using to insert my penis as if to stop me. At that point I stopped. She said to me that we didn't agree to have sex, I said I won't be long I just wanted to feel how inside of her felt. **I also told her it wouldn't hurt. She then said okay. And released my hand, so I proceeded**. He said he believed she was consenting."[11] (Emphasis added)

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[11] Page 42 line 25 to page 43 lines 1-12

He continued:

> "Now, as I understand the case, Mr. Foreman and members of the jury, [the applicant]…is saying to you that this happened well, firstly the sex happened because he got carried away and the charge of rape is being pursued because the complainant was upset that she had not been paid the four thousand dollars.
>
> Now, you have to examine what he has said in considering, yourselves, whether or not you can believe him…"[12]

[75] In dealing with the issue of consent the learned trial judge directed the jury's attention to the applicant's evidence that he got carried away and that the complainant had in fact consented and was upset because he did not pay her for the photo shoot. He also posed this question to the jury:

> "So, what is there in this case that might assist you in coming to the view that there was no consent or there was consent?"[13]

[76] He then proceeded to remind them of the complainant's evidence and directed them to examine the circumstances in which the act occurred. He said:

> "...On the Crown's case you have a lone female in the company of a total stranger, never mind that there was this communication on Tagged for all intention and purposes, you may well find that she was a total stranger and in a lonely place. The complainant spoke about persons, some she said

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[12] Page 48 lines 2-11

[13] Page 49 lines 4-6

a hundred and ten feet away, twice the length of this courtroom and the [the applicant] said there were people some hundred feet away.

In viewing these circumstances, you are entitled, Members of the Jury, to take into account the relative disparity in the size of the complainant and the [applicant]. In assessing, sorry, in assessing the evidence you are entitled to take into consideration the size difference in assessing how, in using your common sense, how, what he said to her, if you accept that what she testified that he said to her, in getting angry, and saying to her she should cooperate because there is nobody else around, hundred and ten feet away the nearest person or hundred feet as the case might be. So nobody is going to hear her so she must co-operate. You are entitled to use your common sense in assessing how that would operate on the mind of a young female from out of the parish coming to a strange place with a total stranger, broad man, small female. How would that affect her. So that when she says she cooperated, she wasn't saying that I was consenting. What she was saying to you, Mr. Foreman and Members of the Jury, was that I didn't see the point in resisting because of the circumstances in which I found myself so he had his way, he had his way by virtue of the fear that she was in, if you accept [that] she was in fear, you accept that she was placed in fear. Now, Mr. Foreman and members of the jury, the [applicant] on the other hand is asking you to say that he got carried away and that is why we are -- a part of the reason we are here today and he told you what carried away means, what he means by it. That he should not have engaged in sexual activities with her and he allowed his feeling to take over the relevance of shoot. But ask do you believe him, you ask yourselves that, if you can believe him that he, in fact, got carried away. When you examine the conversation that he said occurred before the act of sex, the [applicant] was the person initiating all the questions. The [applicant] was the person initiating the physical contact. The [applicant], you may well find was the person who did everything to bring about the sex that took place. He told you, Mr. Foreman and members of the jury, how much [sic] he asked if she was a virgin, she said no. He told her that it is a nice thing it was that the experience she could have, suppose like a man travelling on a rocket to the moon. She should have that experience, she was just nice, yes man. He just wanted her

> to experience the pleasures without any reward, she didn't have to do it back to him. He just wanted her to experience it. That's what he said. So, he –- you bring about all of this. But he is asking you to say, that he only got carried away. When he was there asking all the questions initiating the conversation, initiating personal contact. He went and sat beside her on the bamboo or log. Whether a bamboo or not he went and sat beside her, she isn't doing anything to encourage him so to speak. He is the one making the moves. But it is a matter for you as to whether or not he got carried away, as he said.
>
> Now, Mr. Foreman and members of the jury, remember now, in assessing whether or not you can believe the [applicant, you] are to examine all of what he said. Now, he said remember what was –- before I go on, what was said, remember when you come to the question of oral sex, you know what was put to the complainant was that he asked if he could perform oral sex on her. Not that he did any oral sex. **Well, didn't do any oral sex but she** [sic] **is saying she was reluctant at first then she eventually agreed and he is careful that he didn't force or threaten her in anyway. Then we come down to the kissing**."[14] (Emphasis added)

[77] The learned trial judge also reminded the jury of the applicant's evidence that he did not ask the complainant if he could kiss her, and that she did not resist when he placed his tongue in her mouth and in fact kissed him back. He then indicated that the applicant's attorney-at-law had not put that scenario to the complainant. He also indicated that no questions were asked of the complainant whether she had placed her hand on the applicant's when he was about to have sex with her, as if to stop him and that, on being reassured, she removed her hand from his. He continued thus:

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[14] Page 51 line 6-page 54 line 24

> "So, matter for you, if you believe him. He said he honestly believed that she was consenting... whether or not that belief is reasonable, you cannot convict him. But it is a matter for you. If you believe that he honestly believed that."[15]

He then proceeded to remind the jury again, that it was being said that the charges were borne out of the disappointment of the complainant in not being paid and her fear of becoming pregnant.

[78] In **R v Aggrey Coombs**, Wolfe JA (as he then was) stated:

> "The question of honest belief in a case of rape only arises where the man misreads or misunderstands the signals emanating from the woman. What the defence of honest belief amount to is really this: I had sexual intercourse but I did so under the mistaken belief that she was consenting."[16]

[79] In our view, the learned trial judge's directions on the issue of honest belief in the general part of his summation cannot be faulted. He recounted the evidence and reminded the jury of those aspects of the applicant's testimony which, if believed, could have supported his assertion that he honestly believed that the complainant was consenting to the act. Whilst he did not use the words "honest belief", his treatment of the evidence in the context of whether or not the complainant had consented to sexual intercourse, coupled with the earlier direction, and his reminder at the end that the applicant could not be convicted if they accepted that he honestly believed that he had

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[15] Page 57 lines 18-25

[16] Page 4

had the complainant's consent, was quite sufficient. It would have been quite clear to the jury that he was directing them to look at all the circumstances in order to determine two things: firstly, whether the complainant had consented to the act; and secondly, based on her actions, if they accepted the applicant's evidence, whether he honestly believed that she had consented.

[80] The learned trial judge seems to have dealt with the issue primarily as being one of credibility. He was careful to remind the jury of the evidence of both the complainant and the applicant and the circumstances in which the act occurred. Clearly, they found the complainant to be a credible witness and rejected the applicant's account. We have not had the benefit of the transcript of the evidence, but from the summation it can be gleaned that those aspects of his evidence which may have been capable of forming the basis of an honest belief that he had her consent, were not put to her in cross-examination. Ultimately, the jury accepted the complainant as a witness of truth. They rejected the applicant's evidence that she kissed him back and later removed her hand from his, which could have been inferred as consent to sexual intercourse.

[81] In the circumstances, we are of the view that this ground also has no merit.

The learned trial judge prejudiced the applicant by his comments in relation to counsel's "failure" to cross examine the witnesses in relation to matters raised during the applicant's testimony

[82] It has been argued that certain comments made by the learned trial judge were prejudicial to the applicant's case. They were described as being "disparaging" to his counsel. The Crown has argued that they amounted to a critical analysis of the evidence

in light of the new information that was presented to the court during the applicant's testimony. The relevant portion of the summation is set out below:

> "What was put to the complainant was that he asked if he could kiss her, and you remember her answer. Now, I am sure his lawyer has been surprised as I was when the lawyer asked him, 'I didn't ask if I could kiss her' and then he went on and said he placed his tongue in her mouth and she did not resist and she kissed him back. Now, I just only met the lawyer since the 16th of September but have formed the view that he is a competent lawyer and he ask the [the applicant], asking her to kiss him and not one word about the [applicant] putting his tongue in her mouth and she not resisting and even worst not resisting kissing him back.
>
> So, Mr. Foreman and Members of the Jury, you would be well within your rights to ask yourselves if he made that up as he stood in the witness box. Because, that would have been the prime opportunity for his counsel to say to her, but, you not only agreed to the kissing, well, first he asked her, he said to her the [applicant] asked her and counsel is not asking the complainant any question that the [applicant] didn't tell him about. He got the information from the [applicant] and as this trial went on you saw how he was summoned to the dock from time to time, so this is [applicant] who was fully participating in his trial. But, alas, that wasn't put, well, he is asking you to believe it, it is up to you Members of the Jury. Anyway, he said he got carried away. He said, I, well, he went between her legs and was about to start having sex with her and while placing – inserting, I am sorry, while inserting my penis inside her vagina she placed her hand on my hand that I was using to insert the penis as if to stop me at which point I stopped. Now, when he went up there, the first time you were hearing anything about that. Remember the whole case is about the girl consenting or not consenting, and competent counsel that he is, I do not believe that he would have failed to put something as critical as this to the young lady so that you could have heard her response. And since it was put, Mr. Foreman and Members of the Jury, and the [applicant] is saying, we are hearing for first time when he go up there, you should ask yourself the question, if you can believe him, because this is open consent. She stopping him, wait a minute. I didn't agree to have sex, and then he cajoled her, I

won't be long, I just want to feel inside, how inside felt. But not a word of that to the young lady. So, matter for you, if you believe him. He said he honestly believed she was consenting. Remember what I told you about honest belief that you think that he honestly believed that she was consenting whether or not that belief is reasonable, you cannot convict him. But is a matter for you. If you believe that he honestly believed that.

Now, Mr. Foreman and Members of the Jury, the complainant is asking you, the prosecution through the mouth of the complainant is asking you to say, this man not in support of what I am saying that he had sex without my consent. When he was all done, he was apologizing, and asking her advice as to how, what he could do so that he didn't do it to any other girl. Well, I thought that a strange bit of evidence when I heard it from the complainant, but low [sic] and behold, the [applicant] said she told him that she was a peer counsellor and he asked her; she said she was a peer counsellor, and I asked what advice she would give to somebody like me who gets carried way at times."[17]

[83] In **Mears v R**, Lord Lane who delivered the decision of the Board stated:

> "In rejecting the appellant's submission that the comments of the judge were unfairly weighted against him, the court asked themselves whether the comments amounted to a usurpation of the jury's function. In the view of their Lordships it is difficult to see how a judge can usurp the jury's function short of withdrawing in terms an issue from the jury's consideration. In other words, this was to use a test which by present-day standards is too favourable to the prosecution. Comments which fall short of such a usurpation may nevertheless be so weighted against the defendant at trial as to leave the jury little real choice other than to comply with what are obviously the judge's views or wishes. As Lloyd LJ observed in *R v Gilbey* [(1990) (unreported) 26th January, England CA: —

[17] Page 54 line 25 – 58 line 16

> 'A judge, is not entitled to comment in such a way as to make the summing—up as a whole unbalanced...It cannot be said too often or too strongly that a summing—up which is fundamentally unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury.'

Their Lordships realise that the judge's task in this type of trial is never an easy one. He must of course remain impartial, but at the same time the evidence may point strongly to the guilt of the defendant; the judge may often feel that he has to supplement deficiencies in the performance of the prosecution or defence, in order to maintain a proper balance between the two sides in the adversarial proceedings. It is all too easy for a court thereafter to criticise a judge who may have fallen into error for this reason. However, if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own views. Whether that is what has happened in any particular case is not likely to be an easy decision. Moreover, the Board is reluctant to differ from the Court of Appeal in assessing the weight of any misdirections. Here their Lordships have to take the summing—up as a whole, as Mr. Andrade submitted, and then ask themselves in the words of Lord Sumner in *Ibrahim v R* [1914] AC 599 at page 615 whether there was —

> 'Something which deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future'.

Their Lordships consider that the judge's comments already cited went beyond the proper bounds of judicial comment and made it very difficult, if not practically impossible, for the jury to do other than that which he was plainly suggesting. Their Lordships cannot, taking the summing—up as a whole, overlook the fact that perhaps the most important point in the

> defence case was effectively neutralised by the way in which the judge dealt with the identification of the body."[18]

[84] The comments which are at the centre of this complaint do not in our minds amount to a criticism of counsel for the applicant. The learned trial judge began by stating that counsel was competent. He then proceeded to comment that the applicant who had appeared to have been very involved in the trial process apparently failed to instruct his counsel in respect of the alleged actions of the complainant, based on which the applicant later gave evidence that he had formed the honest belief that she was consenting to sexual intercourse. In **Walter Berkley Hart v R**, at page 207, the court stated:

> "In our opinion, if, on a crucial part of the case, the prosecution intend to ask the jury to disbelieve the evidence of a witness, it is right and proper that that witness should be challenged in the witness-box or, at any rate, that it should be made plain, while the witness is in the box, that his evidence is not accepted."

[85] In **O'Connell v Adams** [1973] Crim LR 113, which was referred to by Crown Counsel, it was held that "if it was part of the client's case to challenge a witness as not speaking the truth at a trial on indictment, the professional advocate had to put the matter fully and fairly to the witness and, if that was not done and the advocate in his speech tried to rely on the falsity of the witness's evidence, the court should check him at once". In the commentary which follows it was stated that cross-examination would

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[18] Pages 289-290

give the witness an opportunity to explain any circumstances which may suggest that his evidence is false.

[86] Whilst the language of the learned trial judge was by no means bland, his words in our view did not spill over into the pool of fundamental "unbalance" (see **Mears v R** page 289). In fact, he had a duty to point out to the jury that the complainant had not been questioned in respect of those matters. If he had omitted to do so, that would have been unfair to the complainant. It must, however, be borne in mind that trial judges must be careful in their choice of words in order to avoid the risk of their comments being viewed as disparaging of a party's case or prejudicial.

[87] In the circumstances this ground of appeal also fails.

Was the sentence manifestly excessive?

[88] Section 14(3) of the Judicature (Appellate Jurisdiction) Act provides that:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case, shall dismiss the appeal."

[89] In dealing with an appeal against sentence this court will only interfere if the sentence is found to be excessive or the principles with regard to sentencing were not correctly applied.

[90] A sentencing judge in the exercise of his discretion is required to conduct a delicate balancing exercise. He is required to bear in mind what was described as the "four

classical principles of sentencing" by Lawton LJ in **R v Sergeant** (1974) 60 Cr App Rep 74. The learned judge said:

> "What ought the proper penalty to be? We have thought it necessary not only to analyse the facts, but to apply to those facts, the classical principles of sentencing. Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing." (See pages 77 and 78)

In **R v Evrald Dunkley**, Harrison JA stated that the sentencing judge was required to apply those principles "or any one or a combination of [them], depending on the circumstances of the particular case". [19]

[91] It is by no means a simple or easy task. Each case has its own unique circumstances and so too each defendant. The sentence as was stated by Rowe JA (as he then was) must "fit the offender and at the same time ... fit the crime" (see **R v Sydney Beckford and David Lewis**).

[92] The offence in this matter was committed on 15 April 2009. At that time, the Sexual Offences Act which provides for a minimum sentence of 15 years' imprisonment was not yet in force.[20] He was, therefore, liable to be sentenced in accordance with section 44(1) of the Offences Against the Person Act which prescribed a maximum

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[19] Page 3

[20] The relevant provisions were enacted 30 June 2011

sentence of life imprisonment. The Sentencing Guidelines, with which we are now familiar, were also not in existence at the time when the applicant was sentenced. In addition, the learned trial judge did not have the benefit of the guidance provided in **Meisha Clement v R**. However, the trial judge was still required to approach the issue of sentencing in a systematic manner in keeping with established principles. In this regard, he would have been guided by cases such as **R v Evrald Dunkley** in which Harrison JA set out the methodology to be employed as follows:

> "The sentencer commences this process after conviction by determining, at the initial stage, the type of sentence suitable for the offence being dealt with. He or she first considers whether a noncustodial sentence is appropriate, including a community service order. If so, it is imposed. If not, consideration is given to the other options, ranging from the suspended sentence to a short term of imprisonment. This is the approach adopted in England, and generally employed in Jamaica, as a useful guide to sentencing and outlined in the case of **R v Linda Clarke** [1982] 4 Cr. App. R [S] 197. That case recommended that after having considered the above options, the sentencer may consider:
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> > 'If a partially suspended sentence is inappropriate, what is the best possible total sentence which can be imposed bearing in mind the circumstances of the case and the record of the offender'. (Emphasis added)
>
> If therefore the sentencer considers that the 'best possible sentence' is a term of imprisonment, he should again make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise. The factors to be considered in mitigation of a sentence of imprisonment are, whether or not the offender has:
>
> (a) pleaded guilty;

(b) made restitution or

(c) has any previous conviction.

These factors must be considered by the sentencer in every case before a sentence of imprisonment is imposed."[21] (Emphasis added as in original)

[93] Morrison P in **Meisha Clement v R**, in addressing the issue of the aggravating and mitigating factors involved in the sentencing process, stated:

"[32] While we do not yet have collected in any one place a list of potentially aggravating factors, as now exists in England and Wales by virtue of Definitive Guidelines issued by the Sentencing Guidelines Council (SGC)..., the experience of the courts over the years has produced a fairly well-known summary of what those factors might be. Though obviously varying in significance from case to case, among them will generally be at least the following (in no special order of priority): (i) previous convictions for the same or similar offences, particularly where a pattern of repeat offending is disclosed; (ii) premeditation; (iii) use of a firearm (imitation or otherwise), or other weapon; (iv) abuse of a position of trust, particularly in relation to sexual offences involving minor victims; (v) offence committed whilst on probation or serving a suspended sentence; (vi) prevalence of the offence in the community; and (vii) an intention to commit more serious harm than actually resulted from the offence. Needless to say, this is a purely indicative list, which does not in any way purport to be exhaustive of all the possibilities.

[33] As regards mitigating factors, P Harrison JA (as he then was), writing extra-judicially in 2002,... cited with approval Professor David Thomas' comment that [David A Thomas, Principles of Sentencing, 2nd edn, page 46] comment that '[m]itigating factors exist in great variety, but some are more common and more effective than others'. Thus, they will

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[21] Pages 3-4

> include, again in no special order of priority, factors such as (i) the age of the offender; (ii) the previous good character of the offender; (iii) where appropriate, whether reparation has been made; (iv) the pressures under which the offence was committed (such as provocation or emotional stress); (v) any incidental losses which the offender may have suffered as a result of the conviction (such as loss of employment); (vi) the offender's capacity for reform; (vii) time on remand/delay up to the time of sentence; (viii) the offender's role in the commission of the offence, where more than one offender was involved; (ix) cooperation with the police by the offender; (x) the personal characteristics of the offender, such as physical disability or the like; and (xi) a plea of guilty. Again, as with the aggravating factors, this is not intended to be an exhaustive list.
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> [34] This list is now largely uncontroversial. 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. As the Privy Council stated in **Callachand & Anor v The State** ([2008] UKPC 49 ... at para. 9), an appeal from the Court of Appeal of Mauritius –
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> > '... any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing'."

[94] This court, in its consideration of whether the sentence imposed by the learned trial judge was manifestly excessive, is guided by the following principle which was referred to by Morrison P in **Meisha Clement v R**:

> "[42] …[W]e remind ourselves, as we must, of the general approach which this court usually adopts on appeals against sentence. In this regard, Mrs Ebanks-Miller very helpfully referred us to **Alpha Green v R** [(1969) 11 JLR 283, 284], in which the court adopted the following statement of principle

by Hilbery J in **R v Kenneth John Ball** ([1951] 35 Cr App R 164, 166]:

> 'In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene.'

> [43] On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (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."

[95] The learned trial judge approached the process by referring to the applicant's previous conviction for carnal abuse. He stated that although the complainant was above the age of consent she was still a minor. He also indicated that the complainant's mother, having spoken to the applicant on the telephone, had entrusted her into his care. The learned trial judge described the crime as being "personally offensive" because the applicant had operated from a website that could have been accessed by persons outside of his community. He made the point that the complainant had journeyed from Kingston. He said, "anybody could have fallen victim to [the applicant's] website seeking persons

to come to be models, and that I find to be a most insidious way of, like a spider, ensnaring young women, luring them into your venomous web. That is what you did to this young girl".

[96] The learned trial judge noted that the offence had been committed during the currency of the suspended sentence that had been imposed in respect of the applicant's previous conviction. He did indicate, however, that he would not activate that sentence.

[97] He expressed the view that the applicant deserved a long sentence and that he found nothing redeeming about the applicant. His antecedents had revealed that he was the father of three young children and had been gainfully employed. His counsel had also indicated that he was involved with youth groups in his community and had expressed remorse. The learned trial judge appears to have concluded that any mitigating factors were nullified by the aggravating factors.

[98] In concluding that a sentence of imprisonment was appropriate the learned trial judge clearly addressed his mind to the principle of retribution/punishment. He spoke of the fact that the offence was of a similar nature as that for which the applicant was given a suspended sentence some two years prior and indicated that he could not identify any redeeming quality about the applicant. That would have addressed the issue of rehabilitation. The length of time for which he was ordered to be imprisoned would also serve as a deterrence to others and prevent the applicant from committing another similar offence for quite some time.

[99] He clearly formed the view that a sentence of imprisonment was appropriate in light of the fact that the applicant had a previous conviction for a similar offence in February 2007 (approximately two years before this offence). Among the aggravating factors was the difference in their ages: the complainant was 17 years old and the applicant was 31 years old.

[100] The learned trial judge, in sentencing the applicant, clearly identified factors which he viewed as aggravating. However, the methodology employed in arriving at the sentence was incomplete, in that, he did not identify the range of sentences normally imposed for offences of that nature, and the starting point that he would adopt. In the circumstances, this court has a duty to apply the relevant legal principles and methodology in order to ascertain whether the sentence is manifestly excessive.

[101] The statutory maximum sentence for rape as prescribed by the Offences Against the Person Act was life imprisonment. The imposition of the maximum penalty is reserved for the worst cases. This is not such a case. Therefore, the maximum sentence would be inappropriate in circumstances such as this. The sentencing range was 15-25 years' imprisonment with 20 years being the norm (see **Oneil Murray v R** [2014] JMCA Crim 25). In the circumstances of this case, in which the applicant was convicted after a trial, an appropriate starting point would be 15 years.

[102] The aggravating factors identified by the learned trial judge far outweigh factors such as his employment record and involvement in the community which could be viewed as mitigating. Whilst no violence was used, the learned trial judge referred to the

complainant's evidence that she was in fear as she was alone with the applicant in a lonely place. If a starting point of 15 years was utilised, in light of all these aggravating features, which include the applicant's previous conviction for an offence of a similar nature, and in the absence of mitigating features, a sentence in the range of 20-25 years' imprisonment at hard labour would have been the most appropriate in the circumstances. As a consequence, in our view, the learned trial judge was rather lenient when he imposed a sentence of 15 years' imprisonment at hard labour, and so we would not disturb it.

Delay

[103] We have also been asked to consider whether the sentence ought to be reduced on account of the delay in the hearing of this application, which was caused by the unavailability of the notes of evidence. Those notes have still not been produced. The records reveal that the transcript of the summation and sentencing was received by this court on 13 September 2012. As stated in paragraph [4] herein, the application was refused by a single judge of this court. The renewed application was filed in February 2013 and the matter listed for hearing on 7 April 2014. On that date, it was taken out of the list due to the absence of the transcript of the proceedings. Efforts were made to obtain the transcript and in January 2020, this court was notified that it could not be produced as all three court reporters had demitted office.

[104] Where the delay in the trial or appeal has not been occasioned by any act of the applicant or appellant, it may be argued that there has been a breach of his constitutional right to a fair hearing within a reasonable time. Counsel for the applicant relied on **Techla**

Simpson v R, **Melanie Tapper and Another v R** and **Curtis Grey v R** in her submissions in respect of this issue.

[105] In **Techla Simpson v R**, there was a delay of eight years in bringing the case to trial. It was argued that the delay breached Mr Simpson's constitutional right to a fair hearing within a reasonable time (see section 16(1) of the Constitution of Jamaica). The court found that although his defence was not prejudiced by the delay, a reduction of his sentence by two years was an appropriate remedy for the constitutional breach.

[106] In **Melanie Tapper and Another v R**, where the hearing of the appeal was delayed by approximately four years due to the absence of the transcript, the right to a hearing within a reasonable time was discussed in great detail. Smith JA who delivered the judgment of the court stated:

> "**The scope and the breach**
>
> In **Eric Bell v R** [(unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 16/ 1998, judgment delivered 29 September, 2003], this Court held that the requirement for a hearing within a reasonable time as provided by section 20(1) of the Constitution applies not only to pre-trial delays but also to post trial delays where an appeal is filed. Indeed [in **Mills v Her Majesty's Advocate and Another (Scotland)** [2002] UKPC D2] concerned a breach of the 'reasonable time' guarantee in appellate proceedings.
>
> As stated before the post-conviction delay of over five (5) years is inordinate. In my judgment such delay without more, constitutes a breach of the appellants' constitutional right to a hearing within reasonable time.

The remedy

The purpose of the 'reasonable time' guarantee in respect of the appellate proceedings is to avoid a person convicted remaining too long in a state of uncertainty about his fate- (see para. 54 of the Mills judgment). In **Taito v R** [[2002] UKPC 15], para. 22 the Board stated that the proposition in **Darmalingum v The State (Mauritius)** [2000] UKPC 30] that the normal remedy is to quash the conviction, went too far. While a conviction which was obtained in breach of the right to a fair trial must be quashed, the position is different where the breach occurs at the stage of an appeal see **Mills** para 50.

It seems to me that only in exceptional circumstances, if at all, would it be justified and necessary to set aside a conviction, which has been upheld on appeal as a sound conviction, on the ground that there was an unreasonable delay between the date of the conviction and the hearing of the appeal.

The appropriate remedies which of course will depend on the circumstances of each case will include a reduction in sentence, monetary compensation or merely a declaration. In this case the appellants were granted bail by the trial judge after they had given verbal notice of appeal. Thus in my view monetary compensation would not be appropriate, A mere declaration would not in my view, be a sufficient remedy as, this would mean that after waiting for over five (5) years the appellants would now have to serve the full sentence.

In my judgment, in the circumstances of this case a reduction in the sentence is the appropriate remedy. I think that a reduction of the sentence from 18 months to 12 months would be sufficient to compensate the appellants for the effects of the delay."[22]

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[22] Pages 75-76

[107] The learned judge of appeal also made the point that the appellant is not required to show prejudice in order to prove that his right to a fair hearing within a reasonable time had been breached. In that regard, he relied on the statement of that principle in **Mills**.

[108] In **Curtis Grey v R**, the fact that there was delay of four years in the hearing of the appeal was considered and the sentence discounted by one year.

[109] It has been approximately nine years since the applicant filed his application for leave to appeal. His application was delayed for eight years through no fault of his. The delay in the hearing of this application was indeed inordinate and so breached constitutional right to a fair hearing within a reasonable time. In this regard we note that the applicant would have been eligible to be considered for parole after serving two-thirds of his sentence, which would be sometime after 3 December 2020. Although the sentence imposed could not be considered to be manifestly excessive, the applicant is entitled to a remedy for the breach of his constitutional right to a fair hearing within a reasonable time. We are of the view that the reduction of the applicant's sentence by two years is a fair remedy.

Disposal

[110] In all these circumstances, we would therefore make the following orders:

(1) The application for leave to appeal against conviction is refused.

(2) The application for leave to appeal sentence is granted.

(3) The hearing of that application is treated as the hearing of the appeal.

(4) The sentence of 15 years' imprisonment at hard labour is set aside and the sentence of 13 years' imprisonment at hard labour substituted therefor.

(5) The applicant's sentence is to be reckoned as having commenced on 3 December 2010.