[2024] JMCA Crim 20

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR GREEN JA

SUPREME COURT CRIMINAL APPEAL NO 18/2018

CRAIG DUBIDATH v R

Bert Samuels and Matthew Hyatt instructed by Knight, Junor & Samuels for the appellant

Ms Sophia Rowe and Mrs Christina Porter for the Crown

7, 8 November 2022 and 3 May 2024

Criminal law – Conduct of defence – Failure by defence counsel to put part of defence to complainant in cross-examination - Impact of defence counsel's conduct on fairness of trial and verdict

Criminal law – evidence – Inconsistencies – Effect on credibility of the complainant – Summation – Adequacy of directions to the jury

Criminal law – Sentence – Certificate to reduce sentence below prescribed statutory minimum – Whether compelling reasons shown for sentence to be reduced –Criminal Justice (Administration) (Amendment) Act, s 42K

DUNBAR GREEN JA

Introduction

[1] On 2 November 2017, following a trial before Beswick J ('the learned judge') and a jury in the Circuit Court for the parish of Saint Catherine, Mr Craig Dubidath ('the appellant') was convicted of forcible abduction and rape contrary to sections 17(1)(a) and 3(1) respectively of the Sexual Offences Act ('the Act'). On 28 February 2018, he was sentenced to three years' imprisonment for forcible abduction, suspended for three years,

and 15 years' imprisonment for rape. The learned judge ordered the sentences to run concurrently and issued a certificate, under section 42K of the Criminal Justice (Administration) (Amendment) Act ('CJAA'), indicating that were it not for the prescribed mandatory minimum sentence of 15 years' imprisonment, she would have imposed a term of six years' imprisonment.

Background

The prosecution's case

[2] At about 9:45 pm, on 21 October 2014, the complainant, a bartender, was at work at the Sweet Pea Bar when three men entered. Two of them, one being the appellant, were known to her. She had seen the appellant before on three prior occasions at the bar. She informed them that she would be closing the bar soon. Based on their commitment not to stay long, she agreed to close the bar at 10:30 pm.

[3] The men ordered six beers, and the man she did not know gave her $100.00 to play the 'Poker Box' (a slot machine).

[4] After closing the bar, the complainant began walking to her home, which was nearby. The appellant, who was driving in her direction, stopped to enquire why she chose to walk home in the dark and offered her a lift. She tried to assure him that she had done this before but relented after he insisted.

[5] The complainant sat in the front passenger seat. The other men she had seen at the bar were sitting in the back. She directed the appellant to her home, but he turned in the opposite direction. The appellant drove for some time, and she noticed a sign which read: "Welcome to Southborough". She told him that he had passed where she was going, but he did not reply and continued driving. She pulled the passenger door as if to jump out, and he said, "You can jump out, you know". She remained in the car. He continued driving, telling her that he intended to drop off the men as he wanted to talk to her. Later, she saw a big sign which read: "Welcome to Clifton", and he turned into a lane.

[6] The appellant stopped at the gate to a yard, turned off the ignition, took the keys, and exited the car. He queried whether she was coming out of the car, and she indicated her desire to go home. The other men exited the car, and the appellant locked the door. The man she knew before ('the second man') indicated that he was leaving, and the appellant, and the other man she did not know ('the third man'), walked into the lane. The complainant called a friend after which she exited the car, triggering the alarm.

[7] The appellant walked from the lane and turned off the alarm. He then enquired of the complainant whether she intended to come inside. The complainant repeated her desire to go home, but the appellant "draped her up" in the front of her pants, dragged her into a yard and padlocked the gate. She started to fight with him, and he lifted and carried her inside a room. The tussle continued during which she repeatedly indicated the desire to go home. The appellant eventually pulled down her pants and pushed her on to a bed. He ripped a condom open with his teeth, placed it on his penis, and proceeded to rape her. She cried and repeatedly told him to stop. When the appellant was done, he left the room. The third man then entered the room from behind the curtain and proceeded to rape her.

[8] During the sexual encounter with the third man, the appellant returned to the room and remonstrated with the third man, saying, "Weh you a do my youth, weh you a do?" The third man then came off her and left through the front door.

[9] The complainant pulled up her pants and underwear, took her bag, and walked outside. The appellant opened the gate and she proceeded to walk home. The appellant drove alongside her and offered to take her home. She refused his offer. The appellant stopped the car, took her up and placed her inside. He explained that he did not know what the third man was doing inside the room and promised to "deal with it". She directed him to her house.

[10] Subsequently, while still crying, she was telephoned by her friend. Soon thereafter, the police came and took the complainant to the police station, where she reported the incident.

[11] On 30 October 2014, the complainant pointed out the appellant on an identification parade ('the parade').

[12] At trial, the complainant was the sole witness to fact. Two additional witnesses gave evidence for the prosecution, namely, the investigating officer, Constable Georgia Richard Williams, and the identification parade officer, Sergeant Andrea Murray, whose witness statement was read into the record by agreement.

[13] In cross-examination, the complainant denied that the appellant had taken her to Clifton (where he resided) the first time they met, in September 2014, and that she saw his "soldier uniform" in his house that night. She insisted that 21 October 2014 (the date of the commission of the alleged offences) was the first time she went to the appellant's house and that she had not consented to sexual intercourse or being there. She maintained that the third man was a stranger and that he had stood behind a curtain in the appellant's room while the appellant raped her.

[14] The complainant was also challenged on the basis of several inconsistencies in her evidence. These will be referred to as the circumstances necessitate.

The defence

[15] The appellant raised the defence of consent. In his unsworn statement from the dock, he stated that he had previously met the complainant at the Sweet Pea Bar on 15 September 2014, when he went there to attend a birthday celebration for his relative, Jason. On that occasion, they struck up an intimate conversation, and she showed him a picture on her phone and a tattoo on her leg. They talked until he was ready to leave. She asked him to get her something to eat. He told her he would love to do so and make

her breakfast in the morning. The complainant responded by saying that she could not stay because she had to go home to her baby and 'baby father'.

[16] The appellant said that he had ridden on the back of a motorcycle that night, so he went for his car and returned to the bar for the complainant. She accompanied him to his home. Upon exiting the car, the complainant saw his helmet and made the observation that he was a soldier. He confirmed that he was, and she responded, "Soldier nuh want nobody, you know". When they got to his room, the complainant saw his uniform and said, "You a really soldier fi true, man". They talked while on the bed, and he began to touch her. The complainant told him to ensure he had a condom. He got the condom and they had sex. Afterwards, he carried her close to her home on Jermaine Road. She asked if he had saved her number, and upon confirming that he had done so, she told him, "All right, tomorrow".

[17] The complainant called him the next day, and he visited her at the bar. This was the second time he had seen her. She wanted him to attend a party with her, but he was unable to do so. He said she texted and called him after.

[18] He saw the complainant a third time at the bar. She winked at him and told him that a truck outside was driven by her baby's father, so he should know what he was doing. He purchased something at the bar, stayed a little, and left.

[19] The fourth time he saw the complainant was on the night of the incident (21 October 2014). He gave his brother money for a 'round' of drinks and to play something on the 'Poker Box'. The complainant came from around the counter, playfully poked him in the side with an ice pick, and accused him of not paying her any attention. He told her that he wanted to spend some time with her. She told him that she had to go home and wash her baby's clothes. He told her he would not stay long, and she said she would close the bar. At that point, they were the only ones there. She told him that she would wait 30 minutes before calling the person who would close the bar. He went outside, and she eventually joined him in his car. Two men were sitting in the backseat.

[20] On the way to his house, the complainant enquired about the other men, and he told her that they lived in the same area and that he would drop them off. When they got to his house, he turned off the car engine and exited the car. The complainant called her 'baby father' and later exited the car, triggering the alarm. They then walked to his room. He and the complainant talked and had sexual intercourse. When they were finished, he went to the bathroom. On his way back, he heard a noise in the room, and when he tried opening the door, it was locked. He started beating the door, and when it opened, he saw his friend, 'Colour', on top of the complainant. He asked him what he was doing there, and he said, "A little pussy me a look". The appellant enquired if he was mad, and things got a little heated. He also noticed that the complainant was crying. He then "collared" his friend and pushed him through the door.

[21] The appellant asked the complainant to explain how the friend got into the house and enquired if she had led him on at the bar, which gave him the idea she would let him have sexual intercourse with her. She denied doing so and asked him to carry her home. He agreed to take her home. She took up her bag, "sorted herself" and joined him in the car.

[22] On the way to her home, she started to curse and told him to tell his friend (Colour) that he should not return to the bar, or she would make some man "fuck him up". He advised her not to get herself in trouble and said that he would deal with it. She insisted that she would "mash him up" and that he (Colour) should not return to the bar. He told her to calm down as Colour was his friend and had disrespected him, so he would "diss him back". He then asked if she wanted to go to the police, and she responded in the negative. She also told him this had happened to her before and it "would not go like that". She repeated the intention "[t]o mek some man mash Colour up" and told him to take her home as she did not want to hear anything from him. He dropped her at the entrance to her home.

[23] Later, he sent the complainant a text message indicating that he hoped she had not led on Colour to have sex with her. She did not respond. He felt terrible about what had happened but was upset with both her and his friend. He sought advice from his supervisor at work and after some checks, it was discovered that a complaint had been made about the incident. The police came to Up Park Camp and arrested him for rape and forcible abduction.

[24] The appellant stated that he would not rape anyone as he had a mother and a sister, and had sworn to protect civilians. He said he had not withheld information, as it was he who asked his superiors to call the police station.

[25] At the conclusion of the trial, the appellant was found guilty of forcible abduction and rape, and sentenced, as earlier indicated. With the permission of a single judge of this court, he brings this appeal against the convictions and sentences.

The appeal

[26] The appellant was granted leave to abandon his original grounds of appeal and argue, instead, the following supplemental grounds (as amended during the hearing):

> "1. Failure to direct the jury properly on previous inconsistent statements and relate the inconsistencies to the relevant issues which the jury had to consider, deprived the appellant of a real chance of acquittal; [and] the numerous inconsistencies and discrepancies materially affected the credibility of the sole witness as to fact for the prosecution, rendering the verdict unreasonable and/or unsafe.
>
> 2. The failure of Defence Counsel to fully suggest the case for the defence, to wit, that the complainant and the Appellant/Applicant had engaged in consensual sexual activity prior to the occasion complained of and which was articulated in the unsworn statement left the prosecutor and judge the right and duty to inform the jury to consider the issue of recent fabrication on the part of the appellant/applicant thus reducing the weight accorded to the statement and denying the Appellant/Applicant a real chance of acquittal.

3. The mandatory minimum sentence legislated is in all the circumstances of this case manifestly excessive and is statutorily provided for and by virtue of the certificate issued by the Learned Trial Judge, the custodial sentence ought to be reduced to a period of no longer than the period suggested by the Learned Trial Judge or less as determined by this Honourable Court."

Ground 1- Failure to direct the jury properly on previous inconsistent statements and relate the inconsistencies to the relevant issues which the jury had to consider, deprived the appellant of a real chance of acquittal; and the numerous inconsistencies and discrepancies materially affected the credibility of the sole witness as to fact for the prosecution, rendering the verdict unreasonable and/or unsafe

Submissions for the appellant

[27] Mr Samuels, appearing on behalf of the appellant, submitted that the directions given by the learned judge regarding the inconsistencies by the complainant were inadequate, thereby depriving the appellant of a fair trial. In particular, the learned judge failed to (a) identify the unexplained inconsistencies, (b) tell the jury how to deal with them, (c) outline the "many factors" that the jury had to consider, (d) assist the jury in dealing with the several inconsistencies in the evidence, (e) advise the jury that where there is a "fundamental inconsistency", it undermines the witness' credibility and renders the verdict unsafe, (f) direct the jury as to the effect of the previous inconsistent statements and the adverse weakening effect of unexplained substantial and significant previous inconsistent statements upon the fairness of the trial, and (g) relate the unexplained conflicts in the evidence to the issues in the case.

[28] We were referred to specific extracts from the learned judge's summation, at pages 13-16, 21-22, and 38 for the treatment of inconsistencies/ previous inconsistent statements which, in counsel's opinion, fell short of what is required in law. Reliance was placed on **Daryeon Blake and Vaughn Blake v R** [2017] JMCA Crim 15, para. [116]; **Ellis Taibo v R** [1996] 48 WIR 74, page 84; **Mustapha Ally v The State** (unreported), Court of Appeal, Guyana, Criminal Appeal No 45/1972, judgment delivered 9 August 1972,

para. [19]; and **The State v George Mootoosammy and Henry Budhoo** [1974] 22 WIR 83.

[29] Counsel highlighted aspects of the transcript in support of his submission that several inconsistencies arose from the cross-examination of the complainant. These pertained to: whether she was familiar with the men at the bar; the number of times she saw them at the bar; how she became aware that the appellant was a soldier; the colour curtain in the appellant's room; whether she had stated that the appellant was knocking at the door when the third man raped her; statements about taking up her bag and leaving the room after the incident and whether the gate was open when she did so; whether she had stated to the police that on the way to her home the appellant quarrelled that his friend had "dissed" him; and whether she had stated to the police that persons were on the road on the night of the incident.

[30] Taken together, counsel submitted, the myriad of inconsistencies eroded the complainant's credibility and rendered the verdict unsafe. Reliance was placed on **R v Joseph Lao** [1973] 12 JLR 1238, page 1241, where the court approved an extract from Archbold, Criminal Pleadings, Evidence and Practice - that the verdict will be set aside "where a question of fact alone is involved, only where the verdict was obviously and palpably wrong".

Submissions for the Crown

[31] Counsel appearing for the Crown, Ms Rowe, relied on **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 2022, at page 16, to illustrate the duty of the trial judge where there are inconsistencies and/or discrepancies in the evidence at trial. Counsel submitted that, in accordance with that duty, the learned judge, at pages 14 and 15 of the summation, informed the jury as to what amounted to an inconsistency and that they should consider whether it was major or minor. Further, at page 17, lines

15-25 and page 18, lines 1-6 of the summation, she directed the jury to the issues that were in dispute.

[32] Counsel contended that the learned judge was not required to address all the inconsistencies and those which did not affect the root of the Crown's case. In support of that argument, she referred to **Albert Edmondson v R** [2020] JMCA Crim 32, which approved the dicta of Carey JA, in **R v Fray Diedrick** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991 that, a trial judge need not identify all the discrepancies but is required to give some examples of conflicts in the evidence; and **Anthony Gayle v R** [2021] JMCA Crim 30 paras. [109] – [111].

[33] Additionally, counsel cited **R v William March and Others** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 87, 155, 156, 157/1976, judgment delivered 13 May 1977, in support of the principle that an appellate court should only interfere with the verdict of the jury where it is plainly wrong, and **Wayne Samuels v R** [2013] JMCA Crim 10 which dealt with the reluctance of the appellate court to interfere with the verdict of the jury because, as the tribunal of fact, it had the benefit of observing the demeanour of the witness of which the appellate court was deprived.

[34] It was acknowledged that there were inconsistencies in the evidence; but counsel submitted that they were slight and not serious, having regard to the issues and the learned judge's directions which, she contended, were adequate. She pointed to pages 13-18, 36-46 and 56 of the summation, and responded to each instance of inconsistency or discrepancy that the appellant highlighted. These pertain to (a) the complainant's familiarity with the men at the bar and the number of times she saw them before the incident, (b) how the complainant knew that the appellant was a soldier, (c) the colour of the curtain, (d) whether there was a knocking on the door, (e) the complainant's account of picking up her handbag and the appellant taking her home, (f) the opening of the gate, (g) the quarrelling in the car, (h) and whether there were persons on the road when the appellant took the complainant home.

[35] Counsel submitted that the inconsistency about the complainant's familiarity with the men at the bar, particularly the second man she identified as "Jason's cousin", was cleared up in re-examination when she explained that after the report was made to the police, Jason called her. The complainant had also indicated that Jason and the other man visited the bar before the night of the incident. Counsel contended that the learned judge did not identify this slight inconsistency, and rightly so, as it was cleared up in re-examination.

[36] As to the complainant's evidence that she saw the appellant "three or four times", counsel indicated that this was juxtaposed with the appellant's statement that he saw the complainant three times before the night of the incident. Counsel further submitted that the difference in the complainant's evidence was not material to the main issues nor undermined the complainant's credibility.

[37] As regards how the complainant knew the appellant was a soldier, counsel argued that the complainant's answer, that she learnt that the appellant was a soldier because he and his relative had told her so, would not have affected the root of the Crown's case, since the appellant was, in fact, a soldier. Further, his occupation did not affect the elements of the offence.

[38] The inconsistency about the colour of the curtain, counsel argued, was also not material as it did not affect the complainant's credibility as to whether she had been abducted and raped. Further, there was no dispute about whether a curtain was in the room.

[39] Counsel acknowledged that the complainant's evidence about whether the appellant had knocked on the door did not correlate with her statement to the police. Nonetheless, counsel argued that it did not undermine her credibility because the inconsistency was not material to the issues of forcible abduction and rape. Further, the

"knocking" would have occurred after the complainant was raped, and the learned judge had addressed this issue in her summation.

[40] Counsel conceded that the complainant gave conflicting evidence about what happened immediately after the appellant had sex with her (whether she grabbed up her bag and asked him to take her home, and he then left the room). However, counsel was of the opinion that the inconsistency did not undermine the complainant's credibility. Counsel maintained that the learned judge dealt with it adequately in her summation.

[41] Counsel submitted further that there was no dispute that the gate was open at one point when the appellant took the complainant to his home, but in any event, it was immaterial in the circumstances of the case. She also submitted that, although no explanation was given as to why the complainant told the police that the appellant was quarrelling in the car, as opposed to her evidence, the appellant had also said, in his unsworn statement, that quarrelling had occurred but only that he attributed it to the complainant. As to the inconsistency regarding people being on the road, counsel argued that the divergence did not undermine the reliability of the complainant's evidence when taken in its totality. Further, the complainant's explanation was satisfactory.

Discussion

[42] In **R v Carletto Linton**, at page 16, Harrison JA laid out the duty of a trial judge to guide the jury on how to deal with inconsistencies and discrepancies, in the evidence of witnesses, as follows:

> "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 they 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 the 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 …"

[43] The learned judge sought to satisfy this requirement, at pages 13-16 of the summation, where she explained to the jury how they should deal with inconsistencies in the evidence. She specifically pointed out that inconsistencies do occur, and one possible explanation was the lapse of time between the complaint and when the evidence was given. She directed the jury that inconsistencies have to be analysed on the basis of their materiality or otherwise, and they can affect the credibility of the witness. Therefore, they, the jury, should consider whether, in spite of the inconsistencies, the witness could be believed. Below are the relevant aspects of the learned judge directions (pages 13 - 15 of the summation):

> "Now, a lot turned in this case on discrepancy and inconsistency, and I will say to you that in most trials, it is possible to find inconsistencies and the evidence of witnesses will not generally be exactly the same. And that will happen especially because time has passed between when the incident is said to have occurred and when you are doing the trial. In this case, this incident is said to have occurred in 2014 and we are now in 2017, so some three years have passed. So when you are judging the case and analysing and going through the evidence, bear in mind that some three years have passed. And see if that helps you to understand if there are, if there are any discrepancies or inconsistencies.
>
> Now, when you look at the evidence if you see that there is an inconsistency, the witness said something here at one time and little later say something different, if you find that has occurred, the first thing you have to find that has occurred, the first thing you have to ask yourself is: Is this a serious, is this a serious inconsistency or is it something minor?"

[44] The learned judge went further with her explanation, at pages. 15-16, lines 1-14:

> "If you look at the inconsistency and you say, well that difference or inconsistency is so minor that I will excuse the witness, because three years have passed people might not remember that small detail, so I will excuse the witness and move on, But if you look at the inconsistency and you say to

> yourself, this one is serious, this is a fundamental inconsistency, no man, the witness supposed to remember, that for a hundred years, that is something serious that I cannot excuse.
>
> Well, if you find yourself in that position, you may well say to yourself, I am not going to believe the witness on that point, on that fundamental point or you might say, well I am not going to believe the witness on anything at all, because of that. Because the law allows you to accept some of what the witness says, all of what the witness says, or none of it. So you have to look at the inconsistency and decide if it is fundamental and what you going to do with that, or if it is something minor that you are going to excuse. And as you make that determination, Mr Foreman and your members, you have to bear in mind the type of witness you have. Bear in mind everything about the witness, the witness' level of intelligence that you see, the witness' age, the witness' gender, the witness" ability to put into words what he or she is saying. You have to consider all surrounding circumstances as you decide what to do with any inconsistency that you find."

[45] At pages 17-20 of the summation, the learned judge focused the jury's attention on the issues of abduction and rape, and explained that those were the central issues. She was careful to point out the matters in dispute and those which were not. At page 17, lines 15-25 and page 18, lines 1-6, she said:

> "…there is no issue that sexual intercourse took place, that is not being disputed. It is also not being disputed that sexual intercourse was between Mr Dubidath and the complainant, …, what is disputed is whether she agreed or didn't agree. That is it, as it concerns the rape. As it concerns forcible abduction – well, they are not agreed that there was any- let put it this way [sic], the issue is how she came to be in the car and in the place with him. There is no issue that she ended up there. There is no issue that she was with him, but the issue is how she came to be with him, in what circumstances."

[46] She further directed the jury, at pages 20-line 24, 22-lines 1-18 of the summation, on how they should treat with previous inconsistent statements:

> "Now, there is another matter that you will have to consider as you deliberate and you---it is the matter of previous inconsistent statement [sic]. You may find, you may well say that you are satisfied that [the complainantt] said something else to the police than what she said to us here, you may well find that you are satisfied that that happened. And I have to say to you that the evidence is what you hear here in court. Evidence is, what you have to consider, what you hear here in court; but, if you are satisfied that she said something else elsewhere then that [sic] throw in the pot as you come to a decision as to whether she is a believable witness. You consider that and help you to decide whether she is a credible witness or not.
>
> But if we are looking at something that she said on a previous occasion that was different and she says to us, yes I said something different to the police and what I said to the police was the truth. If she said that, then you say yes, you look at that previous part of the statement, as long as she says it is the truth here in Court, but if she still say, no, I never said that, or she is confused, or not sure, you throw that into the pot as you try to decide if she is a credible witness. Remember what I told you about inconsistencies, you have to consider so many factors in general as you come to your determination as to what to make of each of the witnesses in the case."

[47] At page 36, lines 12-25, the learned trial judge told the jury that the defence had asked several questions focused on the inconsistencies "to show…that [the] witness cannot be believed". She pointed out that the purpose of cross-examination was to expose any differences in the evidence that should be highlighted. Earlier, at page 14, lines 3-10, she had indicated to the jury that they should look for inconsistencies between the evidence and what was said to the police.

[48] At page 38, lines 1, she continued:

> "[The complainant] was asked several questions as to what she had told the police being different from what she had told us here in Court and remember I have told you how to deal with inconsistencies and discrepancies already…"

[49] The learned judge also pointed out that there were instances when the complainant denied making statements, recalled them differently, or could not remember what was in her statement to the police; and that sometimes she gave a reason for the difference. The learned judge reminded the jury that those parts of the statement were exhibited for their consideration.

[50] Further from pages 38-47 of the summation, the learned judge made reference, in a general manner, to aspects of the complainant's evidence where the cross-examination exposed inconsistencies. These were in relation to (i) the complainant's location when she made the telephone call to her friend; (ii) comments about not wanting to have sex with a soldier; (iii) whether the complainant had said that the appellant came in the room and accused her of leading on the other man from the bar, "dissing" him (the appellant) with his friend, and promising to "diss" his friend in return; (iv) whether the complainant knew all or any of the men prior to the incident; (v) what type of light was in the room; (vi) whether and how the gate was locked; (vii) the colour of the curtain behind which the complainant had seen the shadow of a person; (viii) the complainant's position relative to the shadow; (ix) the appellant's position and/or location when the shadow was moving behind the curtain; (x) whether the complainant heard knocking on the door; (xi) position of the complainant and the third man when the appellant re-entered the room; and (xii) the context in which the complainant had asked the appellant to take her home after the sexual encounter.

[51] We turn now to the appellant's complaint that the learned judge did not deal with these matters adequately.

[52] The existence of contradictory statements in the evidence of a witness calls for the testing of that witness' credibility (see para. [68] **Steven Grant v R** [2010] JMCA Crim 77). It is also well-established that weighing up those conflicts in the evidence is a matter for the jury (see **R v Garth Henriques and Owen Carr** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 97 and 98/1986, judgment delivered 25

March 1988, and **R v Baker and others** (1972) 12 JLR 902, at page 912 (G)). The trial judge must guide the jury, but as the authorities show, there is no requirement for the judge "to comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial" (see **Albert Edmondson v R**).

[53] It is unmistakably clear that the learned judge had these principles in mind, from her directions. However, there were several unexplained inconsistencies in the complainant's evidence on which directions should have been given to the jury as to how they should deal with them. A part of the guidance in **R v Carletto Linton** (page 16) is that the jury should be "…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 the one given is one that they cannot accept, they should consider whether they can accept the evidence on the point or at all…".

[54] In our view, the learned judge seemed to have spent a disproportionate amount of time explaining how a lapse in time could have explained the inconsistencies rather than focusing the jury on the complainant's explanations, or lack thereof. The authorities have made it plain that explanations for contradictions ought to come from the particular witness and not by well-meaning conjecture (**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, at page 7).

[55] It was not enough, therefore, for the learned judge to have told the jury that the inconsistencies went to the credibility of the complainant, point to some major inconsistencies, and direct the jury, generally, on treating with inconsistencies. In taking that approach, she failed to assist the jury in critically analysing the conflicts in the context of the issues that were raised. The jury should have been directed to consider in what way, if any, the conflicting evidence could have impacted the central element of consent, and the elements of forcible abduction. The jury should have also been guided as to the previous inconsistent statements that could have the effect of undermining the

complainant's evidence at trial. This was underscored by this court in **R v Rohan Vidal and Kevin Thompson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 266 and 269/2001, judgment delivered 25 May 2005 at page 6. Further, the trial judge must explain to the jury "the effect which a proved or admitted previous inconsistency should have on the evidence at trial" (see also **Vernaldo Graham v R** [2017] JMCA Crim 30, per Edwards JA, at para. [106] on the duty of the trial judge).

Direction on previous inconsistent statements

[56] At pages 20-22 of her summation, the learned judge directed the jury on previous inconsistent statements, as follows:

> "Now, there is another matter that you will have to consider as you deliberate and you---it is the matter of previous inconsistent statement [sic]. You may find, you may well say that you are satisfied that [the complainant] said something else to the police than what she said to us here, you may well find that you are satisfied that that happened. And I have to say to you that the evidence is what you hear here in court. Evidence is, what you have to consider, what you hear here in court; but, if you are satisfied that she said something else elsewhere then that throw in the pot[sic] as you come to a decision as to whether she is a believable witness. You consider that and help you to decide[sic] whether she is a credible witness or not. But if we are looking at something that she said on a previous occasion that was different and she says to us, yes I said something different to the police and what I said to the police was the truth. If she said that, then you say, yes, you look at that previous part of the statement, as long as she says it is the truth here in court, but if she still says, no I never said that, or she is confused, or not sure, you throw that into the pot as you try to decide if she is a **credible** witness…"

[57] That direction fell short of the standard direction on previous inconsistent statements, which is included at para. 14-5 of the Supreme Court of Judicature of Jamaica Criminal Bench Book 2017 ('the Bench Book'). As Mr Samuels rightly pointed out, previous inconsistent statements are in a discrete category of conflicting evidence and, therefore, have to be given specific and appropriate treatment tailored to the

requirements of the case. The authoritative guidance requires that the jury be told that (a) they should take the previous inconsistent statements into account in considering whether the witness is a believable witness; and (b) the statements themselves are not evidence of the truth of their contents, except for those parts which the witness says are true. Thereafter, the trial judge is to guide the jury in applying the direction to the evidence in the case. This guidance was not fully and clearly expressed in the learned judge's directions to the jury. The learned judge's "throwing it into the pot" analogy was also unhelpful.

[58] Although the jury was told that previous inconsistent statements should be considered in their assessment of the credibility of the complainant, and that they should consider whether, in light of those statements, they could or could not accept the complainant's evidence, the learned judge failed to guide them in terms of which, if any, of the previous inconsistent statements became evidence in the case.

[59] We now turn to whether the inadequacy of the directions to the jury is a basis upon which it could be found that the jury's verdict was "obviously and palpably wrong", or resulted in a substantial miscarriage of justice, as the appellant contended.

[60] This court's jurisdiction with regard to criminal trials, though well-known, bears repeating. Section 14(1) of the Judicature (Appellate Jurisdiction) Act, provides in part:

> "The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

[61] In answering whether there was a substantial miscarriage of justice, we make the following observations. The complainant was consistent in her evidence that she did not consent to sexual intercourse or go voluntarily with the appellant to his house to have sexual intercourse with him. For his part, the appellant did not dispute that sexual intercourse took place but vehemently denied an absence of consent. He stated, among other things, that, he met up with the complainant on the relevant night and took her to his home. He agreed that she sat in the front of the car and that they travelled in the company of two other men who sat in the back; that after sexual intercourse with him, he left the room and, on returning, found his friend having sexual intercourse with the complainant. He stated that he asked certain questions of his friend; the complainant was crying and asked to be taken home; and he took her home.

[62] As indicated earlier, the complainant's evidence contained contradictions, including previous inconsistent statements, but these, in our view, though significant in number, were largely immaterial to the issues that the jury had to decide and were, therefore, not fatal. Even those which, in our view, needed closer scrutiny, as matters going to her credibility, when they are considered alongside the evidence that was consistent, and those aspects of the learned judge's directions which were adequate (including that if the jury found the complainant's evidence unreliable, they could reject it), the jury would have been left in no doubt as to what evidence was materially relevant, reliable, and determinative of guilt. For those reasons, the inadequacy of the directions, as regards the contradictions in the evidence, did not result in a substantial miscarriage of justice.

[63] Also, in our view, the instant case, does not present "the adverse weakening effect that unexplained substantial and significant contradictions [could] have upon the credibility of a witness and the weight of [that witness'] evidence" (**The State v George Mootoosammy and Henry Budhoo**, at page 96). Therefore, the absence of a direction in those terms did not result in a substantial miscarriage of justice.

[64] Mr Samuels referred this court to **R v Joseph Lao**, but our analysis discloses no basis for finding that the jury's verdicts were "obviously and palpably wrong". There is also no dissonance with (a) **Daryeon Blake v R,** where this court stated that the trial judge is obligated to discuss the inconsistencies, explain their impact on the credibility of the witness, and assist the jury on how to approach them; (b) the observation in **Ellis Taibo v R** that in a marginal case, the evidence needs to be scrutinized, not simply rehearsed if a verdict founded on it is to be safe; (c) **Mustapha Ally v The State** where the State conceded that failure to give proper directions to the jury about a vital contradiction amounted to a misdirection; or (d) with the observation, in **The State v George Mootoosammy**, of it being axiomatic that in the summing up, the judge must guide the jury on how to deal with discrepancies and inconsistencies.

[65] These authorities offer helpful guidance concerning the importance of proper directions to the jury. However, they do not help the appellant because, although there was some deficiency in the treatment of the conflicting evidence, it should be reiterated that the inconsistencies were about matters that did not go to the root of the prosecution's case. Hence, the errors by the learned judge were insufficient to compromise the verdicts.

[66] For those reasons, the convictions cannot be impeached on the basis of the complaints in ground one.

Ground 2: The failure of defence counsel to fully suggest the case for the defence to the complainant, thus reducing the weight accorded to the appellant's unsworn statement, and denying the appellant a real chance of acquittal

Submissions for the appellant

[67] Mr Samuels submitted that defence counsel's failure to put aspects of the appellant's case to the complainant to establish her prior sexual relationship with the appellant went to the crux of the issues of consent and credibility, and supported a conclusion that the appellant's instructions were not carried out on a material issue. To demonstrate the point, learned counsel highlighted the following aspects of the complainant's cross-examination at page 73, line 25 to page 75, lines 1-11 of the transcript:

> "Q: You and Mr Dubidath, Ma'am met from September 2014 when it was Jason's birthday?
>
> A: Yes, Miss. That was the first time he came at the bar.
>
> Q: And you were both talking and you showed him ma'am your tattoo?
>
> A: No Miss. I was [sic] have on a shorts.
> ……[intervention by learned judge]
>
> Q: Very well. You and Mr Dubidath were both talking?
>
> A: Yes, because him order and we were having a conversation. He is a customer. I have to deal with him like a customer.
>
> Q: And you showed him your tattoo, Ma'am.
>
> A. No, miss. I have on a shorts.
>
> Q. And you also showed him pictures in your phone?
>
> A. Don't remember that, don't remember that, miss
>
> Q. And he took you, ma'am to Clifton that very same night?

A. No, miss.

Q. That is when you saw his helmet in the back of the car?

A. No, miss

Q. And you asked him if he is a soldier?

A. No, miss

Q. And when you went to his house in September, you saw his uniform hang up in him house?

Her Ladyship: I don't have any suggestion about her going to his house. You want to break that down?

[Defence Counsel]: Very well, m' Lady.

Her Ladyship: I have Clifton, I don't have anything else.

Q: You went to his house in Clifton in September?

A: No, Miss. First time I went was the 21st of October…"

[68] Counsel's position was that, had defence counsel continued along the same line in cross-examination, she would have put to the complainant the appellant's instructions, consistent with his unsworn statement, that they had consensual sex in September 2014. In furtherance of the point, counsel referred to the appellant's affidavit about the instructions he said he gave to defence counsel:

"……7. Prior to my trial, I gave signed instructions to my Attorney-at-Law relating to my defense [sic].

8. I gave instructions to my Attorney-at-Law that I was in a sexual relationship with the complainant which lasted for approximately one (1) month.

9. I gave written instructions to my Attorney-at-Law that I had sexual intercourse with the complainant with her consent on the 'first September night' at my house located in Clifton District, Bernard Lodge, in the parish of Saint Catherine."

[69] Mr Samuels correctly submitted that it would have been permissible under section 27(1) of the Sexual Offences Act to cross-examine the complainant on her prior sexual contact with the appellant. Counsel also submitted that the appellant's affidavit was consistent with his unsworn statement and that the extracts below, from defence counsel's affidavit, did not categorically deny instructions about a previous sexual contact.

[70] We cannot avoid setting out most of the averments in defence counsel's affidavit:

> "3. That I am the Attorney who represented Craig Dubidath at his trial on the offences of Forcible Abduction and Rape in the Circuit Court holden in Saint Catherine on the 28th day of February, 2018.
>
> 4. That it is my practice to take several notes and statements from clients culminating in a final written signed instructions which is the basis of my representation at the trial and I verily believe that prior to the trial this system would have culminated in me taking the customary final written and signed instructions from him.
>
> 5. This, based on my experience, is necessary because recollections of clients sometimes comes [sic] in increments and evolve.
>
> 6. That Mr. Dubidath was convicted and sentenced on both counts before Her Ladyship Mrs. Carol Beswick and that this is now the subject matter of an appeal.
>
> 7. That I am also aware that my conduct of the defence at the trial is a ground of appeal filed as to whether or not I had fully suggested to the complainant the instructions provided to me by him.
>
> 8. The subject matter of a ground of appeal is that I did not suggest to the complainant that she had consensual sexual intercourse with him at his home on a night in September prior to the night, the subject matter of the indictment.
>
> 9. I have been shown a draft Affidavit of Mr. Dubidath where in paragraph (9) he stated:

> 'I gave written instructions to my Attorney-at-Law that I had sexual intercourse with the complainant with her consent on the 'first September night' at my house located in Clifton District, Bernard Lodge, in the parish of Saint Catherine'……

10. During the week of the 23rd of November, 2020 I was contacted by Mr. Matthew Hyatt, Attorney-at-Law who informed me that he was preparing grounds of appeal for Mr. Dubidath set for hearing for December 2, 2020. He then requested Mr. Dubidath's file to aid with his preparation, however, I was unable to locate same.

11. In order to assist the court I have tried to locate Mr. Dubidath's file to refresh my memory as to the exact instructions given to me.

12. There was a major leakage in my office which destroyed some files and I am unable to locate the file, [sic] I conducted repeated searches, diverting the resources of my office over several weekends in an effort to find the files. This explains the delay in responding to the request for my response to the ground.

13. That in my searches among damaged water logged papers some of which were pure " mush", not legible or identifiable and in which ink writings were washed out and not decipherable I have found a piece of one document relative to the instant case.

14. That I exhibit hereto the original document I found marked TH-2 for identification.

15. That I advised Counsel Mr. KD Knight Q.C of the document and asked for time to read the transcript to refresh my memory of the case.

16. That having read the entire case including the summation I comment as follows:

a) To the best of my recollection I had put the accused signed instructions to the Complainant as he had given me.

b) That the documents I found, I recall it to be brief notes I made when I spoke with Mr. Dubidath. It started with his reporting conditions and bail.

c) That to the best of my recollection the instructions on which I based my cross-examination had one sexual encounter that is the incident for which he was charged.

d) I recall the experience of the unsworn statement of Mr. Dubidath as I sat in court and I recall my view that he seemed to have expanded his instructions.

e) One of the things I heard was the two (2) sexual encounters and I recalled the mention of the first one in the first brief notes I took when I spoke to him.

f) Despite the fact that what he was saying was not in my instructions from which [sic] was working at the trial I attempted in my address to cover by indicating the possibility that I may have forgotten to put the other sexual encounter.

g) I sought to ensure that the client would not be prejudiced if I could in fact have forgotten but I honestly do not believe I forgot the written and signed instruction given to me by Mr. Dubidath in his defence.

h) This is my honest recollection of what happened."

[71] Mr Samuels further submitted that the failure to put the appellant's case to the complainant ultimately denied the appellant's right to due process and a real chance of acquittal, as (a) the jury did not get to see the complainant's response and demeanour

in cross-examination, and (b) the impact of the appellant's unsworn statement and credibility would have been diminished. Counsel posited that the effect was highlighted by the learned judge's adverse comments in the following extracts from her summation, at page 41, lines 18 to page 43, lines 1-11:

> "So, in cross-examination of the complainant, I have to tell you this, the case of the accused man should be put fully to the complainant, so as to allow her to respond to anything that he is saying. So that you can see if part of his case causes her to be shocked, surprised or you can see if the lawyer is really touching on the truth, if she elicits the truth from the witness. All of that depends on the case of the accused man being put to the complainant carefully and clearly to allow that to happen. To allow the complainant to respond. And the reason for that now is that the lawyer, while the case is going on, the lawyer is not just pulling evidence from out of the air, the lawyer is putting the case according to instructions. So that is why the prosecutor says to her or urge you to consider that there were some parts of the accused's case that were never put to [the complainant] to allow her to respond to say that it is a lie or it is true. It was never put, so it is quite proper for the prosecutor to say to you bear that in mind, this must be something new because his lawyer never said it to [the complainant] to ask her if her client is lying or not. The prosecutor says that to you and she can quite properly say that.
>
> On the other hand now, the defence lawyer is saying, he [sic] hasn't stated it in so many words, suppose I forget, well, we are human beings, we can forget, but the question is, forget what. There are some things that are very important that one ought not to forget but we are human beings, [sic] might forget, might forget every little detail, but is it a little detail or a major part of the case. [sic] Is a matter for you to determine, but the fact is if there is a part of the defendant's case which was not put to [the complainant], it means she doesn't get the chance to say something about it and you have to bear that in mind…"

[72] And at page 56 lines 8-15, where the learned judge continued:

> "Then from there, from the talking they went to lying down then they went to touching and he got a condom and they had sex. Now, that is the part of his case, Mr Foreman and your members, that the prosecution is reminding you about that was never put to the witness, that there was sex on that first September night."

[73] As to the professional conduct which is expected of counsel and the effect of misconduct, we were referred to Canon 3(g) of the Legal Profession Act and Regulations (1978), **R v McLoughlin** (1985) 1 NZLR 106 at page 107, **Daryeon Blake v R**, **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009 and **Benedetto v R** [2003] 1 WLR 1545.

Submissions for the Crown

[74] Counsel for the Crown submitted that the essence of the appellant's case had been put to the complainant, as it was suggested to her, in cross-examination, that she had seen the appellant's helmet and uniform when she was at his home, on a prior occasion in September 2014 (which was denied). It was also suggested that she had come out of the car on the night of the incident because she was comfortable with the appellant, and to have consensual sex with him.

[75] Counsel submitted further that there was no miscarriage of justice as consensual sex had been linked to the suggestion that the complainant had previously been to the appellant's home, in September 2014. Also, the learned judge had called the jury's attention to defence counsel's omission to put the aspect of prior consensual sex to the complainant, and the jury was told to weigh up whether this was a major or minor detail.

[76] We were urged to follow **Dareyon Blake v R**, in which a conviction was not overturned, even though defence counsel had failed to put the case, in detail, regarding an incident that formed a part of the indictment. Counsel argued that the omission in **Daryeon Blake v R** was more egregious than in the instant case, where an incident, a month prior to the commission of the offences, was not sufficiently suggested to the complainant. Further, the latter conduct does not reach the high threshold of exceptional

cases in which a conviction is overturned due to the impact of the faulty conduct on the trial and verdict, and/or misconduct by counsel, which was so extreme as to result in a denial of due process to an applicant (reliance was placed on **Leslie McLeod v R** [2012] JMCA Crim 59).

[77] **Sankar v The State of Trinidad and Tobago** [1955] 1 All ER 236; **Muirhead v R** [2008] UKPC 40 (discussed in **McLeod**); **Paul Lashley and John Campayne v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ) (cited in **Daryeon Blake v R**); **Christopher Bethel v The State** (2000) 59 WIR 451; and **Kenyatha Brown v R** [2018] JMCA Crim 24 were distinguished as cases in which the appeal was allowed and the convictions overturned because the inadequate representation by counsel resulted in the absence of a defence being advanced, which deprived the accused of due process.

Discussion

[78] **Kenyatha Brown v R** affirms the well-established position in law that an accused is entitled to have his case put to a complainant in cross-examination, in accordance with his instructions to defence counsel. In the instant appeal, defence counsel's affidavit was admitted for the purpose of establishing a basis for the appellant's complaint that, contrary to instructions, his defence was not put to the complainant, so far as it concerned his statement about a prior consensual sexual encounter with the complainant, on 15 September 2014. However, it remains unresolved whether the appellant gave that specific instruction to defence counsel, as that question has not been definitively answered in her affidavit, filed in this appeal (due in part to defence counsel's purported inability to locate the appellant's signed instructions among water-damaged files in her office).

[79] We are, however, not totally bereft of some documentation concerning instructions, which, defence counsel asserts, she obtained from the appellant. There is a handwritten note (referred to by defence counsel as "a piece of one document") attached to defence counsel's affidavit, from which certain observations might be made. Firstly, although indecipherable in parts, it appears to set out a sequence of events which purportedly involved sexual intercourse between the appellant and a "young lady". No

date is given for any such encounter. Secondly, defence counsel's cross-examination of the complainant, at pages 73-75 of the transcript, about a purported September incident, mirrors some of the contents of that note, the most significant omission being any mention of sexual intercourse. The relevant exchange between defence counsel and the complainant has already been set out at para. [67] above. Thirdly, the appellant's unsworn statement about what purportedly occurred, on 15 September 2014, bears some similarity to the contents of the note, as well as aspects of the said cross-examination.

[80] When all the above matters are juxtaposed with defence counsel's "best recollection" that she had put the appellant's signed instructions to the complainant as he had given them to her (paras. 16(b), (c), (e), and (f) of defence counsel's affidavit) coupled with the apparent reference, in closing arguments, to her having "forgotten" to put the question in issue (as pointed out by the learned judge in her summation), we are inclined to proceed on the hypothesis that there was an omission to put aspects of the appellant's case to the complainant.

[81] We turn now to consider the appellant's complaint that the omission, coupled with the learned judge's directions on this matter, rendered his conviction unsafe.

[82] This ground turns on (a) the impact which the omission (the alleged faulty conduct), coupled with the learned judge's directions in that regard, had on the trial and verdict, and/or (b) whether the misconduct, alleged on the part of defence counsel, was so extreme as to result in a denial of due process to the appellant. See **Leslie McLeod v R**, where Morrison JA (as he then was), at para. [64], adopted the approach in **R v Clinton** [1993] 1 WLR 1181. See also the judgment of Bastide CJ (as he then was) in **Bethel v The State**, at pages 459-60, where he explained part (b) of the test, thus:

> "In such a case, the question of the impact of counsel's conduct on the result of the case is no longer of any relevance for, whenever a person is convicted, without having enjoyed due process, there is a miscarriage of justice, regardless of his guilt or innocence. In such circumstances, the conviction must be quashed."

[83] The determinative effect of denial of due process was the result in **Lawrence Pat Sankar v The State of Trinidad and Tobago** [1995] 1 WLR 194, where the Judicial Committee of the Privy Council ('Privy Council') allowed an appeal on the ground of miscarriage of justice where the applicant remained silent (as against giving evidence or making an unsworn statement from the dock) having not been given any advice and any explanation as to his options.

[84] The circumstances were similar in **Michael Reid v R**, where the crucial question was one of credibility. This court found that counsel's failure to follow instructions to call character witnesses made it uncertain whether the result would inevitably have been a conviction. Consequently, the appeal succeeded.

[85] The substance of the complaint in **Michael Reid v R** was that relevant character evidence from witnesses who were available was not adduced by counsel, and the applicant was not advised on matters essential to his defence, including the implications of making an unsworn statement from the dock as opposed to giving sworn evidence. Counsel for the applicant explained that calling character witnesses prior to sentencing would have made no difference, but was adamant that he had adequately explained the choices available to the applicant.

[86] An important consideration in that appeal was that the applicant was of previous good character, and had the evidence been called on his behalf, the trial judge would have been obliged to give a standard good character direction. As a consequence of the applicant's good character having not been raised by the applicant, or his counsel, the applicant did not have the benefit of a good character direction to the jury. At para. [15], Morrison JA (citing Lord Bingham of Cornhill in **Randall v R** [2002] 60 WIR 103, 108) emphasised that "the overriding requirement in any criminal trial is to ensure that the defendant accused of a crime is fairly tried".

[87] The decision in **R v McLoughlin** was predicated on the basic principle that an accused person must receive a "full and fair trial", which requires that he "be afforded

every proper opportunity to put his defence to the jury". Otherwise, he is denied justice (para. 35). That was a case in which an accused, charged with rape, denied knowledge of the matter and proposed to call two witnesses who were willing to confirm his alibi. This was communicated to his lawyer, who formed the view that the witnesses were unreliable and sought the accused's approval not to call them. The accused refused, and the lawyer elected to call no evidence, relying on the defence that the complainant had consented. The accused was convicted. The appeal against conviction was allowed, and a new trial was ordered on grounds that the accused had been deprived of an opportunity to put his defence and, therefore, justice had been denied him. It was pointed out that a lawyer has no right to disregard his client's instructions.

[88] In **Muirhead v R**, there was a challenge to a conviction of murder on grounds of defence counsel's failure to advise the client to give evidence and to adduce evidence of the appellant's good character. The appellant made an unsworn statement on advice from defence counsel, in which he said he was "surprised and disconcerted". The Privy Council felt constrained to allow the appeal, as it was unable to conclude that the appellant received a fair trial. A difficulty that faced the Board was that defence counsel did not respond to the appellant's assertions, on appeal, that he had been advised, after the close of the prosecution's case, to make a statement from the dock rather than to give sworn evidence in his defence (para. 31).

[89] **Kenyatha Brown v R** was an appeal against an appellant's conviction for rape on the ground of incompetence of counsel, among other things. The conviction was quashed, and a re-trial ordered.

[90] The evidence of the virtual complainant was that the appellant held her down with a ratchet knife pressed to her throat, stripped her below the waist, and proceeded to have sexual intercourse with her. Under cross-examination, she admitted to visiting the appellant's home alone on a prior occasion to pull out his hair and 'pick bump' on his face. She also said there was a previous incident in which the appellant had assaulted her at his home, but she did not report it to the police.

[91] The appellant gave evidence that he had consensual sexual intercourse with the complainant, but denied putting a knife to her throat. He also testified that she had lied about the alleged rape because he promised her $6000.00 but had not been able to keep that promise.

[92] In an affidavit, defence counsel stated that he had discussed thoroughly with the appellant his defence, prior to trial; and that, consistent with the strategy arranged for the trial, the appellant gave sworn testimony setting out his case, which was that he had consensual sex with the virtual complainant with whom he had developed a social friendship over the period that they knew each other.

[93] During the hearing of the appeal, defence counsel submitted a 'Statement' purportedly signed by the appellant but which bore no date. The substance of the statement was that he had sex with the complainant, and she had asked him for $6000.00, which he promised to give her; that he did not give her the money at the same time, and she kept calling him; and that while he was putting the money together, she got impatient and claimed that he raped her.

[94] However, it was not put to the complainant, at trial, that she had consented to have sex with the appellant on the night of the incident alleged; neither that the complainant had asked for money which had not been delivered and on that basis, she reported that the appellant had raped her. In particular, the evidence showed that at the end of the prosecution's case, defence counsel had submitted that the sole challenge to the evidence of rape was a mere denial. Therefore, the defence, pursuant to the appellant's instructions, was not put to the complainant. This meant that the details of the defence would have been heard for the first time when the appellant gave evidence.

[95] Contentions, on appeal, were that the appellant did not get a fair trial as counsel appearing for him, at trial, "had been less than helpful in advancing his defence", which was one of consensual sexual intercourse; the jury would have wondered why they had not heard his case put to the complainant; and the failure of counsel to put the defence

to the complainant deprived the jury of the complainant's reaction to those suggestions being made to her.

[96] The appeal was allowed and a new trial ordered. Phillips JA, writing on behalf of this court, said at paras. [33] – [34] that:

> "[33] Although questions were posed challenging the complainant's narrative on the incident of rape, namely the removal of her clothes, the use of the condom, and the ratchet knife, there were few suggestions made by counsel, which related to the case of the appellant in relation to his specific instructions. The suggestions which were put to the complainant were: whether the complainant had requested that the appellant pick her up at Green Island to go to Westmoreland; whether she had asked him to permit her to accompany him to several places; that the appellant had not pulled a knife on her; and that she had asked him for money on occasions including the day of the incident. The specific instructions set out in his statement to counsel were not put to the complainant.
>
> [34] So, as indicated, his case was never adequately put to the complainant pursuant to his instructions. This was in our view a clear dereliction of duty. The appellant's case was therefore being explicitly placed before the jury for the first time when he gave evidence. It allowed Crown Counsel in cross-examination to attack his credibility, and to permit the jury to consider whether his case was a concoction, a recent fabrication and lacking sincerity."

[97] In **McLeod v R**, it had been argued as one of the grounds of appeal that the applicant had been denied a fair trial in the light of his having been deprived of the opportunity to consult with and receive advice from his counsel on the question of whether he should give evidence. At para. [67], this court stated that having taken all factors into account, "the failure of the applicant to give sworn evidence [had] not been shown to have had a significant impact on the trial and the verdict". Consequently, the applicant's application for leave to appeal his conviction was refused.

[98] Morrison JA, writing on behalf of the court, endorsed the principles stated in the authorities and shared the observation by the English Court of Appeal in **R v Clinton** that, the cases where the conduct of counsel can afford a basis for appeal must be regarded as wholly exceptional. Nevertheless, if counsel acted "either in defiance of or without proper instructions, or when all the promptings of reason and good sense point the other way, [that] may lead an appellate court to set aside a conviction on the ground that it was unsafe or unsatisfactory".

[99] Morrison JA seems to have had in mind the observation by Lord Hope of Craighead in **Benedetto v R** [2003] UKPC 27, that "a defendant should be punished for the crimes he has committed, not for the failure of his representatives to conduct his defence as they ought". He was quick to point out that although few would dispute the reference in **Benedetto**, "the common law has been slow to admit error or even incompetence of counsel as a ground of appeal". Having made that observation, Morrison JA accepted at para. [57] that "on the basis set out in **R v Clinton**, it was open to this court to allow an appeal in an appropriate case in which complaint is made of the conduct of defence counsel on the ground that there has been a miscarriage of justice".

[100] It should be noted that the latter decision was appealed to the Privy Council, but the Board refused to decide on the factual dispute, and remitted the matter to the Court of Appeal. This court subsequently ruled that the fact that there was a character witness in the trial suggested that consultation had taken place and, therefore, it had no reason to depart from its previous conclusion.

[101] Similar considerations arose in **Daryeon Blake** (see paras. [74]-[75], and [140]) and **Leslie McLeod v R** which was applied in that case. The court also cited with approval the Caribbean Court of Justice's (CCJ's) decision in **Paul Lashley and John Campayne v Det Cpl 17995 Winston Singh** for the general proposition that the court will assess the impact of counsel's conduct on the fairness of the trial, but even if the outcome would not have been affected, the court may consider whether the ineptitude or misconduct was so extreme as to result in a denial of due process. In the result, the

conviction was not quashed, but this court reduced it from murder to manslaughter on the basis that the judge had failed to leave provocation to the jury.

[102] The Crown is relying on **Daryeon Blake v R**, to guide this court on the approach to be adopted in the instant appeal. In **Daryeon Blake v R**, the applicants were charged with murdering the deceased at a bar. One of the witnesses for the prosecution gave evidence of seeing the first applicant approach the deceased from behind, after which they wrestled, and the first applicant pulled a knife and stabbed the deceased twice in the side. The second applicant also ran up and stabbed the deceased in the chest. A second witness for the prosecution admitted to not exactly seeing who started the fight. She, however, said she saw when the first applicant stabbed the deceased in his neck but did not see the second applicant do anything. That was contrary to her statement to the police that it was the second applicant and the deceased who were fighting. She denied seeing a Pick-axe stick incident. A third witness gave evidence that he saw the second applicant hold the deceased and push something in his side while the first applicant stabbed the deceased in his chest. He too denied seeing a Pick-axe stick incident.

[103] In his defence, the first applicant gave evidence that he was approached by the deceased with a Pick-axe stick which he used to hit him a few times. The second applicant pushed the deceased out of the bar, and the deceased threatened to kill them, at which point, the first witness for the prosecution said, "Pull him out. Mek we kill him". That was when, according to the first applicant, he pulled his knife and stabbed the deceased. Under cross-examination, he maintained that he was the only one who stabbed the deceased.

[104] One of the contentions on appeal was inadequate representation. It was argued on the applicants' behalf that defence counsel had failed to suggest the first applicant's case to the witnesses for the prosecution, having regard to the fact that his testimony was detailed regarding the circumstances of the attack upon him, thereby leaving the prosecution to justifiably invite the jury to conclude that his evidence was fabricated.

[105] Counsel who represented the applicants at trial, admitted, in an affidavit, that he did not suggest some of the details from the applicants' instructions to the prosecution's witnesses, as he had formed the view that once he had suggested that there was an attack with a pick-axe stick that would have been sufficient.

[106] On an examination of the transcript, and in particular the cross-examination of the prosecution witnesses, by defence counsel, this court stated at paras. [61] - [62] of the judgment as follows:

> "[61] It seems to us that the clear tenor of this aspect of Mr McFarlane's cross-examination of Mr Levy was to suggest that (i) the deceased was the aggressor in relation to both applicants; (ii) the deceased first attacked the second applicant with a pick-axe; (iii) the second applicant's response was to push the deceased out of the bar, after which the deceased attacked the first applicant (Mr Blake); and (iv) it was during this latter attack on the first applicant that the deceased was stabbed.
>
> [62] In our view, while the actual content of the cross-examination was perhaps, as Mr McFarlane accepted in retrospect, less detailed than it could have been in the light of his instructions, it nevertheless adequately foreshadowed, and was entirely consistent with, the case which the first applicant would subsequently advance in evidence."

[107] In **Paul Lashley and John Campayne v Det Cpl 17995 Winston Singh**, the Caribbean Court of Justice said that, in resolving the issue of the incompetence of counsel, "the proper approach does not depend on any assessment of the guilt or degree of incompetence. Rather that the court [should be] guided by the principles of fairness and due process" (see paras. [11], [12], and [13] of the majority judgment). We also note this court's conclusion at para. [44 (v)] in **Michael Reid v R** that "the test ultimately must always be whether the jury properly directed, would inevitably or without doubt have convicted".

[108] The defining question in Mr Dubidath's case is whether the jury would have inevitably entertained reasonable doubt about his guilt had defence counsel suggested to

the complainant that she had sexual intercourse with the appellant on a prior visit to his home, in September 2014. This is an objective assessment, which must take account of the particular circumstances of the case and guidance from the authorities.

[109] Some considerations are worth noting: (i) the indictment was for abduction and rape allegedly committed on the night of 21 October 2014; (ii) the aspect of the appellant's unsworn statement, which defence counsel omitted to put to the complainant, pertains to an allegation of sexual intercourse on a prior occasion (15 September 2014) that could not have had a direct bearing on, or be determinative of what transpired on the night of the incident. It could only be used to attack the complainant's credibility and possibly impugn her testimony; (iii) the omission was not an entirely missed opportunity to test the complainant's credibility because she was questioned about being at the appellant's home prior to the night of the incident, specifically, in September 2014, and she denied having been there. Defence counsel had also suggested to the complainant that she was familiar with the appellant prior to the night of the alleged rape such that she comfortably alighted from his vehicle with the intention to have sexual intercourse with him, and she denied that to be so; (iv) the appellant did put his defence before the jury, in his unsworn statement, and also had the opportunity to put evidence before them; (v) defence counsel sought to correct the omission in her closing argument, indicating that she had forgotten, it seems, to have put specifically to the complainant the allegation of previous consensual sexual intercourse; and (vi) the learned judge gave attention to the omission in her summation, indicating that the jury should consider both the perspective of the prosecution and defence counsel in considering the effect of the omission. There were additional directions, by the learned judge, including that the jury should consider both the complainant's evidence and her demeanour, as well as the unsworn statement of the appellant.

[110] Those aspects of the trial would have made the jury aware of the appellant's position - that he and the complainant had a prior sexual encounter - denoting that she accompanied him voluntarily to his home on the night of 21 October 2014, and was not

raped by him. After that, it was entirely for the jury to make up their minds about what they believed to be the true state of affairs regarding whether there was a previous sexual incident between the appellant and the complainant, and what, if any, impact it had on the credibility of the complainant and the reliability of her evidence regarding the offences charged.

[111] It must be emphasised here that in dealing with this matter, the learned judge was not wrong in pointing out to the jury that there was nothing put to the complainant about any sexual intercourse in September 2014, and that was something they had to consider, and that in doing so, they should take account of what defence counsel submitted to the court, and the prosecution's interpretation of the omission. See aspects of her concluding remarks on the point, at page 43, lines 4-8 of the summation, as follows:

> "It is a matter for you to determine, but the fact is if there is a part of the defendant's case which was not put to [the complainant], it means she doesn't get the chance to say something about it and you have to bear that in mind. At the same time as recognizing the frailty of human beings this lawyer can just forget."

[112] Those directions on that aspect of the evidence were further to the learned judge's directions about how the jury should approach the unsworn statement, specifically, that they should consider it (the full text of which she reminded the jury about) and give what weight they thought it deserved. She also directed the jury on the purpose of cross-examination; and that when considering whether they could believe the complainant, they were entitled to consider not just her answers but also her demeanour.

[113] As regards the latter, they would have been entitled to consider how she reacted to the series of questions about her going to the appellant's home in September 2014. Had the particular detail, regarding the alleged prior sexual encounter, been put to the complainant, the learned judge would have been required to inform the jury of the purpose of that line of cross-examination and, specifically, that it was introduced to

impeach her and impugn her testimony. However, having not been put to the complainant, there could be no requirement for the learned judge to give that specific direction. In all the circumstances, we cannot fault the learned judge for the manner in which she handled the particular matter regarding the omission of defence counsel.

[114] The most striking common thread in the cases, relied on by the appellant to show that counsel's faulty conduct resulted in denial of due process, was that fairness of the process was left questionable and, in the result, constituted a substantial miscarriage of justice.

[115] The circumstances in those cases are quite distinctive and, except for the principles of law that the cases expound, most of them provide little assistance for present purposes. Unlike those cases, the details which were omitted in the instant case did not specifically relate to the incident that gave rise to the offences in question, but to another alleged incident, a month earlier. In **Kenyatha Brown v R,** for example, the omitted details went directly to the offence for which the appellant was charged and his instructions concerning it. His defence was consensual sex, and there was a promise of money which was not fulfilled, which he alleged had led to the accusation of rape for which he was charged. The defence of consent was never put to the complainant in that case.

[116] Contrast those circumstances with the instant case, where (a) the defence of consent was put to the complainant and fully ventilated, (b) the appellant himself, in addition, raised for the jury's consideration the purported prior sexual encounter, and (c) some of the questions in cross-examination raised the issue that the complainant had gone to the appellant's house on the night when he said they had prior sexual intercourse, and she emphatically denied that she had gone there with him, and went on to say that the night of the offences was the first time she had gone to the appellant's house. The jury should, therefore, have been in no doubt as to what the defence was and the complainant's response to it.

[117] We believe that the case of **Daryeon Blake v R**, particularly the court's pronouncement at para. [62], is relevant to the present circumstances which also concern a purported omission by defence counsel to put 'details' of the circumstances of the defence to a prosecution witness. It can be said, as regards the instant case, that although the alleged previous incident was not put to the complainant, what was put to her "foreshadowed" the question of what allegedly took place in September 2014, and was, therefore, consistent with the case put forward by the appellant in his unsworn statement. As earlier noted, the complainant denied ever being at the appellant's home in September 2014, that is, before the night of the incident, and seeing specific items of clothing belonging to the appellant there. She had also stated definitively that the night of the alleged incident was her first time being there.

[118] We take note of Mr Samuel's contention that the omitted details were intended for the jury to assess the complainant's reaction in relation to them. We accept that this might have had some relevance to their assessment of the probability of whether the appellant committed the offence, and the credibility of the complainant. However, in our view, there were ample opportunities for them to have made their assessment, on the basis of the answers given by the complainant, both in examination-in-chief and cross-examination. In the circumstances, we cannot say that the complainant would have responded to the omitted question in any way different than she did when she was asked about going to the appellant's home "on a night" in September 2014 and what transpired. Neither are we satisfied that there was any real possibility of an acquittal had the allegation of prior consensual sex been put to the complainant.

[119] We are also of the view that defence counsel's conduct of the defence was not so extreme as to have resulted in a denial of due process, or left the process completely bereft of the essential requirements of the appellant's defence as to render the conviction unfair (see **Ann Marie Boodram v The State** [2001] UKPC 20).

[120] In the circumstances, no substantial miscarriage of justice has actually occurred. Ground two, therefore, fails.

Ground 3: The mandatory minimum sentence legislated is in all the circumstances of this case manifestly excessive

Submissions for the appellant

[121] Mr Samuels submitted that under section 42K of the CJAA, a judge in sentencing may refer a sentence to the appellate court if, in the circumstances of the case, the mandatory minimum sentence would be manifestly excessive and unjust. On that basis, the decision in **Ewin Harriott v R** [2018] JMCA Crim 22 should be distinguished as at the time of the imposition of the sentence, in that case, the 2015 amendment to the CJAA, which permits an application under section 42K, was not in effect.

[122] Counsel submitted further that the mandatory minimum sentence of 15 years' imprisonment for the offence of rape under the Sexual Offences Act ('the Act') deprived the sentencing judge of the power to account for extenuating circumstances that may arise in a particular case, and called this court's attention to remarks, by the learned judge, that were it not for the prescribed minimum sentence, six years' imprisonment would have been appropriate. He also pointed to the special circumstances relied on by the learned judge in sentencing the appellant, and added that the appellant contributed practically to his community for sustained periods of time in a consistent manner, supervised homework, actively assisted school-leavers to write resumes, and was reportedly, a role model in the community.

[123] Counsel reasoned that in light of such "compelling factors", the mandatory minimum sentence of 15 years' imprisonment is manifestly excessive and unjust.

Submissions for the Crown

[124] It was submitted by counsel for the Crown that the learned judge erred in failing to specify a period of not less than 10 years, which the appellant should serve before becoming eligible for parole, as required by section 6(2) of the Act. Additionally, she submitted that the learned judge had failed to act in accordance with the principles and approach outlined in the Sentencing Guidelines for use by Judges of the Supreme Court

and Parish Courts, December 2017 ('the Sentencing Guidelines'), and in **Meisha Clement v R** [2016] JMCA Crim 26 which required her to state how she arrived at the recommended sentence of six years' imprisonment.

[125] The proper approach, counsel submitted, was for the learned judge to have weighted the appellant's good character evidence against how the law states that the offences should be punished, and arrive at a sentence that was not unduly harsh or lenient. Counsel contended that contrary to **Meisha Clement v R**, the learned judge did not identify a starting point or consider any of the relevant aggravating features relative to the offence and/or the appellant. She only mentioned the mitigating ones, and did not give reasons for the sentence imposed.

[126] Counsel further contended that the following are aggravating factors: (i) the complainant was promised a lift home but was instead abducted; (ii) the complainant was subjected to non-consensual sex with the appellant and another man while being held against her will; (iii) the complainant reported the incident on the same night; and (iv) the failure of the defendant to enter a guilty plea. Counsel submitted that when these aggravating factors are contrasted with the mitigating ones, which were considered by the learned judge, on a balance, there was no factor which made the sentence manifestly excessive or unjust. **Paul Haughton v R** [2019] JMCA Crim 29 was relied on in furtherance of counsel's submission that there were no compelling reasons to find that the mandatory minimum sentence was manifestly excessive and unjust.

[127] In arguing further that the principle of parity should be applied, counsel referred to the decision in **Oneil Murray v R** [2014] JMCA Crim 25, as confirming that the sentence for the offence of rape spans 15-25 years' imprisonment in a variety of circumstances, with 20 years being the norm. Lastly, counsel submitted that, in accordance with the reasoning in **Paul Haughton**, the appellant should be credited with six months for the time he spent in custody prior to sentencing.

Discussion

[128] Mr Samuels took no issue with the sentence imposed for forcible abduction. His submissions, in respect of this ground, concerned the sentence imposed for rape only. The main issues that arise for our consideration under this ground are: (i) whether this court agrees with the learned judge that there are compelling reasons that would render it "manifestly excessive and unjust" to sentence the appellant to the prescribed minimum sentence; (ii) if so, would six years' imprisonment be an appropriate sentence in this case; and (iii) did the learned judge err in failing to specify a parole ineligibility period?

The sentencing exercise

[129] The appellant's antecedent report revealed that he was 28 years old at the time of sentencing and about 25 years old at the date of the offences. From all accounts, he had good schooling and was gainfully employed throughout his adult life. At the date of the commission of the offences, he was a member of the Jamaica Defence Force ('JDF'). He had no previous convictions and was of previous good character. The Member of Parliament for the area in which he resided, a detective sergeant of police, his mother, and community residents spoke glowingly of his many positive attributes and community involvement. There was also a petition signed by some 200 community members in support of his previous good character and positive influence in his community. It was also revealed that he had dependent children as well as responsibility for his disabled mother.

[130] At the start of the learned judge's remarks, she observed that the appellant was found guilty of two separate offences at the end of a trial, and referred to what his lawyer urged on her and the evidence of his character witnesses. She went on to consider the following factors as being in the appellant's favour:

(a) member of the JDF for over four years with a good record;

(b) no previous conviction;

(c) gainfully employed throughout his life;

(d) a supportive family;

(e) provided financial assistance to his mother who was disabled;

(f) two young dependants one of whom was sick and needed regular hospitalization;

(g) educated and had skills to contribute to society;

(h) a good community report (including a petition with some two hundred signatures, attesting to his loyalty and the respect the community has for him);

(i) previous good character;

(j) posed no threat to the community; and

(k) good character references including one from a Member of Parliament.

[131] She also noted that, in determining the appellant's sentence, she took account of the six months that he spent on pre-sentence remand. At the end of the process, the learned judge sentenced the appellant to the prescribed minimum sentence of 15 years' imprisonment in accordance with section 6(1) of the Act. She, however, did not specify a parole ineligibility period as required by section 6(2). We, therefore, accept the submissions on the Crown's behalf that the learned judge erred when she failed to stipulate a period before which the appellant would be eligible for parole.

[132] Having regard to the appellant's positive attributes and antecedents, the learned judge issued a certificate to him, under section 42 K(1)(b) of the CJAA, on the basis that, in her opinion, he should have received a sentence lower than the prescribed minimum penalty for the offence in this case, that is six years' imprisonment. That section provides for an appeal to a judge of this court from a sentence of the prescribed minimum penalty, where the sentencing judge forms the opinion that, based on the circumstances of the

particular case, the prescribed minimum penalty would be manifestly excessive and unjust.

[133] This court's jurisdiction in regard to that review is outlined in section 42K(3) of the CJAA, as follows:

> "…Where a certificate has been issued by the Court pursuant to subsection (2) and the Judge of the Court of Appeal agrees with the decision of the court and determines that there are compelling reasons that would render it manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty, the Judge of the Court of Appeal may –
>
> (a) impose on the defendant a sentence that is below the prescribed minimum penalty; and
>
> (b) notwithstanding the provisions of the *Parole Act,* specify the period, not being less than two-thirds of the sentence imposed by him, which the defendant shall serve before becoming eligible for parole."

[134] See also sections 13 (1A) and (1B) of the Judicature (Appellate Jurisdiction) Act.

Whether there are compelling reasons rendering it manifestly excessive and unjust to sentence the appellant to the prescribed minimum sentence

[135] The Sentencing Guidelines for the offence of rape indicate a normal range of 15 -25 years' imprisonment, and a usual starting point of 15 years' imprisonment; the latter being the prescribed minimum penalty. See **Daniel Roulston v R** [2018] JMCA Crim 20, **Levi Levy v R** [2022] JMCA Crim 13, **Oneil Murray v R**, and **Paul Haughton v R** which affirm a normal range of 15-25 years' imprisonment for the offence of rape.

[136] In **Levi Levy v R**, the applicant was found guilty of one count of rape and one count of grievous sexual assault and sentenced to 18 years' imprisonment on each count. In relation to the count of rape, it was ordered that he should not be eligible for parole until he had served 12 years. That sentence was upheld, on appeal, as being "proportionate and commensurate with the crime". Aggravating features included a

personal assault on the victim (slapping her in the face causing bleeding when she bit him on his penis, which he had pushed into her mouth); and that the applicant had tricked the complainant into believing that she was being taken to a bar in a motel rather than in a room to have sexual intercourse. The applicant had a favourable social enquiry report with a positive community report. He was characterised as a hard worker and the sole breadwinner for his dependents. Although he had a previous conviction, minimal weight was placed on it given the time that had elapsed, and he was not generally known to be a troublemaker.

[137] In **Paul Haughton v R**, the appellant was convicted of rape, robbery with violence, and unlawful wounding. He was sentenced to concurrent terms of 15 years for rape, three years for robbery with violence, and three years for unlawful wounding. He was given a certificate pursuant to section 42K, with respect to the rape, on the basis that he did not deserve the prescribed minimum sentence for that offence. The complainant was a sex worker who had agreed with the applicant to have sex for money. He gave her a part of the money and promised the balance. They got into a taxi to go to the home of the appellant. On alighting the taxi, he caused her to believe that she was being led towards a house. He then started to "rough her up", threatened her, and used a stone to beat her. Although the applicant had three previous convictions, they were not heavily weighted because they had occurred long before and were not of a similar nature.

[138] The judge's reasons for the certificate included that (a) the offence occurred in circumstances where there was a willing transaction entered into by both the complainant and the appellant, (b) there was no force or violence at the time; (c) the appellant may have misjudged the actions of the complainant, and (d) he did not go to the place of the offence with any weapon; he used a stone to cause the injury.

[139] At para. [47], of the judgment, this court concluded:

> "However, in a case in which the appellant clearly used personal violence to subdue the complainant, we do not think this latter factor [that no firearm or other weapon was used] is sufficient to reduce the sentence in this case below the

> prescribed minimum sentence of 15 years' imprisonment. Or, put another way, it cannot be said that, in all the circumstances of this case, there are compelling reasons which render the prescribed minimum sentence manifestly excessive and unjust."

[140] In **Daniel Roulston v R**, the appellant pleaded guilty to rape, and grievous sexual assault, which took place in the home of the complainant, at night time, when he found his way there. He was sentenced to 20 years and 10 years' imprisonment at hard labour on counts one and two respectively. On appeal, the sentence for rape was reduced to 15 years' imprisonment, with a stipulation that he should serve 13 years before becoming eligible for parole. It should be noted that the early guilty plea and time spent in custody were material considerations in reducing the sentence.

[141] The authorities, including these cases, indicate that the lowest sentence in the range is usually reserved for those which reflect mitigating factors rather than those distinguished by aggravating features. The factors which usually advance the sentence within the range include the degree of violence used in committing the act, the infliction of other forms of sexual abuse, the involvement of multiple accused, forcible abduction of the victim or invasion of the victim's house, and the commission of multiple offences simultaneously.

[142] It is quite noticeable, in the instant case, that the learned judge did not approach the sentencing exercise as the authorities have shown, and she gave, in our view, an inadequate explanation for her sentencing decision. Firstly, she did not identify an appropriate starting point within the range of sentences for rape, as she was required to do, for the purpose of showing the adjustments relative to the aggravating and mitigating factors. Secondly, although she mentioned that the offences were serious, she did not expressly consider any particular aggravating feature relative to the offences or the appellant. In fact, she concentrated her analysis on the mitigating factors, to the exclusion of any aggravating factor. Thirdly, there was no indication of how she arrived at the 15

years' imprisonment, or the recommended six years in substitution therefor. Further, as noted earlier, she did not indicate a parole ineligibility period.

[143] The authorities have shown that an appropriate sentence is one which demonstrates an appropriate mix of all relevant factors, and fits the crime and the offender (see Sentencing Guidelines 1.2 and 1.3). In **Meisha Clement v R**, Morrison P, at para. [43], said this in relation to the function of the appellate court in an appeal against sentence:

> "…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."

[144] We also take note of the approach outlined by McDonald-Bishop JA, in **Daniel Roulston v R**, wherein the first two steps involve identifying the normal range and then setting a starting point within the range of sentences for the offence in question (the other steps being to consider the relevant aggravating and mitigating factors, among other things; deciding on the appropriate sentence; and giving credit for time spent on pre-sentence remand) (see para. [17]). Although that approach was not available at the time of sentencing the appellant, the analogous approach, in **Meisha Clement v R**, had already been established.

[145] Having not followed the standard approach that existed, the learned judge erred in principle. This error provides an additional reason for this court to review the sentence imposed for rape.

[146] Adopting the usual starting point of 15 years, we now consider the aggravating factors that made the circumstances of this offence more serious and increased the

culpability of the appellant. These include (i) the level of pre-meditation (the evidence was that the appellant drove the complainant to his house against her will to have sexual intercourse with her); (ii) the evidence that the complainant was exposed to non-consensual sexual intercourse with the third man who had been in the company of the appellant when she was taken against her will to the appellant's home; (iii) the evidence of two offences having been perpetrated against the complainant by the appellant almost simultaneously (the forcible abduction and non-consensual sexual intercourse); (iv) the appellant's breach of the complainant's trust when she went willingly into his car on the promise of being given a ride to her home; (iv) the prevalence of sexual offences in the society; and (vi) the betrayal of the public trust, the appellant having been a member of the security forces.

[147] We are not in agreement with counsel for the Crown that, the fact of the complainant reporting the incident on the same night, and the failure of the appellant to enter a guilty plea should be characterised as aggravating factors. These would not increase the appellant's culpability for the offence. Furthermore, a defendant's choice not to plead guilty to an offence is his fundamental right. It is worth adding that the ingredients inherent in a particular offence cannot aggravate that offence. The aggravating features are those that increase the harm caused and/or the culpability of the offender. The aggravating factors identified would adjust the starting point of 15 years upwards.

[148] The next step is to consider the mitigating factors, including those identified by the learned judge and Mr Samuels. We make the observation that, as a member of the security forces, the appellant was expected to be a person of good character and without previous convictions. Hence, no significant weight is given to those mitigating factors. However, when the other mitigating factors are balanced against the aggravating factors, our conclusion is that those mitigating factors are sufficiently weighty to cancel out the significant aggravating features. Thus, the result is 15 years.

[149] In that assessment, we have also taken account of the parity principle whereby like cases are treated similarly. As was seen in **Levi Levy v R**, there was violence perpetrated against the complainant beyond that inherent in the offences, and that accounted, in part, for the sentence of 18 years' imprisonment and the parole ineligibility period of 12 years, which was not adjusted on appeal.

[150] In **Leslie Walker v R** [2023] JMCA Crim 32, a police officer was convicted for the offence of rape, following a trial. He was sentenced to 15 years' imprisonment, with the stipulation that he would not be eligible for parole until he had served 10 years' imprisonment. There was no violence beyond that which was inherent in the offence. The application to appeal his conviction and sentence was refused as the sentence was found not to be manifestly excessive. A circumstance that made the latter case distinctive is that it involved only one offence.

[151] Undoubtedly, the circumstances of two equally serious offences, in the instant case, are more egregious, and would necessarily increase the appellant's level of culpability. Having regard to the aggravating factors in this case (none of which was expressly mentioned by the learned judge), and the weighty mitigating factors, it is our view, that there is nothing that takes this case outside the normal range of sentences for this offence.

[152] In **Kimani McDermot v R** [2022] JMCA Crim 38, in which a similar ground of appeal was advanced (in relation to convictions for firearm offences), the decision was predicated on the proposition that a prescribed minimum penalty "is generally applicable in cases where there is an absence of violence or aggravation beyond that inherent in the offence itself; where there is an absence of factors that would increase the level of culpability of the offender and the harm which results; and where the offender has good antecedents" (see para. [21]). See also **Garfield Elliott v R** [2023] JMCA Crim 22.

[153] On the basis of the reasoning in those cases (with which we concur), the appellant's positive antecedents and previous good character in this case, albeit weighty,

would not be sufficient to reduce the sentence of 15 years' imprisonment since, as we have seen, there were significant aggravating factors which increased the level of culpability of the appellant and the harm caused by his offending. So, the appellant's previous good character would not make the prescribed minimum sentence manifestly excessive and unjust.

[154] In the circumstances, we are not persuaded to the view that the mitigating circumstances provide compelling reasons that would render the prescribed minimum sentence manifestly excessive and unjust, such as to warrant a reduction of the prescribed penalty to a term of six years, as the learned trial judge opined.

Time spent on pre-sentence remand

[155] The decision in **Paul Haughton v R** has confirmed that this court has jurisdiction to go below the prescribed minimum penalty to take account of time spent on pre-sentence remand by an offender in circumstances where a section 42K certificate was granted (see para. [50]).

[156] We note that the learned judge had expressly considered six months that the appellant spent on pre-sentence remand (see **Mohammed Iqbal Callachand and Anor v The State** [2008] UKPC 49, which addresses the issue of the entitlement by an offender to full credit for time spent on pre-sentence remand). However, because the learned judge erred in her sentencing approach, as a result of which we had to engage in a re-sentencing exercise, we are now required to apply the credit of six months, which the learned judge determined was applicable.

[157] Although we disagree with the learned judge that the prescribed minimum sentence would be manifestly excessive and unjust, regarding the offence and offender, we, nonetheless, believe that he should be credited with the time spent in pre-sentence custody to which he is entitled. Put another way, we consider it just to give the appellant full credit for the time spent on pre-sentence remand which would be a compelling reason

to reduce the sentence below the statutory minimum sentence, on the authority of **Paul Haughton v R**.

[158] On this basis, we will allow the appeal and reduce the appellant's sentence by six months to account for the time spent in pre-sentence custody. The result is a sentence of 14 years and six months' imprisonment.

The minimum pre-parole period

[159] On the matter of the parole ineligibility period, the learned judge erred. Section 6(2) of the Act provides that:

> "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."

[160] Reference is also made to section 42K(3) of the CJAA, which permits this court, where it agrees with the sentencing judge that there are compelling reasons to reduce the sentence below the statutory minimum, to set a pre-parole period "not being less than two-thirds of the sentence imposed by this court, notwithstanding the provisions of the *Parole Act*".

[161] Having found that the learned judge did not indicate a parole ineligibility period, and this court having reduced the sentence to give credit to the appellant for time spent in pre-sentence custody, we will specify that the appellant should serve a period of nine years and six months' imprisonment before becoming eligible for parole.

Conclusion

[162] We have given due consideration to the grounds of appeal advanced, and the detailed and well-articulated submissions of counsel on the appellant's behalf, but we were unable to find any basis on which the convictions ought to be set aside, as there

was no substantial miscarriage of justice. However, we have made an adjustment to the sentence to account for time spent by the appellant in pre-sentence custody, and set a parole ineligibility period.

[163] Accordingly, it is ordered as follows:

i) The appeal against conviction is dismissed and the convictions are affirmed.

ii) The appeal against sentence is allowed, in part.

iii) The sentence of 15 years' imprisonment for rape is set aside. Substituted therefor is a sentence of 14 years and six months' imprisonment (after applying a credit of six months for time spent in pre-sentence custody) with the stipulation that the appellant shall serve nine years and six months' imprisonment before becoming eligible for parole. The sentence of three years' imprisonment suspended for three years, for forcible abduction, is affirmed.

iv) The sentences are to be reckoned as having commenced on 28 February 2018, the date on which they were imposed.