[2021] JMCA Crim 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME CRIMINAL APPEAL NO 9/2014

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

DAVID GRAY v R

Hugh Wilson for the appellant

Miss Kathy Ann Pyke and Miss Sophia Rowe for the Crown

17 November 2020 and 1 February 2021

SIMMONS JA

[1] On 17 November 2020, the court had the benefit of hearing submissions from counsel. At the conclusion of the hearing, we made the following orders:

(1) The appeal against sentence is allowed in part.

(2) The sentence of 15 years' imprisonment for the offence of illegal possession of firearm is affirmed.

(3) The sentence of 5 years' imprisonment for the offence of forcible abduction (count 2 on the indictment) is affirmed.

(4) The sentence of 25 years' imprisonment for the offence of rape (count 3 on the indictment) is set aside and the

sentence of 25 years with the stipulation that the appellant serves 15 years before being eligible for parole (having been awarded credit for 1 year and 6 months) is substituted in lieu thereof.

(5) The sentences are to run concurrently and are reckoned as having commenced on 22 November 2013.

[2] It was indicated to the parties that the reasons would be provided and this judgment is a fulfilment of that promise.

Background

[3] On 18 November 2011 sometime after 6:00 pm the complainant was sitting at the waterfront in downtown Kingston listening to music through her earphones. Whilst there she observed three men including the appellant walking towards her. They stopped in close proximity to her and the appellant engaged her in conversation. He told her that she looked like the person who sent his brother to prison. He then took up her handbag which was on the wall beside her. When she attempted to pull the bag away from him he lifted his shirt and showed her a gun in his waistband.

[4] The appellant then held onto her hand and forced her to walk with him some distance away from where she had been sitting. When they stopped, one of the two men who was with the appellant asked her for money. She gave it to him and he left. The complainant and the appellant then sat on a wall by the waterfront for about 10 minutes.

When the man who had asked for the money returned, the appellant instructed the complainant to get up and they walked for about 30 minutes.

[5] When they arrived at a bushy area, the appellant instructed the complainant to remove her clothes. She did not comply. He then removed the gun from his waist and gave it to one of the men who were standing nearby. That man was about 6 feet away from where the complainant and the appellant were standing. The appellant then pulled down her sweatpants and had sexual intercourse with her without her consent.

[6] After he finished, the complainant, the appellant and the man to whom he had given the gun, walked together around the block. During that time, the appellant continued to hold onto the complainant's bag. The other man told the appellant to return her bag. Before doing so he took out her phone and used it to dial his number and told the complainant that he was going to call her. He also told her that if she went to the police he would kill her.

[7] When the complainant got home she called her boyfriend and told him that she needed to see him. Later that evening he came to her home she told him what had happened. The matter was reported to the police approximately three days later.

[8] Later that month the complainant saw the appellant in the Matthews Lane area but she hid upon seeing him. In March 2012 she saw him in the vicinity of the Captain's Bakery in downtown Kingston and made a report to an officer who was nearby. The appellant was apprehended, arrested and charged with the offences of illegal possession of firearm, forcible abduction and rape.

[9] On 22 November 2013, after a trial before a judge alone, in the High Court division of the Gun Court for the parish of Kingston, the appellant, Mr David Gray, was found guilty, on an indictment charging him with the offences of illegal possession of firearm, forcible abduction and rape. He was sentenced as follows:

(1) Illegal possession of firearm – 15 years' imprisonment;

(2) Forcible abduction – 5 years' imprisonment; and

(3) Rape – 25 years' imprisonment.

It was ordered that these sentences should run concurrently.

The appeal

[10] By way of a notice of application for permission to appeal against conviction and sentence dated 4 December 2013, the appellant sought to challenge his conviction and sentence on following grounds:

> "(1) Misidentity by the Witness – That the prosecution witness wrongfully identified [him] as the person or among any person [sic] who committed the alleged crime;
>
> (2) Unfair Trial – That the evidence and testimonies upon which the Learned Trial Judge relied on for the purpose to convict [him] lack [sic] facts and credibility thus rendering the verdict unsafe in the circumstances.
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> (3) Lack of Evidence – That the prosecution failed during the Trial to present any form of 'concrete' material evidence to link [him] to the alleged crime.
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> (4) Miscarriage of Justice – That the court failed during the Trial, to recognise the fact that the prosecution [sic] case was substantially based on 'hearsays' [sic] and assumption, instead of real facts of law."

[11] His application was considered on paper by a single judge of this court on 11 June 2020. His application was refused in relation to conviction on the basis that the trial judge had correctly identified the major issues as being identification, dock identification and alibi. The single judge also found that the learned trial judge gave himself appropriate directions and properly considered issues of joint enterprise, recent complaint and inconsistencies and discrepancy. Leave was granted to appeal his sentence.

[12] Two supplementary grounds of appeal were filed on 12 November 2020. At the hearing of the appeal, permission was sought by Mr Wilson to abandon the original grounds and to argue instead, those supplementary grounds. There was no objection from the Crown and permission was granted to proceed in that manner. The supplementary grounds read as follows:

> "1. The learned sentencing judge erred in law in sentencing the Appellant to:
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> a. 15 years' imprisonment [sic] for the offence of illegal possession of firearm; and
>
> b. 25 years' imprisonment for the offence of rape
>
> which were manifestly excessive in the circumstances of the case.
>
> 2. The sentencing judge erred in failing in law to take into consideration when sentencing the appellant, the time he had already spent in custody."

The application for permission to appeal against conviction was not pursued.

Submissions

Supplementary ground 1 - The learned sentencing judge erred in law in sentencing the Appellant to 15 years' imprisonment for the offence of illegal possession of firearm and 25 years' imprisonment for the offence of rape

For the appellant

[13] Mr Wilson submitted that whilst the learned trial judge in his consideration of sentence took into account the appellant's previous convictions and expressed disappointment that he did not avail himself of the opportunity of rehabilitation, there was no indication of how he arrived at the sentences imposed. In this regard he referred to the Sentencing Guidelines for use by Judges of the Supreme Court and Parish Courts, December 2017 (Sentencing Guidelines) and the well-known cases of **Meisha Clement v R** [2016] JMCA Crim 26 and **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered 5 July 2002.

A. *Illegal possession of firearm*

[14] Mr Wilson submitted that the sentence of 15 years' imprisonment was manifestly excessive. He stated that the sentencing range for this offence is seven to 15 years' imprisonment range with a usual starting point of 10 years. Having referred to several authorities including **Brian Williams v R** [2012] JMCA Crim 34, **Keith Reid v R** [2014] JMCA Crim 39, **Craig Mitchell v R** [2019] JMCA Crim 8, **Cornell Grizzle v R** [2015] JMCA Crim 15, **Marlon Blair v R** [2014] JMCA Crim 59, **Kenneth Hylton v R [**2013] JMCA Crim 57 and **Aaron Lewis v R** [2015] JMCA Crim 17, he submitted that a sentence of 12 years' imprisonment would be appropriate.

B. *Rape*

[15] Counsel submitted that the learned trial judge erred in two respects. Firstly, by not fixing a starting point and secondly, by not stipulating a period which the appellant should serve before becoming eligible for parole. Reference was made to sections 6(1)(a) and (2) of the Sexual Offences Act in support of the second submission.

[16] It was also submitted that McDonald-Bishop JA in **Daniel Roulston v R** [2018] JMCA Crim 20 had suggested that the statutory minimum of 15 years should be considered as the starting point. He pointed out that in that case the sentence of 20 years was substituted by a sentence of 15 years with the stipulation that the appellant serve 13 years before being eligible for parole.

[17] Counsel also referred to **Oneil Murray v R** [2014] JMCA Crim 25 in which the sentences for rape were reduced to 18 years and 15 years in circumstances where a firearm was used. Reference was also made to **Jimmy Murray v R** [2015] JMCA Crim 19 (18 years), **Steven Collins v R** [2016] JMCA Crim 17 (15 years' imprisonment and eligible for parole after 10 years for the offence of sexual intercourse with a person under the age of 16 years) and **Percival Campbell v R** [2013] JMCA Crim 48 (the sentence of 21 years was reduced to 18 years in circumstances in which no was weapon used).

[18] It was submitted that based on the above cases, the sentence of 25 years' imprisonment was beyond the acceptable range of sentences for the offence of rape and therefore manifestly excessive. He suggested that a sentence of 17 years would be appropriate in light of the appellant's previous convictions as there were no "exceptional

aggravating features in [the] case other than the act of non-consensual sexual intercourse".

For the Crown

[19] Miss Pyke submitted that the appellate court will only disturb a sentence if it is borne out that the learned trial judge erred as a matter of principle. Reference was made to **Worrel Wint v R** [2019] JMCA Crim 11 in support of that submission.

[20] She stated that in arriving at an appropriate sentence the learned trial judge was required to demonstrate that he gave consideration to the requisite matters in accordance with all the requirements and authorities; it is satisfactory if he complies in substance even if he fails to do so in form. In this matter, it was submitted, the learned trial judge demonstrated by his comments that he bore in mind the principles of sentencing and assessed the relevant factors before passing sentence. She indicated that whilst this was not done in a systematic manner the principles were applied in substance. Reference was made to **R v James Sargeant** (1974) 60 Cr App R 74, in which Lawton LJ stated that the classical principles of sentencing are: retribution, deterrence, prevention and rehabilitation.

[21] Miss Pyke submitted that when pages 135 (lines 13-33) and 137 (lines 1-7) of the transcript are examined it appears that deterrence was uppermost in the learned trial

judge's mind.[1] She indicated that he identified the aggravating factors and averted to the fact that the appellant was of the Christian faith.

[22] It was also submitted that when those factors are weighed, the sentences imposed were appropriate. Miss Pyke identified the aggravating factors as follows:

(i) The appellant's previous conviction for the offences of illegal possession of firearm and rape;

(ii) The fact that the offences were committed approximately 17 months after the appellant's release from prison;

(iii) The appellant was armed and in the company of two men and as such the commission of the offence was premeditated; and

(iv) The fact that the appellant threatened the complainant after the commission of the offence.

[23] She opined that there are no notable mitigating factors.

[24] Miss Pyke stated that in light of the learned trial judge's failure to indicate a starting point for both offences and his failure to indicate in relation to the sentence for rape, the

[1] See paragraph [39] of this judgment.

period to be served before eligibility for parole, the court in accordance with established principles would be entitled to consider the matter afresh.

[25] Where the authorities referred to by the appellant are concerned, Miss Pyke submitted that those cases were largely inapplicable as they did not relate to situations in which a firearm was used in the commission of a rape. She indicated that only **Oneil Murray v R** was of assistance albeit only in relation to the applicable principles. Specific reference was made to the following paragraph:

> "[23] In our view, these cases, which span a period of close to 15 years, suggest a sentencing range of 15-25 years' imprisonment, with 20 years perhaps most closely approximating the norm, on convictions for rape after trial in a variety of circumstances. For this purpose, we have disregarded ***Marvin Reid v R***, in which the sentence of 10 years' imprisonment appears to be plainly on the low side, and ***Lynden Levy et al v R***, in which the sentence of 30 years' imprisonment handed down to the first named appellant clearly reflected, not only the particularly heinous circumstances of that case, but also his role as the 'ring master'."

[26] Miss Pyke reminded the court that in **Oneil Murray v R** the sentence imposed on the appellant who had pleaded guilty to rape and abduction with a firearm was reduced from 23 years' imprisonment to 18 years. The court's attention was directed to the following paragraph which counsel submitted should guide the court:

> "[27] Against this background, we come now to consider whether the sentences imposed by the learned judge in this case can be said to have been manifestly excessive. There were undoubtedly, as Mr Equiano realistically accepted, some severely aggravating factors in the case, including in particular the intrinsically awful nature of the offence of rape, aggravated by the applicant's deployment of a firearm, the

> ages of both victims, most particularly so the complainant in the first incident, and the fact that in both cases the complainants were lured into the applicant's vehicle on the pretext that he was a provider of a public passenger transport service. Had the applicant been found guilty after a trial, all these factors would manifestly have militated, in our view, in favour of sentences close to the top of the range established by the cases for sentences for rape."

[27] It was submitted that based on the above observation by Morrison P, the sentence of 25 years' imprisonment imposed in respect of the offence of rape was not excessive. Miss Pyke stated that in light of the fact that the appellant was assisted by two other men and had used a firearm in the commission of the offence, he could have received a higher sentence.

[28] Reference was also made to **Carl Campbell v R** [2019] JMCA Crim 22 in which the appellant who had pleaded guilty was sentenced to 12 years for forcible abduction and grievous sexual assault, six months for assault, 10 years for robbery with aggravation and 45 years for rape with the stipulation that he serve 35 years before being eligible for parole. On appeal, the court stated that a sentence of 25 years would have been appropriate had the matter proceeded to trial, using a starting point of 15 years. However, when a 30% discount on account of the guilty plea was applied and the appellant credited with the 12 months he had spent in custody, the sentence was reduced to 16 years.

[29] It was submitted that in the circumstances of this case a sentence of 25 years for rape was appropriate.

[30] Ultimately, it was urged that the sentence in regards to the offence of illegal possession of firearm be upheld and affirmed and the sentence in regards to the offence

of rape be remedied to the effect that the court imposes a stipulated period to be spent before eligibility for parole and credit be given for the time that the appellant was incarcerated before trial.

Supplementary ground 2 - The sentencing judge erred in law in failing to take into consideration when sentencing the appellant, the time he had already spent in custody

For the appellant

[31] Mr Wilson also argued that the learned trial judge did not give any credit to the appellant for the one year and 6 months he had spent in custody before his trial and as such fell into error. When that period is deducted the appellant should be sentenced to 15 years' imprisonment and serve 12 years before becoming eligible for parole for the offence of rape.

For the Crown

[32] The Crown conceded on this point.

Discussion and analysis

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

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

[34] However, as indicated by Hilbery J in **R v Ball** (1952) 35 Cr App Rep 164, 165:

> "…this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might

> have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses as to character he may have chosen to call. **It is only when a sentence appears to err in principle that the Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene**." (Emphasis added)

[35] The above statement of principle by Hilbery J in **R v Ball** was adopted by this court in **Alpha Green v R** (1969) 11 JLR 283, 284, **Meisha Clement v R** and more recently, in **Patrick Green v R** [2020] JMCA Crim 17[2].

[36] In **Patrick Green v R** the court also underscored the need for the sentencing judge to address his or her mind to the principles of sentencing. Morrison P, who delivered the judgment of the court, stated:

> "[21] …Firstly, it is beyond controversy that the four 'classical principles of sentencing', as this court described them in **R v Beckford & Lewis** ((1980) 17 JLR 202, 202-203), are retribution, deterrence, prevention and rehabilitation. Thus, the possibility of rehabilitation, even in a case calling for condign punishment, must always be considered by the sentencing judge. Accordingly, in **R v Errol Brown** ((1988) 25 JLR 400, 401), the court considered that, in imposing a well-deserved deterrent sentence, the sentencing judge ought to have kept in mind 'a possible rehabilitation of the prisoner'. And similarly, in **Michael Evans v R** ([2015] JMCA Crim 33), the court found that counsel's criticism that the sentencing judge, whose primary focus appeared to have been on the principle of deterrence, had failed to demonstrate that he had also taken into account the need to rehabilitate the offender, was 'not at all unjustified'."

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[2] Para. [23]

[37] In **Meisha Clement v R** the court stated that when considering 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. Where it is determined that the sentence satisfies these criteria, this court will be loath to interfere with the sentencing judge's exercise of his or her discretion".[3]

[38] The procedure which is to be utilized is outlined in the Sentencing Guidelines. In **Meisha Clement v R** further clarity was provided by Morrison P, who stated:

> "[26] Having decided that a sentence of imprisonment is appropriate in a particular case, the sentencing judge's first task is, as Harrison JA explained in **R v Everald Dunkley**, to 'make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any other factors that will serve to influence the sentence, whether in mitigation or otherwise'. More recently, making the same point in **R v Saw and others** ([2009] 2 All ER 1138, 1142), Lord Judge CJ observed that 'the expression 'starting point' ... is nowadays used to identify a notional point within a broad range, from which the sentence should be increased or decreased to allow for aggravating or mitigating features'.
>
> [27] In seeking to arrive at the appropriate starting point, it is relevant to bear in mind the well-known and generally accepted principle of sentencing that the maximum sentence of imprisonment provided by statute for a particular offence should be reserved for the worst examples of that offence likely to be encountered in practice. By the same token, therefore, it will, in our view, generally be wrong in principle

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[3] **Meisha Clement v R** at paragraph [43].

to use the statutory maximum as the starting point in the search for the appropriate sentence…

[29] But, in arriving at the appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence. Although not a part of our law, the considerations mentioned in section 143(1) of the United Kingdom Criminal Justice Act 2003 are, in our view, an apt summary of the factors which will ordinarily inform the assessment of the seriousness of an offence. These are the offender's culpability in committing the offence and any harm which the offence has caused, was intended to cause, or might foreseeably have caused.

[30] Before leaving this aspect of the matter, we should refer in parenthesis, with admiration and respect, to the recent judgment of the Court of Appeal of Trinidad and Tobago in **Aguillera and others v The State** (Crim. Apps. Nos. 5,6,7 and 8 of 2015, judgment delivered on 16 June 2016). In that case, after a full review of relevant authorities from across the Commonwealth, the court adopted what is arguably a more nuanced approach to the fixing of the starting point. Explicitly influenced by the decision of the Court of Appeal of New Zealand in **R v Tauer** and others ([2005] NZLR 372), the court defined the starting point as '… the sentence which is appropriate when aggravating and mitigating factors relative to the offending are taken into account, but which excludes any aggravating and mitigating factors relative to the offender'. So factors such as the level of premeditation and the use of gratuitous violence, for instance, to take but a couple, would rank as aggravating factors relating to the offence and therefore impact the starting point; while subjective factors relating to the offender, such as youth and previous good character, would go to his or her degree of culpability for commission of the offence.

[31] We have mentioned **Aguillera and others v The State** for the purposes of information only. But it seems to us that, naturally subject to full argument in an appropriate case, the decision might well signal a possible line of refinement of our own approach to the task of arriving at an appropriate starting point in this jurisdiction.

[32] While we do not yet have collected in any one place a list of potentially aggravating factors, as now exists in England

> and Wales by virtue of Definitive Guidelines issued by the Sentencing Guidelines Council (SGC), the experience of the courts over the years has produced a fairly well-known summary of what those factors might be. Though obviously varying in significance from case to case, among them will generally be at least the following (in no special order of priority): (i) previous convictions for the same or similar offences, particularly where a pattern of repeat offending is disclosed; (ii) premeditation; (iii) use of a firearm (imitation or otherwise), or other weapon; (iv) abuse of a position of trust, particularly in relation to sexual offences involving minor victims; (v) offence committed whilst on probation or serving a suspended sentence; (vi) prevalence of the offence in the community; and (vii) an intention to commit more serious harm than actually resulted from the offence. Needless to say, this is a purely indicative list, which does not in any way purport to be exhaustive of all the possibilities.
>
> [33] As regards mitigating factors, P Harrison JA (as he then was), writing extra-judicially in 2002, cited with approval Professor David Thomas' comment that '[m]itigating factors exist in great variety, but some are more common and more effective than others'. Thus, they will include, again in no special order of priority, factors such as (i) the age of the offender; (ii) the previous good character of the offender; (iii) where appropriate, whether reparation has been made; (iv) the pressures under which the offence was committed (such as provocation or emotional stress); (v) any incidental losses which the offender may have suffered as a result of the conviction (such as loss of employment); (vi) the offender's capacity for reform; (vii) time on remand/delay up to the time of sentence; (viii) the offender's role in the commission of the offence, where more than one offender was involved; (ix) cooperation with the police by the offender; (x) the personal characteristics of the offender, such as physical disability or the like; and (xi) a plea of guilty. Again, as with the aggravating factors, this is not intended to be an exhaustive list." (Emphasis added)

[39] The procedure was further addressed in **Daniel Roulston v R** [2018] JMCA Crim 20 by McDonald-Bishop JA who stated:

> "[17] Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:
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> a. identify the sentence range;
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> b. identify the appropriate starting point within the range;
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> c. consider any relevant aggravating factors;
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> d. consider any relevant mitigating features (including personal mitigation);
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> e. consider, where appropriate, any reduction for a guilty plea;
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> f. decide on the appropriate sentence (giving reasons); and
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> g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."[4]

[40] The learned trial judge in his sentencing remarks had this to say:

> "Stand up Mr. David Carl Gray…When I look at your criminal record I see where you were sentenced to five years imprisonment at hard labour for Possession of Firearm in December 2005 for that same time for the offence of rape, You were given a prison sentence of seven years at hard labour to run concurrently with the possession of firearm offence and by the 18 November, 2011 you were at it again…
>
> I have a duty to this society. I am going to sentence you on the basis of principles now. Protection of the society, that's one deterrence I am not going to even going the route of retribution and I am not going to use the word reformation. You believe in Christianity, wherever you go you go and preach the Word of God because you will be there for a long time. A woman has a right to say no to any man and her body should not be violated under the influence or the fear of a gun

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[4] See also **Patrick Green v R** at para. [22] and **R v Evrald Dunkley** (unreported) Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered 5 July 2002.

> or other men. There is no freedom for anybody to go and sit down at the water park and enjoy the evening by himself/herself, not even that freedom people can enjoy anymore. I am sorry, you are going to prison for the offence of Rape for 25 years and for the Illegal Possession of firearm for 15 years and for Abduction five years and the sentences are to run concurrently. You didn't learn your lesson. You had an opportunity. You went to prison for the very same offences and you are back out doing the same thing with gun, 25 years in prison". [5]

[41] In light of the judge's errors as identified by counsel for the appellant and in accordance with established practice of the court, we considered the question of sentence afresh.

Illegal possession of firearm

[42] A person convicted of a breach of section 20(1)(b) of the Firearms Act may be imprisoned for life. The circumstances of this case would not warrant such a sentence. It has now been settled that the usual starting point for this offence is 10 years' imprisonment (see the Sentencing Guidelines). The aggravating features are:

(1) The appellant's previous conviction for the same offence;

(2) The fact that the appellant re-offended within 17 months of his release from prison;

(3) The use of the firearm to commit the offence of rape;

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[5] Page 135 (lines 13-33) and page 136 (lines 1-7).

(4) The fact that the offence was committed in the company of others; and

(5) The threat issued to the complainant.

In those circumstances, we thought it was appropriate to add two years for the aggravating factors identified at (1) and (2) above, two years for the use of the firearm, two years in respect of (4) above and one year for the threat. That would take the sentence to 17 years. We could not identify any mitigating features. When the one year and 6 months that the appellant spent in custody is subtracted the sentence would be 15 years and 6 months. In the circumstances, this being substantially the same sentence as the sentence imposed on the appellant, there was no basis on which to disturb it.

Rape

[43] Section 6(1)(a) and (2) of the Sexual Offences Act (the Act) provides as follows:

> "6 (1) A person who - a) commits the offence of rape (whether against section 3 or 5) is liable on conviction in a Circuit Court to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years: …
>
> (2) Where a person has been sentenced pursuant to subsection (1) (a) or (b) (ii), then in substitution for the provisions of section 6 (1) to (4) of the Parole Act, the person's eligibility for parole shall be determined in the following manner: the court **shall** specify a period of not less than ten years, which that person shall serve before becoming eligible for parole." (Emphasis added)

[44] The learned trial judge, in sentencing the appellant to 25 years, failed to comply with section 6(2) which requires him to specify a period that the appellant should serve

before parole. The Crown, quite rightly, conceded on this point. That specification is mandatory. He therefore erred as a matter of law. Section 6(2) of the Act also stipulates that the period before which a person convicted of the offence becomes eligible for parole should not be less than 10 years. It was also submitted that the sentence was manifestly excessive.

[45] Where the length of the sentence is concerned, although by virtue of section 6(1) a person convicted of rape may be sentenced to imprisonment for life, such a sentence would be reserved for the worst cases. This case cannot be categorized as such although the behaviour of the appellant was reprehensible.

[46] In **Daniel Roulston v R**, to which counsel for the appellant referred, the sentence was reduced to 15 years with the stipulation that he serve 13 years before being eligible for parole, in circumstances where the appellant had pleaded guilty. In addition, the offence would not properly be categorized as an aggravated form of rape (see paragraph [12]).

[47] In **Oneil Murray v R** the appellant's sentences were reduced by this court to 18 and 15 years for the offence of rape in light of the fact that he had pleaded guilty.

[48] We have noted that in **Jimmy Murray v R** the sentence of 18 years' imprisonment with the stipulation that the appellant serve a minimum of 12 years before being eligible for parole was not disturbed by this court. In **Percival Campbell v R** the sentence of 21 years' imprisonment was reduced to 18 years in circumstances where no weapon had been used.

[49] As stated by L Pusey JA (Ag) (as he then was), in **Carl Campbell v R**, the appropriate sentencing range for this offence is 15-25 years' imprisonment (see the Sentencing Guidelines). The offence carries a mandatory minimum sentence of 15 years which, in our view, was an appropriate starting point in the circumstances of this case. The aggravating features are:

(1) The appellant's previous conviction for the same offence;

(2) The fact that the appellant re-offended within 17 months of his release from prison;

(3) The use of the firearm to at the time of committing the offence;

(4) The fact that the offence was committed in the company of others; and

(5) The threat issued to the complainant.

In those circumstances, we thought it appropriate to add four years for (1) and (2) above, three years for the use of the firearm, three years in respect of (4) above and two years for the threat. That would take the sentence to 27 years. When the one year and 6 months that the appellant spent in custody was subtracted the sentence would be 25 years and 6 months. Again, this being substantially the same as that imposed by the learned trial judge, there was no basis on which to disturb the sentence imposed on the appellant.

Conclusion

[50] In the interest of transparency and clarity, we have set out in detail the process that was utilised to arrive at our decision. However, we wish to make it clear that the values assigned to the aggravating and mitigating factors are specific to the circumstances of this case and are not of general application.

[51] These are the reasons for our decision as stated in paragraph [1] above. The application for permission to appeal conviction was not pursued. However, at the time when we made the orders at paragraph [1] above, we did not address that application. As such, we now order that the application for leave to appeal against conviction is refused and the conviction affirmed.

[52] Our final orders therefore are:

(1) The application for permission to appeal conviction is refused and the conviction is affirmed.

(2) The appeal against sentence is allowed in part.

(3) The sentence of 15 years' imprisonment for the offence of illegal possession of firearm is affirmed.

(4) The sentence of five years' imprisonment for the offence of forcible abduction (count 2 on the indictment) is affirmed.

(5) The sentence of 25 years' imprisonment for the offence of rape (count 3 on the indictment) is set aside and the sentence of 25 years with the stipulation that the appellant serves 15 years before being eligible for parole (having awarded credit for one year and 6 months) is substituted in lieu thereof.

(6) The sentences are to run concurrently and are reckoned as having commenced on 22 November 2013.