[2020] JMCA Crim 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 3/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA

PATRICK GREEN v R

Mrs Caroline Hay and Neco Pagon for the appellant

Miss Sophia Thomas for the Crown

30 May 2017 and 26 May 2020

MORRISON P

Introduction

[1] On 11 December 2014, the appellant appeared before Thompson-James J ('the judge') in the Clarendon Circuit Court on an indictment charging him with 23 counts in total. He was charged with the offences of illegal possession of firearm (eight counts), robbery with aggravation (five counts), rape (eight counts) and grievous sexual assault (two counts). The appellant pleaded guilty on all 23 counts. At the request of his counsel, the judge ordered a social enquiry report and adjourned the matter for sentencing on 19 December 2014.

[2] On that date, counsel for the prosecution provided the court with an outline of the facts, a police officer gave a report on the appellant's antecedents and a probation officer gave the findings of the social enquiry report. After hearing a plea in mitigation from the appellant's counsel, the judge sentenced him to the following periods of imprisonment at hard labour:

(a) 10 years' imprisonment on each of the counts charging him with illegal possession of firearm;

(b) 15 years' imprisonment on each of the counts charging him with robbery with aggravation;

(c) 38 years' imprisonment on each of the counts charging him with rape; and

(d) 20 years' imprisonment on each of the counts charging him with grievous sexual assault.

[3] The judge also ordered that these sentences of imprisonment should run concurrently with each other and recommended that the appellant should not be considered for parole before he had served a minimum of 30 years in prison. Although the judge referred to the fact that the appellant had pleaded guilty in her sentencing remarks, there was no indication on the record whether any and, if so, what discount was applied.

[4] In an application for leave to appeal dated 29 December 2014, the appellant indicated his desire to appeal against sentence. The only ground of the application was that the sentence was manifestly excessive.

[5] After considering the appellant's application on paper, a single judge of appeal granted leave to appeal. In her brief reasons for doing so, she mentioned specifically the absence of any indication by the judge that she had given a discount for the guilty pleas.

[6] When the appeal came on for hearing before us, Mrs Hay told us that the appellant proposed to make no complaint about the sentences for illegal possession of firearm and robbery with aggravation. The focus of the appeal would therefore be to contend that the sentences of 38 years' imprisonment for rape and 20 years for grievous sexual assault were manifestly excessive, and that an appropriate allowance should have made for the guilty pleas. In relation to the latter point, Mrs Hay also invited us to consider whether the provisions of the Criminal Justice (Administration) Act ('the CJAA'), as amended with effect from 27 November 2015, apply to this case. For the purposes of this judgment, we will refer to the CJAA, as amended, as 'the amended CJAA').

The facts in outline

[7] The facts which counsel for the prosecution outlined to the court at the sentencing hearing were as follows:

(a) At about 9:23 pm on 9 July 2013, Miss PP was walking along the road in Savannah Cross in the parish of Clarendon, when she was approached by a masked gunman. The man led her into the nearby bushes, took away her cellular telephone charger and removed $4,370.00 from her purse. Thereafter, the man had sexual intercourse with her without her consent.

(b) On 26 July 2013 at 8:30 pm, Miss NR was on her way to a shop in Savannah Cross when a masked gunman pounced upon her from bushes and had sexual intercourse without her consent.

(c) On 7 August 2013 at 3:00 am, Miss AH was walking along Paisley Avenue, when a masked gunman approached her, led her to a dark area where he put his penis in her mouth. He took money and jewellery from her and had sexual intercourse with her without her consent. A subsequent medical examination revealed a superficial abrasion over the vaginal opening.

(d) On 16 August 2013 at 8:00 pm, Miss GH was walking along Eve Road in Palmers Cross when a masked gunman held her and took her into the nearby bushes where he put

his penis in her mouth, then had sexual intercourse with her without her consent.

(e) Two hours later, at 10:00 pm that same night, Miss OE was walking with others in Palmers Cross, when she was approached by a masked gunman who took her to an open lot. He hit her to the back of the neck and she fell. He eventually took her into bushes where he had sexual intercourse with her without her consent. He then left with her handbag which contained, among other things, her cellular telephone and a quantity of cash. A subsequent medical examination revealed a small vaginal laceration, as well as trauma to her cheek and the back of her neck.

(f) On 21 August 2013 at 9:30 pm, Miss CB was walking in Savannah Cross when she was held up by a masked gunman. She ran through the bushes where the man caught her and had sexual intercourse with her without her consent. At one point, he used a piece of board to hit her. A subsequent medical examination revealed swelling to the chin, abrasions to the upper and lower limbs, as well as a laceration to the right palm.

(g) On 26 August 2013 at 12:30 am, Miss KB was sitting in a parked car in the Rules Pen District when a masked gunman approached. He drove the car for some distance, stopped at a dead end and told the complainant to run from the car, which she did. He chased and held her and eventually carried her to the side of a house, where he had sexual intercourse with her without her consent and left with her cellular telephone.

(h) On 29 August 2013 at 7:45 pm, Miss KG was walking along Red Road in Clarendon when a masked gunman approached her and led her into the bushes, where he had sexual intercourse with her without her consent and left with her two cellular telephones.

[8] It is not clear from the record in what circumstances the appellant came to be in police custody in the parish of Saint James in January 2014. However, on 21 January 2014 he gave a statement under caution to the police in the presence of two justices of the peace. Among other things, he told the police that the mother of his child had left him and refused to allow him to see the child. As a result of his, he became angry and decided he would start "doing some things". He developed a hatred for women. Armed with an imitation firearm, which he made out of board and black tape, he went on a robbery and rape spree in the Clarendon area. He attributed a role in these activities to

two friends whom he had known from school days and who encouraged him. He explained that, when he looked at the women, he saw the face of his baby mother and remembered that she had left him and refused to allow him to see his child.

[9] In a subsequent question and answer session with the police, the appellant admitted several offences of rape and robbery in Savannah Cross and the surrounding area. The police later found the imitation firearm which the appellant had mentioned in the caution statement in a house where he was staying.

[10] The appellant's antecedent report revealed that he was born on 9 July 1986. The first of the offences listed above was therefore committed on his twenty-seventh birthday. He was educated up to the junior high school level and was literate. After leaving school, he was variously employed and at the time of his arrest earned a living by building French windows. He was single and had five children between the ages of two and 11 who were dependent on him.

[11] As might have been expected, the social enquiry report supplemented the antecedent report with far greater detail and nuance. It revealed that the appellant had led "a chaotic and unstable family life", which included several dysfunctional relationships with women. It also included chronic ganja and crack cocaine use and three suicide attempts. An apparently consensual relationship with the mother of his two older children, who was under the statutory age of consent at the material time, had led to his conviction for carnal abuse and a two-year probationary period. He expressed deep remorse for the wrongs he had done and, perhaps as a result of the

counselling which he was receiving from the Jamaica Constabulary Force Chaplain, as well as his inability to access drugs while in custody, he was rebounding somewhat from his previous angry and anti-social outlook on life. However, the report noted that the appellant himself admitted that he was "not yet ready to return to society". The probation officer who authored the report regarded this acknowledgment as, "the first step in the change process and augurs well for [the appellant] who must be rehabilitated in a confined environment for his and society's protection".

[12] In his plea in mitigation on the appellant's behalf, counsel emphasised the appellant's remorse for what he had done and asked for the court's mercy.

[13] In her sentencing remarks, the judge acknowledged that the appellant had not wasted the court's time, but rather had accepted responsibility for his actions by entering pleas of guilty. She specifically recognised that, in order to arrive at an appropriate sentence, it was her duty to weigh the mitigating as well as the aggravating circumstances, consider the appellant's age, character and antecedents, the nature and gravity of the offences and the manner in which they were committed and the possibility for reform and social adaptation. The judge concluded as follows[1]:

> "Having said all of this, I don't really think that you are beyond redemption. Nobody, I believe, so far in my experience is. However, you might have a difficulty in terms of social adaptation. I believe as you have rightly said that you are not ready to go out there, that a changing

[1] Transcript, pages 30-33

environment is likely to bring about probably a change in your behavior [sic].

You know you have to go away for a period and it will not be a short period. And it is for you to say to yourself and to appreciate that violence is never the answer to any issue at all, that the gun is not the answer to issues. It is so prevalent nowadays, gun-related offence I'm talking, and then you have to sit down and determine the way forward how you are going to manage yourself, how you are going to manage your actions and then maybe, just maybe, you might decide to change your behavior [sic] and you may well become a better member of society and not a threat to women and others.

You see, Mr. Green, the gun and its attendant problems are really a purgatory to the Jamaican society. People no longer are able to stand up outside their gate after a certain time. Women can't even walk on the road after a certain hour. I don't know how much more serious it can get than Grievous Sexual Assault, Rape, Robbery with Aggravation and Illegal Possession of Firearm.

I must tell you also that in arriving at a just and appropriate sentence, the Court must look at the interest of society and strike a balance when considering what sentence the Court has to impose. And, this has been reported in recent – in some cases, the protection of society is an overwhelming consideration. Responding in a negative way to what happened to you cannot be the answer and the protection of society here – the interest of society is more than overwhelming.

Yes, you pleaded guilty. Yes, you accepted responsibility. Yes, I have to think about discount for all of that, but on the Illegal Possession of Firearm, which from the indictment shows Counts 1, 4, 6, 10, 13, 18 and 21: 10 years. The sentence is ten years imprisonment at hard labour.

On the Robbery with Aggravation, which shows Counts 2, 8, 15, 20, and 23, the sentence is 15 years imprisonment at hard labour. On the Rape: 3, 5 – I'm talking about Counts on the indictment, Counts 3, 5, 9, 12, 14, 17, 19 and 22, Mr. Gentleman, sentence of this Court is 38 years imprisonment at hard labour.

> And on the Grievous Sexual Assault, on each Count, I think is Count 7 and 9: 20 years imprisonment at hard labour. The sentences are to run concurrently, so you will not – so you don't have a totality of all of this. And the Court is recommending that you are not to be considered for parole under 30 years. That's the sentence for this Court.
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> As I said, you did not waste my time, but when I look at what transpired with – when I look at the commission of the offence, that is the best I can offer you in the circumstances."

The submissions

[14] Mrs Hay readily acknowledged that this was a serious case of serial rape involving several complainants. However, she submitted that the sentences for rape and grievous sexual assault were manifestly excessive in all the circumstances of the case. She therefore invited the court to set them aside and to substitute such lesser sentences as it might deem to be just.

[15] Mrs Hay identified the following as aggravating factors: (i) the use of an imitation firearm; (ii) the fact that there were serialised acts of sexual assault; (iii) the use of violence causing injury to some of the victims (over and beyond the act of rape itself); (iv) the deliberate fear induced by the appellant in at least one of his victims (who was told to run from a car and was chased by the appellant); and (v) the fact that each victim was robbed.

[16] On the other hand, she identified the following as mitigating factors: (i) the appellant's plea of guilty to all of the charges (making the point that, without the confession, the prosecution would have been unable to prove the charges against the

appellant); (ii) the appellant's age; (iii) the fact that he was gainfully employed and the father of five young children; (iv) his relatively clean criminal record; and (v) the fact of his remorse.

[17] Applying these factors, Mrs Hay submitted that the sentences imposed by the judge were manifestly excessive, when compared to previous sentences imposed by sentencing judges and/or approved by this court in the several authorities to which she referred us. She submitted that, based on these authorities, the court should apply a starting point of 25-27 years' imprisonment for rape and 15-17 years for grievous sexual assault. We will review some of the authorities in due course.

[18] As regards the effect of the guilty pleas, Mrs Hay invited us to say that the amended CJAA, which entered into force on 27 November 2015, applies to this case. On the basis that it does, she submitted that the issue of a suitable discount for the appellant's pleas of guilty falls to be dealt with by this court in accordance with section 42B of the amended CJAA. We will also consider the relevant provisions of the Act in the course of this judgment.

[19] Mrs Hay submitted in the alternative that, if the amended CJAA does not apply to this case, the question of a suitable discount will still remain to be resolved in accordance with the common law principle that a defendant who pleads guilty will ordinarily be entitled to a discount at a level determined by the sentencing judge.

[20] For the Crown, Miss Sophia Thomas submitted that the sentences which the judge imposed for rape and grievous sexual assault were not manifestly excessive,

bearing in mind the exceptional nature of the case and the fact that the statutory maximum sentence for rape is life imprisonment. She further submitted that the judge was entitled to take into account the important issue of the protection of the public from someone with his proclivities. As regards the guilty plea discount, she submitted that the judge obviously had it in mind and took it into account in imposing the sentences which she did. Finally, in her written submissions[2], Miss Thomas concluded on the note that the judge had exercised her sentencing discretion judiciously and in accordance with the right principles.

Some points of sentencing principle

[21] We begin with three general observations. Firstly, it is beyond controversy that the four "classical principles of sentencing", as this court described them in **R v Beckford & Lewis**[3], are retribution, deterrence, prevention and rehabilitation[4]. 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**[5], 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"[6]. And similarly, in **Michael Evans v R**[7], the court found that counsel's criticism that the sentencing judge, whose primary focus appeared to have been on the principle of

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[2] Filed on 30 May 2017
[3] (1980) 17 JLR 202, 202-3
[4] Per Rowe JA, as he then was, at pages 202-3
[5] (1988) 25 JLR 400
[6] Per Carey P (Ag) at page 401
[7] [2015] JMCA Crim 33

deterrence, had failed to demonstrate that he had also taken into account the need to rehabilitate the offender, was "not at all unjustified"[8].

[22] Secondly, the now accepted approach to sentencing is to (i) arrive at an appropriate starting point for the sentence (taking into account the seriousness of the offence, the usual range of sentences for like offences and other such factors); and (ii) adjust that figure upwards and/or downwards to allow for aggravating and/or mitigating factors. As Harrison JA[9] explained in **R v Everald Dunkley**[10], once it has been determined that a sentence of imprisonment is appropriate in a particular case, the sentencing judge should "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".

[23] Thirdly, this court will not usually interfere with a sentence imposed by a judge in the court below, unless it can be shown that the judge erred in principle or that the 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".[11]

[24] It seems to us to be clear from the judge's sentencing remarks, which we have set out at paragraph [14] above, that the possibility of rehabilitation featured hardly at

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[8] Per McDonald-Bishop JA at para. [19]
[9] As he then was
[10] (Unreported) Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002, page 4
[11] Per Hilbery J in **R v Ball** (1951) 35 Cr App R 164, at page 165; applied by this court in **Alpha Green v R** (1969) 11 JLR 283, 284

all in her consideration of the appropriate sentence to be imposed on the appellant. While it is true that the judge did make a passing reference to redemption ("I don't really think you are beyond redemption"), it is clear that her primary focus was on the public interest and what she described as "the protection of society" ("I must tell you also that in arriving at a just and appropriate sentence, the Court must look at the interest of society and strike a balance when considering what sentence the Court has to impose ... in some cases, the protection of society is an overwhelming consideration."). Given the views expressed in the social enquiry report, the appellant's age, his remorse and his own frank self-assessment that he was "not yet ready to return to society", he may in fact have been a good candidate for a structured programme of rehabilitation. We therefore think that, by appearing to leave the possibility of rehabilitation out of the equation altogether, or to marginalise its impact, the judge erred in principle.

[25] It is also clear from the sentencing remarks that the judge did not approach the question of fixing an appropriate sentence by way of the methodical approach outlined in paragraph [23] above. Rather, looking at matters in the round, so to speak, she chose the sentences which would in her view best achieve the aim of protection of society.

[26] In this latter regard, in fairness to the judge, it is right to note that the approach to sentencing described in paragraph [23] above has gained far greater currency in the

years since she undertook the sentencing exercise in this case[12]. However, to the extent that the developed rules reflect, albeit in more refined form, longstanding sentencing orthodoxy, of which **R v Everald Dunkley** is a clear example, we also think that the judge erred in principle in her approach to sentencing the appellant.

[27] It accordingly seems to us that, in accordance with the established practice of the court, the judge's errors in the two respects we have identified enable us to consider the question of sentence afresh.

[28] With the principles which we have summarised at paragraphs [22] and [23] in mind, we will therefore consider, firstly, whether the sentences which the judge imposed for rape and grievous sexual assault were manifestly excessive in all the circumstances; secondly, whether the judge made any or any sufficient allowance for the appellant's guilty pleas; and thirdly, if she did not, what allowance should now be made.

Were the sentences manifestly excessive?

[29] We begin with the sentence for rape. In order to establish the range of usual sentences for rape, Mrs Hay referred us to a number of cases. In **Paul Allen v R**[13], the appellant was convicted of the offences of illegal possession of firearm, rape, indecent assault and robbery with aggravation. In summary, the facts of the case were that the appellant accosted the complainant at about 9:30 pm as she walked along a city street,

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[12] See now **Meisha Clement v R** [2016] JMCA Crim 26; and the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, issued December 2017, paras 7-9

[13] [2010] JMCA Crim 79

pulled a gun from his waistband and ordered her to follow him. He eventually led her up the steps of an upstairs premises, where he ordered her to undress and to assist him to do likewise. He then had sexual intercourse with her without her consent, indecently assaulted her, and afterwards robbed her of cash amounting to $1,550.00

[30] The trial judge sentenced the appellant to eight, 20, three and 10 years imprisonment respectively, for the offences of illegal possession of firearm, rape, indecent assault and robbery with aggravation. It was also ordered that, while the sentences of 20 and three years for rape and indecent assault should run concurrently, they should be consecutive to the sentences of eight years for illegal possession of firearm and 10 years for robbery with aggravation, both of which should also be served consecutively. In sum, the appellant was sentenced to a total term of imprisonment of 38 years.

[31] While this court considered[14] that the sentence of 20 years' imprisonment was "not inappropriate for this offence of rape", it was clearly of the view that the consecutive components of the trial judge's order, which took the total period of imprisonment to 38 years, made the sentence manifestly excessive. The appeal against sentence was therefore allowed, but to the extent only that the order as to how the sentences should run was set aside.

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[14] At para. [47]

[32] In **Sheldon Brown v R**[15], the applicant was convicted of the offences of abduction and rape. The case against him was that he gained entry into the complainant's home in the middle of the night by kicking off her door and forced her to leave the house. She was taken to various places, ending up in a room in which the applicant had sexual intercourse with her against her consent several times. He did not appeal against the trial judge's sentences of 10 years' imprisonment for abduction and 20 years' imprisonment for rape.

[33] **Sheldon Brown v R** and **Paul Allen v R** came in for mention in **Paul Maitland v R**[16]. In that case, the appellant was sentenced to 30 years' imprisonment for the offence of rape after a trial. The evidence was that he and another man accosted the complainant along the road and took her to an open lot, where each of them had sexual intercourse with her without her consent. In considering the appellant's complaint on appeal that the sentence was manifestly excessive, Brooks JA pointed out[17] the distinction between this case, which involved two rapists (albeit that only one of them was before the court), and **Sheldon Brown v R** and **Paul Allen v R**:

> "Although only one person has been convicted of the offence, and it may be said that he should only be punished for his acts, the fact remains that he was present and supporting the other offender."

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[15] [2010] JMCA Crim 38
[16] [2013] JMCA Crim 7
[17] At para. [35]

[34] Brooks JA then went on to identify[18] other relevant factors in **Paul Maitland v R**, including the ordeal to which the complainant was subjected, the fact that the appellant was 35 years old at the time of conviction, did not employ a firearm in the commission of the offence and had a previous conviction for robbery with aggravation ("an offence involving the person of another"). On this basis, Brooks JA concluded that the appropriate sentence in this case was 23 years' imprisonment and the appeal against sentence was therefore allowed accordingly.

[35] In **R v Lynden Levy et al**[19], the appellants, who were jointly charged with four others, were convicted on an indictment charging them with one count of illegal possession of firearm and two counts of rape. The two complainants were two teenage sisters. The case for the prosecution was that the appellants and several other men (said to have been 11 in all), armed with guns and knives, subjected them to multiple acts of rape, indecent assault, and what the trial judge described as "utterly disgusting, degrading and repulsive acts". The appellant Levy also caused a video tape recording to be made of the various activities.

[36] The trial judge sentenced the appellant Levy, whom he described as "the ring master", to 50 years' imprisonment on each count, each sentence to run concurrently. The four other appellants were each sentenced to 20 years' imprisonment on each

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[18] At para. [38]

[19] (unreported), Court of Appeal. Jamaica, Supreme Court Criminal Appeal Nos 152, 155, 156, 157 & 158/1999, judgment delivered 16 May 2002

count, with the sentence for illegal possession of firearm to run consecutively to the sentences on the two counts of rape, which were to run concurrently with each other.

[37] The appellants' contention that these sentences were manifestly excessive succeeded on appeal. This court reduced the appellant Levy's sentences to 25 years' imprisonment for illegal possession of firearm and 30 years' imprisonment on each of the counts for rape, all three sentences to run concurrently. The other appellants' sentences were reduced to 15 years' imprisonment for illegal possession of firearm and 20 years' imprisonment on each of the two counts for rape, all three sentences to run concurrently.

[38] Mrs Hay submitted that, on its facts, **R v Lynden Levy et al** was a far worse case than any of the others. Although she did not refer to the case specifically, she was clearly supported in this view by our previous decision in **Oneil Murray v R**[20], in which the court considered that the sentence of 30 years' imprisonment handed down to the appellant Levy in **R v Lynden Levy et al**, "… clearly reflected, not only the particularly heinous circumstances of that case, but also his role as the 'ring master'". On this basis, the court in **Oneil Murray v R**, leaving on one side **R v Lynden Levy et al**, concluded at para. [23] that -

> "… 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

[20] [2014] JMCA Crim 25

> approximating the norm, on convictions for rape after trial in a variety of circumstances."

[39] In our view, the previous sentencing decisions to which we were referred in this case equally support this conclusion as a general guide[21]. However, in this case, the appellant pleaded guilty to what Mrs Hay described as "serialised acts of sexual assault"[22]. Put plainly, he committed eight separate offences of rape in close succession to each other. This makes this case, though plainly more serious than **Paul Maitland v R**, in which the appellant was sentenced to 23 years' imprisonment, perhaps, though not by a very long way, a slightly less serious case than **R v Lynden Levy et al**. In other words, this was a case in which, as it seems to us, the judge would have been fully entitled to step outside of the normal sentencing range in all the circumstances.

[40] No doubt with these considerations in mind, Mrs Hay realistically suggested a starting point of 25-27 years' imprisonment. In all the circumstances, reflecting the added seriousness with which the unfailingly serious offence of rape deserves to be treated, we think that an appropriate starting point in this case would have been 27 years' imprisonment.

[41] As Mrs Hay also acknowledged, other particularly aggravating factors in this case included the use of the imitation firearm, the use of violence which caused additional injury to some of the victims, the deliberate fear induced by the appellant in at least

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[21] And see now the Sentencing Guidelines, page A-7, in which the normal range of sentences for rape is also stated to be 15-25 years, with a usual starting point of 15 years.
[22] See para. [16] above

one of his victims (who was told to run from a car and was chased by the appellant), and the fact that each victim was robbed.

[42] As regards mitigating factors (leaving aside for this purpose the appellant's plea of guilty to all of the charges, to which we will give separate consideration), there were the appellant's early confession to the police, his relative youth, the fact that he was gainfully employed and the father of five young children, his relatively clean criminal record and the fact of his remorse.

[43] In our view, the aggravating factors outweigh the mitigating factors, but again not by a long way. Accordingly, we consider that an appropriate sentence for rape in this case would have been 28 years' imprisonment. It follows from this that the sentence of 38 years' imprisonment imposed by the judge was manifestly excessive and must be set aside.

[44] Turning now to the offence of grievous sexual assault, section 4(1) of the Sexual Offences Act (SOA) provides that a person commits the offence of grievous sexual assault where, among other things, he "places his penis into the mouth of the victim"[23]. Section 6(1)(b)(ii) provides that a person who commits the offence of grievous sexual assault is, upon conviction in a Circuit Court, liable "to imprisonment for life or such other term as the court considers appropriate not being less than fifteen years". The offence therefore carries a minimum sentence of 15 years' imprisonment.

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[23] Section 4(1)(c)

[45] The charges of grievous sexual assault against the appellant arose out of the two occasions on which he put his penis into the mouths of the complainants GH and AH respectively, without their consent[24]. It is not entirely clear whether the judge gave the question of what was the appropriate sentence for this offence any separate consideration. Indeed, her only remark on the relative seriousness of each of the offences with which the appellant was charged was that, "I don't know how much more serious it can get than Grievous Sexual Assault, Rape, Robbery with Aggravation and Illegal Possession of Firearm"[25]. Unfortunately, it is therefore impossible to say on what basis the judge sentenced the appellant to 20 years' imprisonment for grievous sexual assault, as distinct from, say, the statutory minimum sentence of 15 years, or, for that matter, an even higher sentence of 25 years.

[46] Mrs Hay submitted that the sentence of 20 years' imprisonment which the judge imposed was manifestly excessive in the circumstances. As has been seen, she suggested, albeit without any reference to authority, that a sentence in the range of 15-17 years of imprisonment would have been suitable. Miss Thomas, for her part, was content to say that the sentence which the judge imposed was not manifestly excessive.

[47] The SOA, which introduced the offence of grievous sexual assault into our law for the first time, is now over 10 years old. Notwithstanding this, there are in fact still

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[24] See para [7], (c) and (d) above.
[25] See para. [13] above

very few discussions in judgments of this court indicating an appropriate sentencing range for the offence over and above the statutory minimum. Perhaps the closest which we have been able to find is **Linford McIntosh v R**[26], in which the applicant was convicted of the offences of grievous sexual assault and rape. In respect of the former offence, the conduct which the jury found to be proved was that the applicant had penetrated the complainant's vagina with a bodily part other than his penis, that is, his finger, contrary to section 6(1)(b)(ii) of the SOA. The trial judge sentenced the applicant to eight years' imprisonment for rape and 18 years' imprisonment for grievous sexual assault. As regards the latter offence, the applicant's counsel told this court on appeal that "he could not conscientiously argue that the additional two to three years above the mandatory sentence imposed by the learned trial judge for that offence rendered the sentence manifestly excessive"[27]. In the result, the application for leave to appeal against sentence was not pursued.

[48] In dismissing the application for leave to appeal, this court considered that, given that the starting point for a sentence for this offence was the prescribed minimum sentence of 15 years, the trial judge could not in the circumstances "be faulted for imposing an additional three years on the mandatory minimum … "[28]

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[26] [2015] JMCA Crim 26
[27] Per McDonald-Bishop JA, at para. [11]
[28] Ibid, at para. [17]. The Sentencing Guidelines now suggest a normal range of 15-25 years for grievous sexual assault, with a usual starting point of 15 years – see page A-7

[49] In this case, it would obviously have been helpful for us to know the basis on which the judge decided to exceed the prescribed minimum sentence for grievous sexual assault by five years. However, bearing in mind that the appellant was being sentenced in respect of two such offences committed in the same egregious circumstances which we have described, we find it impossible to say that the sentence of 20 years' imprisonment was manifestly excessive. We therefore affirm the sentence of 20 years' imprisonment for grievous sexual assault.

Did the judge make any or any sufficient allowance for the fact that the appellant pleaded guilty?

[50] The general principle is not in doubt. A plea of guilty will generally entitle the offender to the judge's specific consideration of whether he or she should receive a discount in the sentence which would ordinarily be imposed for the offence. As Sir Denys Williams CJ explained in **Keith Smith v R**[29], a decision of the Court of Appeal of Barbados, "[i]t is accepted that a plea of 'Guilty' may properly be treated as a mitigating factor in sentencing as an indication that the offender feels remorse for what he has done".

[51] At common law, the level of the discount on account of the guilty plea to be given in a particular case was always a matter for the discretion of the sentencing judge in all the circumstances of the case. However, over time, it came to be generally

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[29] (1992) 42 WIR 33, pages 35-36; and see also **Meisha Clement v R**, where the principle is more fully discussed at paras [36]-[39]

accepted that, depending on the circumstances, a discount of somewhere between 20-33% would be appropriate[30].

[52] In 2015, Parliament sought to place the matter of the allowable discount for a guilty plea on a statutory footing by enacting the Criminal Justice (Administration) (Amendment) Act. As a result, the amended CJAA now provides for an extended range of 15-50% for the allowable discount for a guilty plea. The determination of what level of discount should be given in a particular case is a matter for the sentencing judge's discretion, depending on the stage of the proceedings at which the plea is offered, the nature of the offence with which the offender is charged and a number of other factors listed in the amended CJAA[31].

[53] We will come back to the question whether the amended CJAA has any bearing on this case.

[54] In sentencing the appellant, the judge clearly had the common law principle in mind at some stage. Right at the beginning of her sentencing remarks, she observed that, "sentencing becomes difficult … in the situation where you have pleaded guilty ... [y]ou did not waste my time, accepted responsibility…"[32] And then, in the passage which we have already quoted in full at paragraph [13] above, she added –

> "Yes, you pleaded guilty. Yes, you accepted responsibility. Yes, I have to think about discount for all of that …"

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[30] See **Meisha Clement v R**, paras [38]-[39]
[31] See generally sections 42D, 42E and 42H of the CJAA, as amended.
[32] Transcript, page 26

[55] But the judge then went on to impose sentences which, on the face of them, do not appear to have been discounted in any way. For instance, for illegal possession of firearm, the sentence was 10 years' imprisonment (which falls comfortably within the normal range of sentences for the offence[33]); for robbery with aggravation, it was 15 years' imprisonment (which is at the top of the normal range of sentences for the offence[34]); and for rape, it was, as we have seen, 38 years' imprisonment (a sentence which, as we have already concluded, was clearly manifestly excessive).

[56] In our respectful view, therefore, despite seeming to have had the question of a discount for the appellant's guilty plea in mind during the sentencing process, it is clear that, in the end, the judge did not in fact discount the sentences in any way. We accordingly consider that the judge also fell into error in this respect, and that it is now open to this court to do what it thinks the circumstances dictate.

What, if any, discount should this court apply in the circumstances?

[57] The offences to which the appellant pleaded guilty were committed in 2013 and he was sentenced in December 2014. Although the amendment to the CJAA came into force on 27 November 2015, Mrs Hay relied on section 42B of the amended CJAA which provides that "[t]his Act shall apply to criminal proceedings whether instituted before or after the appointed day". On this basis, Mrs Hay submitted that the amended CJAA has

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[33] Sentencing Guidelines, page A-15
[34] Sentencing Guidelines, page A-12

retroactive effect, and that, since the phrase "criminal proceedings" in section 42B must include the appellate process, it is open to this court to apply the provisions of the amended CJAA in determining what level of discount to allow the appellant on account of the guilty plea.

[58] And, as regards the prescribed minimum sentence of 15 years' imprisonment provided for in section 6(1) of the SOA for rape and grievous sexual assault, she also submits that it is open to the court, pursuant to section 42L(1) of the amended CJAA to review and, in effect, dis-apply the prescribed minimum sentence if we think that, in all the circumstances of the case, a lesser sentence ought to have been imposed.

[59] We will take this second submission first. Section 42L(1)(b) of the amended CJAA provides that a person who has been convicted of an offence to which a prescribed minimum sentence applies, and who has been so sentenced, "may apply to a Judge of the Court of the Court of Appeal to review the sentence … on the ground that, having regard to the circumstances of his particular case, the sentence imposed was manifestly excessive or unjust". However, section 42L(2)(a) provides that such an application "shall … be made within six months after the appointed day [27 November 2015] or such longer period as the Minister may by order prescribe".

[60] It is common ground that the appellant made no such application within the time prescribed in section 42L(2)(b), or at all. Nor did the Minister prescribe any longer period. Accordingly, despite Mrs Hay's submission that it might in some way still be possible for the appellant to access the procedure set out in section 42L(1) in these

circumstances, we are clearly of the view that, purely as a matter of statutory interpretation, the moment is long past.

[61] The remaining question is therefore whether, in determining the level of discount to be allowed in this case, it is open to this court to have regard to the provisions of the amended CJAA. In other words, do those provisions have retroactive effect? In our view, the clear objective of section 42B was to ensure that criminal proceedings which were already in train as at the date the amended CJAA took effect would benefit from the ameliorative provisions of the amended Act. It therefore seems to us that, had the judge's sentencing hearing in this matter taken place after amended CJAA came into effect, there could have been no question that section 42B, again as a matter of statutory interpretation, would have applied and so permitted the judge to calculate the allowable discount in accordance with the amended CJAA, rather than by reference to the common law. If, as we think it is, this is the correct analysis of the position, then it further seems to us that, to the extent that this appeal is in fact an integral part of the criminal proceedings against the appellant, it must equally be open to this court to complete the sentencing process by reference to the provisions of the amended CJAA.

[62] The relevant provision of the amended CJAA is section 42D, which provides as follows:

> "42D. (1) Subject to the provisions of this Part, where a defendant pleads guilty to an offence with which he has been charged, the Court may, in accordance with subsection (2), reduce the sentence that it would otherwise have imposed on the defendant, had the defendant been tried and convicted of the offence.

(2) Pursuant to subsection (1), the Court may reduce the sentence that it would otherwise have imposed on the defendant in the following manner –

(a) where the defendant indicates to the Court, on the first relevant date, that he wishes to plead guilty to the offence, the sentence may be reduced by up to fifty *per cent*;

(b) where the defendant indicates to the Court, after the first relevant date but before the trial commences, that he wishes to plead guilty to the offence, the sentence may be reduced by up to thirty-five *per cent*;

(c) where the defendant pleads guilty to the offence, after the trial has commenced but before the verdict is given, the sentence may be reduced by up to fifteen *per cent*

(3) Subject to section 42E, and notwithstanding the provisions of any law to the contrary, where the offence to which the defendant pleads guilty is punishable by a prescribed minimum penalty the Court may –

(a) reduce the sentence pursuant to the provisions of this section without regard to the prescribed minimum penalty; and

(b) specify the period, not being less than two-thirds of the sentence imposed, which the defendant shall serve before becoming eligible for parole.

(4) In determining the percentage by which the sentence for an offence is to be reduced pursuant to subsection (2), the Court shall have regard to the factors outlined under section 42H, as may be relevant."

[63] As will be seen, the "first relevant date" is an important date in relation to a defendant's eligibility for a discount of up to 50% under section 42D(2)(a). Section 42A of the amended CJAA defines the "first relevant date" as -

> "… the first date on which a defendant -
>
> (a) who is represented by an attorney-at-law; or
>
> (b) who elects not to be represented by an attorney-at-law,
>
> is brought before the Court after the Judge or Resident Magistrate is satisfied that the prosecution has made adequate disclosure to the defendant of the case against him in respect of the charge for which the defendant is before the Court."

[64] In order to establish the first relevant date for the purposes of this case, Mrs Hay provided us with a copy of a letter dated 29 May 2017 from the Office of the Director of Public Prosecutions ('the ODPP'). The letter indicated that, although the appellant's case had had five trial dates, he was unrepresented on the first four occasions. On the fifth trial date, however, 11 December 2014, he appeared by counsel. When pleaded, the appellant entered pleas of guilty to all 23 counts of the indictment.

[65] In these circumstances, Mrs Hay submitted that 11 December 2014 should be treated as the first relevant date for sentencing purposes, since this was the first date on which the appellant had the benefit of counsel. In our view, this submission derives some support from the timeline set out in the letter from the ODPP, although it is not clear why it was that the appellant was unrepresented on the first four trial dates. But,

be that as it may, in the particular circumstances of this case, we will proceed on the basis that 11 December 2014 was the first relevant date for present purposes. We will therefore treat the appellant as having been entitled, in principle, to a discount of up to 50% on account of his guilty pleas.

[66] But, ultimately, the question of the extent of the discount to be allowed in a particular case is a matter for the trial judge in the exercise of his or her sentencing discretion. In this regard, section 42H of the amended CJAA lists a number of factors to be considered by a sentencing judge for the purpose of determining the percentage by which the sentence for an offence is to be reduced pursuant to section 42D(2). These factors are as follows:

> "(a) whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;
>
> (b) the circumstances of the offence, including its impact on the victims;
>
> (c) any factors that are relevant to the defendant;
>
> (d) the circumstances surrounding the plea;
>
> (e) where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;
>
> (f) whether the defendant had any previous convictions;
>
> (g) any other factors or principles the Court considers relevant."

[67] In considering this aspect of the matter, we naturally take all of these factors into account. But we have in mind in particular items (a) and (b) in the list above, both of which weigh heavily in the scale against the appellant, given the heinous nature of the offences of rape and grievous sexual assault; and item (e), which is definitely in his favour. In these circumstances, we consider that a discount of no more than 30% would be appropriate in this case. As regards the sentence of 28 years' imprisonment for rape, a discount of 30% yields a total sentence of 19 years and six months' imprisonment; while, as regards the sentence of 20 years' imprisonment for grievous sexual assault, the same exercise yields a total sentence of 14 years' imprisonment.

[68] In respect of the sentence for grievous sexual assault, section 42D(3)(a) specifically permits the court to reduce such a sentence without regard to the prescribed minimum sentence of 15 years' imprisonment[35]. However, in such a case, section 42D(3)(b) requires the court to specify a period of not less than two-thirds of the sentence imposed which the defendant must serve before becoming eligible for parole. In accordance with this section, therefore, we will stipulate that the appellant must serve a minimum period of 10 years' imprisonment before becoming eligible for parole.

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[35] Section 42D(3)(a) obviates the problem faced by the court in **Ewin Harriott v R** [2018] JMCA Crim 22, in which it was held that, in the analogous context of seeking to reduce a sentence awarded at trial so as to give credit for time spent in custody before trial, this court has no power to dis-apply a statutory minimum sentence.

Conclusions and disposal of the appeal

[69] The appellant has made good his contention that the judge erred in her approach to the matter of sentencing in this case and that it is therefore open to this court to consider the matter afresh.

[70] We consider that the sentence of 38 years' imprisonment for the offence of rape was manifestly excessive in all the circumstances. That sentence must therefore be set aside and a sentence of 28 years' imprisonment imposed in its stead. However, the appellant's challenge to the sentence of 20 years' imprisonment for the offence of grievous sexual assault fails, on the ground that the judge's approach to arriving at that sentence cannot be faulted.

[71] As regards the appellant's pleas of guilty to all the offences for which he was charged, the judge failed to give the appellant the benefit of any or any sufficient discount. In this regard, in light of the fact that this court is reconsidering the matter after the coming into force of the amended CJAA, and in light of the provisions of section 42B of that Act, it is open to this court to determine the appropriate level of discount to apply in accordance with sections 42L(1) and 42H of that Act. On this basis, we have determined that a 30% discount would be suitable in this case.

[72] The appeal against sentence is therefore allowed. The sentences of 38 years' imprisonment for the offence of rape and 20 years' imprisonment for the offence of grievous sexual assault are set aside. Substituted therefor are sentences of 19 years and six months' imprisonment for the offence of rape and 14 years' imprisonment for

the offence of grievous sexual assault. In relation to the latter sentence, it is hereby specified that the appellant must serve a minimum of 10 years' in prison before becoming eligible for parole. The sentences are to run concurrently and are to be reckoned as having commenced on 19 December 2014.

An apology

[73] This judgment has been outstanding for far too long. We apologise unreservedly.