[2020] JMCA Crim 48

JAMAICA

IN THE COURT OF APPEAL

SUPREME CRIMINAL APPEAL NO 88/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA (AG)

DELTON SMIKLE v R

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

Miss Paula Llewellyn QC, Director of Public Prosecutions, and Kemoy McEkron for the Crown

9, 13 March and 27 November 2020

SIMMONS JA (AG)

[1] On 28 July 2017, after a trial before a judge and jury in the Circuit Court for the parish of Saint Thomas, Mr Delton Smikle ('the appellant'), was found guilty on an indictment charging him with the offences of forcible abduction (count 1) and having sexual intercourse with a person under the age of 16 years (count 2). On 22 September 2017, he was sentenced to 15 years' imprisonment at hard labour for the offence of forcible abduction and 20 years' imprisonment at hard labour for the offence of having sexual intercourse with a person under the age of 16 years, to run concurrently. It was also ordered that his name be entered in the Sex Offender Registry.

[2] On 1 April 2019, a single judge of this court granted the appellant leave to appeal against conviction (in respect of count 1), and sentence (in respect of both counts).

[3] By way of an amended notice of application to appeal against conviction and sentence, filed on 4 April 2019, the appellant abandoned his appeal against conviction and indicated that he wished to pursue his appeal in respect of sentence only.

Background

[4] The full transcript of the proceedings was not available and as such we have had to rely on the facts as outlined by the learned trial judge in her summation.

[5] On 28 November 2012, the appellant, who was a taxi driver, picked up the complainant and her older sister to transport them to school. At the time the complainant was 11 years old. The appellant took the older sister to her destination first while the complainant remained in his taxi. However, instead of taking her to school, he took her to his house where he had sexual intercourse with her. Her evidence was that he pulled her out of the car and pushed her into the kitchen and began taking off her school uniform. He then kissed her on the lips and began fondling her breasts. He removed his clothes, pushed her on the bed. She tried to keep her legs closed but he overpowered her and inserted his penis in her vagina. At the time she was crying and tried to fight him off. The appellant later transported her to school but she arrived late. In the evening of that same day, the complainant told her sister what had happened to

her and a report was made to the police. The appellant was subsequently arrested and charged.

[6] In his unsworn statement he admitted that he picked up both the complainant and her sister to take them to school and did so. He said that he never molested the complainant and that she and her sister were telling "a big lie" on him.

The grounds of appeal

[7] On 4 April 2019, the appellant filed an amended notice of appeal in which he sought to challenge the sentences imposed on him on the basis that they were manifestly excessive. As stated previously, he was granted permission to appeal the sentences imposed on both counts.

Submissions

Count 1 – Forcible abduction

For the appellant

[8] Miss Reid, for the appellant, submitted that a sentence of four years' imprisonment at hard labour would be more appropriate. She opined that the learned trial judge in her approach to sentencing appeared to have confused this count with count 2 as she seemed to have been addressing both counts at the same time with no line of demarcation between them. It was submitted that, as a consequence, the trial judge fell into error. By way of illustration, reference was made to pages 105-110 of the transcript where the judge began by stating:

> "I will start at 15 years, that is the usual starting point for the offence listed in Count 2."

[9] Miss Reid indicated that the learned trial judge then proceeded to deal with the wrongfulness of having sexual intercourse with the complainant and did not address the offence of forcible abduction.

[10] It was submitted that the end result of that exercise was the imposition of a sentence that was manifestly excessive. In support of that submission, reference was made to **Mervin Jarrett v R** [2017] JMCA Crim 18, in which the appellant had been sentenced to six years' imprisonment at hard labour and **Donald Gregory v R** [2017] JMCA Crim 16, in which the sentence of seven years' imprisonment at hard labour was affirmed.

[11] Counsel also referred to **Dwayne White v R** [2013] JMCA Crim 11, in which the appellant was sentenced to 10 years' imprisonment in circumstances where a firearm had been used in the commission of the offence.

[12] It was also submitted that the appellant should have been charged under section 20(1) of the Sexual Offences Act which carries a lesser penalty than section 17 as no weapon was used in the commission of the offence. Section 20(1) deals with the abduction of a child with the intent to have sexual intercourse.

[13] Counsel also stated that the trial judge, contrary to established principles, failed to take into account the fact that the appellant had a good social enquiry report. In this regard, she referred to **Christopher Brown v R** [2014] JMCA Crim 5.

[14] Miss Reid submitted that the learned trial judge also erred when she used the maximum sentence of 15 years as the starting point. She submitted that, in arriving at an appropriate starting point, the aggravating and mitigating factors were to be taken into account and the learned trial judge failed to consider some of the mitigating factors. For example, the fact that the appellant received a good community report and his remorse. In this regard, reference was made to **Meisha Clement v R** [2016] JMCA Crim 26, in which Morrison P set out the procedure which should guide the sentencing judge.

[15] Counsel stated that the usual starting point for the offence of forcible abduction is five years and the normal range of sentence is three to 10 years. In this regard, she relied on the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ("the Sentencing Guidelines"). She suggested that the aggravating factors would increase the sentence to nine years and the mitigating factors would warrant a reduction of two years. In the circumstances, it was submitted that a sentence of between seven and eight years would have been appropriate.

For the Crown

[16] The Crown, although conceding that it was difficult to decipher in clear terms how the learned trial judge arrived at the sentence for each offence, submitted that the sentences imposed were not manifestly excessive.

[17] Mr McEkron submitted that the cases of **Mervin Jarrett v R** and **Dwayne White v R**, which were relied on by the appellant, do not assist as they can be distinguished on the basis that those offences were committed in 2009 and 2006 respectively and therefore predate the Sexual Offences Act. He pointed to section 17 of the Sexual Offences Act which states as follows:

> "A person commits an offence who by force takes away or detains another person, against the will of that person, with intent to-
>
> (a) have sexual intercourse with or commit grievous sexual assault upon that person;
>
> (b) cause that person to be married or to have sexual intercourse with or to be subjected to an act of grievous sexual assault by another person."

[18] He stated that at pages 37 and 38 of the transcript the learned trial judge correctly outlined the elements of the offence to the jury. Mr McEkron also pointed out that section 17 was of general application and was enacted to protect women, girls and boys. He stated that the learned trial judge's definition of force at lines 18 – 25 of page 37 was a correct statement of the law. As such, the appellant was correctly charged under section 17 of the Sexual Offences Act.

[19] Mr McEkron submitted that although the learned trial judge did not strictly adhere to the methodology prescribed by the Sentencing Guidelines, the approach of this court in **Samuel Blake v R** [2015] JMCA Crim 9 ought to be adopted. In the circumstances, it was argued that the learned trial judge's failure to indicate the mathematical formula employed with the required precision for both counts was not

fatal and should not weigh heavily in the court's consideration of whether the sentence ought to be reduced.

[20] It was however, submitted that in light of the learned trial judge's failure to indicate how the sentence of 15 years' imprisonment was arrived at, the sentence ought to be recalculated by this court. In this regard, counsel stated that the usual starting point of five years for abduction without the use of violence, ought to be used. It was suggested that the aggravating factors would increase the sentence by seven years. The mitigating factors and the time spent on remand (six weeks) he suggested, would reduce the sentence by three years. A sentence of nine years' imprisonment was suggested as being appropriate.

Count 2 - Sexual intercourse with a person under the age of 16 years

For the appellant

[21] Miss Reid submitted that the learned trial judge failed to indicate how she arrived at the sentence of 20 years' imprisonment at hard labour. Reference was made to page 110 lines 16 – 22 of the transcript where the learned judge said:

> "The sentence of the court on count 2 is 20 years imprisonment [sic] at hard labour. Your conviction will be recorded in the Sex Offender Registry."

[22] Miss Reid submitted that the learned trial judge failed to follow the guidelines in **Meisha Clement v R** and it was unclear how she arrived at the sentence of 20 years' imprisonment. Counsel reminded the court that the learned trial judge had begun to address this count at page 105 (lines 7 – 9) and then proceeded to embark on a

general discussion of the factors that were being taken into account and then pronounced the sentence in respect of count 1. Those factors it was submitted, were however, mostly relevant in respect of count 2.

[23] It was also submitted that the learned trial judge was not balanced in her approach to sentence and failed to take the appellant's good character into account. Reference was made to **Wignall v R** (1969) 11 JLR 401, in which the sentence of 15 years' imprisonment at hard labour for the offence of manslaughter was reduced by this court to four years, on account of the appellant's good character.

[24] Reference was also made to **Patrick James v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 68/1983, judgment delivered 23 September 1993, in which the appellant was sentenced to six years' imprisonment at hard labour for the offence of illegal possession of a firearm. Miss Reid stated that this court having considered the social enquiry report which was favourable to the appellant, substituted a sentence of three years suspended for three years therefor.

[25] With respect to the learned trial judge's approach to the issue of remorse, counsel pointed out that she had found that the appellant had shown no remorse for his actions. In this regard counsel referred to page 105 (line 6) where the learned trial judge stated:

> "I see no remorse on your path [sic]"

[26] Miss Reid argued that this comment was unfortunate as the appellant in his social enquiry report stated that he has taken responsibility for his actions and

expressed concern for those persons who had been hurt by his actions. Reference was also made to page 107 (lines 7 – 11) of the transcript where the learned trial judge stated:

> "You were confronted by her sister you denied the offence. You were confronted by the complainant's mother you denied the offence and you still deny it today here in court."

[27] Counsel referred to **Regina v The Parole Board and the Secretary of State for the Home Department, ex parte Owen John Oyston** [2000] EWCA Crim 3552, in which Pill LJ cited with the approval the dicta of Stuart-Smith LJ in **R v The Secretary of State for the Home Department, ex parte Zulfikar** The Times 26 July 1995, in which he stated that a prisoner who has not accepted guilt but is a model prisoner in all other respects should not be denied parole.

[28] She stated that although the learned trial judge referred to the appellant's good character she failed to consider it as a mitigating factor. Miss Reid also indicated that the appellant in the social enquiry report demonstrated his remorse by confessing to the probation aftercare officer and by stating his reason for not accepting responsibility prior to his trial. These facts she said, were not appreciated by the learned trial judge. Reference was made to page 107 (line 25) and page 108 (lines 1 – 4) which read as follows:

> "Your lack of remorse, your stance in your SER that you have not done anything wrong and you are taking no responsibility for your role in this offence increases the sentence by a further five years."

[29] Miss Reid submitted that an appropriate starting point would be 10 years' imprisonment. She suggested that four years could be added to take into account the aggravating factors and two years deducted for the mitigating factors. In conclusion, it was submitted that a sentence not exceeding 12 years would be appropriate in the circumstances.

For the Crown

[30] Mr McEkron submitted that the sentence imposed in respect of this count was not manifestly excessive. He also submitted that failure of the learned trial judge to adhere to the methodology outlined in the Sentencing Guidelines was not fatal and commended to this court the approach adopted in **Samuel Blake v R.** It was however conceded that the methodology employed by the learned trial judge in arriving at the sentence was unclear.

[31] Mr McEkron restated that in seeking to arrive at an appropriate sentence there was no need to rely on **Robert Rowe v R** or **Mervin Jarrett v R,** as the commission of the offences in both cases predated the enactment of the Sexual Offences Act. He submitted that, bearing in mind the procedure outlined in **Meisha Clement v R** and the recommendations in the Sentencing Guidelines, a sentence of 15 years' imprisonment would be appropriate.

[32] In arriving at the conclusion that a starting point of 15 years would be appropriate, Mr McEkron also indicated that the applicant had expressed remorse in his social enquiry report particularly for the trauma caused to the complainant. This factor

he said, should have been considered in the appellant's favour and as such the five years imposed by the learned judge as an aggravating factor ought to have been subtracted to his credit. An additional mitigating factor was the appellant's previous good character which counsel submitted warranted a reduction of five years. An aggravating factor was the complainant's age which he said warranted an additional five years. The need for deterrence was also identified as such a factor.

[33] With respect to **R v James Wignall** in which a sentence of 15 years for manslaughter was reduced to four years' imprisonment, Mr McEkron submitted that the court is to be guided by the Sentencing Guidelines. In this regard, he pointed out that the normal range of sentence for manslaughter is five to seven years' imprisonment and whereas the normal range for the offence of having sexual intercourse with a person under 16 years is 15 to 20 years.

[34] With respect to the order for the appellant's conviction to be recorded in the Sex Offender Register, it was submitted that this was a matter in which the learned judge exercised her discretion. He stated that in keeping with the principles in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, an appellate court will not interfere with the exercise of a judge's discretion merely because it would have exercised its discretion differently. In this regard, he asked the court to bear in mind that the complainant was under the age of 16 years and the prevalence of sexual

offences in the Jamaican society. In the circumstances, he submitted that there was no basis on which to set aside the order.

Discussion and analysis

[35] 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."

[36] 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)

[37] 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[1].

[1] Para. [23]

[38] 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'."

[39] In **Meisha Clement v R** the court stated that when considering an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge "(i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. 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".[2]

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[2] **Meisha Clement v R** at paragraph [43]

[40] 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'.
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> [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 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.
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> [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)

[41] 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)."[3]

[3] 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.

Count 1- Forcible abduction

[42] In light of the lack of clarity in the learned trial judge's approach to the sentencing process and in accordance with the established practice of the court, we will consider the question of sentence afresh.

[43] Although counsel for the appellant has argued quite forcefully that the sentence imposed was manifestly excessive, she has not sought to the impress upon the court that a non-custodial sentence would be appropriate. The Crown appropriately conceded that there were deficiencies in the methodology employed by the learned trial judge and ultimately agreed that there should be a reduction in the sentence imposed.

[44] By virtue of section 17 of the Sexual Offences Act, a person who is convicted of the offence of forcible abduction may be imprisoned for a maximum term of 15 years. In seeking to arrive at an appropriate starting point, it must be borne in mind that the maximum penalty of 15 years' imprisonment is reserved for the worst cases. The facts as outlined do not indicate that this is such a case although, from the information in the social enquiry report, the complainant has been deeply affected by this incident. According to that report, the complainant, who was head girl at her school, has since the incident refused to go to school and has become promiscuous.

[45] The testimony of the complainant, as outlined by the learned trial judge at page 57 (lines 10-12), is that when the appellant drove the complainant to his home she asked him what he was doing three times but he did not answer. He then pulled her

from the car. At line 16 she recounts the complainant's evidence that he then pushed her into the bedroom and had sex with her and told her to keep it between them.

[46] As stated by Morrison P in **Meisha Clement v R**, in order to arrive at an appropriate starting point, the seriousness of the offence must be taken into account[4]. He also stated that in assessing the seriousness of the offence the provisions of the United Kingdom Criminal Justice Act, 2003 may be used as a guide. These provisions refer to the offender's culpability in committing the offence as well as any harm that the offence caused, was intended to cause or might have caused.

[47] The usual starting point for the offence of forcible abduction is five years' imprisonment. The learned trial judge erred when she chose a starting point of 15 years' imprisonment.[5] The serious nature of the offence and her finding that it was pre-meditated seems to have informed her decision. The learned trial judge indicated:

> "In this case, there is a significant amount of premeditation…This Court will send a strong message to those who would wish to interfere in a sexual way with children and would seek to deter them from that course of action."[6]

She continued:

> "The finding of the jury was that you always took the complainant to school last dropping off all other passengers first and it was the finding of the jury that you were causing the complainant to become accustom [sic] to being alone with you in the taxi and to be dropped off last that allowed this offence to take place.[7]

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[4] Paragraph [29]
[5] Page 105 lines 7 and 9 of the transcript
[6] Page 104 lines 7-13 of the transcript
[7] Page 106 lines 17-25 of the transcript

There is a significant amount of premeditation."

[48] At page 1 (lines 15-25) of the transcript the learned trial judge also stated:

> "…[the complainant] was on her way to school with her sister …, they walked from their home to Poor man's Corner Square into a taxi driven by Delton Smikle. They were the only passengers. [Her sister] was dropped off first at …High School. [The complainant] attends … Primary School which is in the same direction. Instead of continuing on to …Primary School Delton Smikle turned back to Poor Man's Corner."

[49] The learned trial judge also indicated that the sentence was intended to serve as a deterrent to others. To this end, she stated:

> "Prevention in this case is young children taking public transportation ought to be safe to do so. The sentence the Court will impose is going to reflect the fact that the Court wishes to send the message that young children are to be free to walk on the streets to get to and from home and school safely without being taken away by those who drive public transportation, vehicle, public passenger vehicles for this case involves a count of abduction."[8]

[50] The learned trial judge also expressed the view that, based on his social enquiry report, the appellant has expressed no remorse for his actions.[9] She stated at page 105 (lines 12- 17):

> "I see no remorse on your path [sic], Mr. Smikle. In your Social Enquiry Report you say at paragraph one that they, meaning yourself and the complainant decided to go to your home and engage in sexual activity, this is despite the verdict of the jury."

She continued at page 107 (line 25) and 108 (lines 1-4):

> "Your lack of remorse, your stance in your SER that you have not done anything wrong and you are taking no responsibility for your role in this offence increases the sentence by a further five years."

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[8] Page 104 lines 21-25 and page 105 lines 1-6 of the transcript
[9] Page 105 lines 12-13 and page 106 lines 5-15 of the transcript

[51] The above remarks must however be balanced with the following sections of the social enquiry report with which no issue was taken:

> "Delton Smikle sombrely stated that he and [the complainant] became friends as he regularly transported her and her older sister to school. He said that on the day in question he picked up both children, along with others and took them all, except [the complainant] to their designated locations. Additionally, other passengers were picked up and transported to their destinations, he said, until eventually [the complainant] and he were alone in the vehicle. He said they then decided and went to his home where they both engage [sic] in sexual activity. He asserted that thereafter he carried her to school and left her there. According to him, this untimely behaviour resulted in him being arrested and charged.
>
> Mr Smikle stated that he has accepted responsibility, and is deeply disappointed at his actions, as he should have waited until the complainant was of the age of consent before engaging in sexual activities with her. According to him, he is very concerned of [sic] the negative psychological and emotional effect the ordeal might have had on the complainant. He added that taking into consideration the lives that were hurt by his actions he is even more regretful for not admitting guilt before now. He said it was the shame and disgrace, along with the fear of the unforeseen that caused him to maintain his innocence over the years."

[52] From the above extract, whilst it is unsettling that the appellant was still maintaining that the complainant agreed to go to his home to have sexual intercourse, he has expressed regret. It is therefore unclear how the learned trial judge arrived at the conclusion that the appellant had not accepted responsibility for his actions and had expressed no remorse.

[53] Even if he had expressed no remorse, it has been stated by this court that caution should be exercised when treating with the absence of remorse as an

aggravating factor. In **Bernard Ballentyne v R** [2017] JMCA Crim 23, McDonald-Bishop JA stated:

> "[68] … **the use of the absence of remorse as an aggravating factor should be approached with some caution**. In **Regina v The Parole Board and The Secretary Of State For The Home Department, Ex parte Owen John Oyston** [2000] EWCA Crim 3552, a case concerning the question of the release of a prisoner on parole and his reluctance to show remorse, Pill LJ cited with approval the dicta of Stuart-Smith LJ in **R v The Secretary of State for Home Department, Ex parte Zulfikar** (The Times 26 July 1995), that:
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> > 'Where a prisoner either pleads guilty or after conviction later accepts his guilt, it is plain that he is in a position to address his offending in the sense that he can examine his underlying motivation, unreasonable reactions to stress or provocation and anger management and suchlike matters.
> >
> > **But there may be a variety of reasons why a prisoner will not accept his guilt. He may genuinely have been wrongly convicted**. Although inwardly he may know he is guilty, he may be unwilling to accept that he has lied in the past or confront loss of face in accepting what he has hitherto denied. Where, for example, the offence is one of specific intent, he may genuinely have persuaded himself that he did not have the necessary intent. Such a man may in all other respects be a model prisoner. He may have behaved impeccably in prison, occupied his time constructively and shown himself trustworthy and reliable with a settled background to which to return.
> >
> > Should he be denied parole solely because of his attitude to the offence? In the majority of cases I think plainly not. Each case will depend upon its own circumstances and this Court should avoid trying to lay down principles which may well not be universally applicable. While I have no doubt that paragraph 1.3(b) should be taken into account in all cases, the weight to be attached to it will vary greatly. At one end of the scale is the persistent offender, in particular the persistent sex offender, who refuses to accept his guilt in the face of clear evidence and is unable to accept that he

> has a propensity to such conduct which needs to be tackled if he is not to offend again.
>
> In such a case it may well be a determinative consideration. At the other end of the scale is the first offender, where the motivation for the offence is clear and does not point to a likelihood of re-offending. In the majority of cases it is unlikely to be more than one of many factors to which undue weight should not be given.' (Emphasis added)

[54] She also stated that although the court in **R v The Secretary of State for Home Department, Ex parte Zulfikar** was dealing with the issue of parole, the principles were useful when considering sentence. The learned judge of appeal continued:

> "[69] … The principles do offer some insight into other reasons that may cause a defendant not to show remorse other than him being unrepentant. It seems right to say, therefore, that while absence of remorse is a factor to be considered in appropriate circumstances, it must be approached with caution as it is not a conclusive indicator that the defendant is beyond rehabilitation and thus likely to reoffend, therefore justifying a longer period of incarceration. The extent to which it should serve as an aggravating factor in sentencing, therefore, must depend on the circumstances of each case and it should only be one of many factors to be considered without undue weight given to it."

[55] As stated previously, the usual starting point for this offence is five years' imprisonment. Bearing in mind the serious nature of the offence and the fact that the appellant was no stranger to the complainant and her mother who trusted him to transport her child to school, a reasonable starting point would be six years' imprisonment.

[56] The aggravating factors are: (i) the complainant's age (11 years); the appellant's offering a Black Berry phone to the complainant on her way to the police station after the commission of the offence; (ii) the adverse effect the commission of the offence has had on the complainant; (iii) the prevalence of similar offences; and (iv) the appellant's denial that he had committed the offence when he was confronted by the complainant's sister in the first instance and then her mother.

[57] We note that the learned trial judge had regard to premeditation as an aggravating factor. The court is somewhat at a disadvantage where this aspect of the case is concerned due to the absence of the portion of the transcript containing the complainant's evidence. The learned trial judge appears to have arrived at the conclusion that the commission of the offence was premeditated based on the evidence that the appellant always dropped off the complainant last. She said at page 106 (lines 17-25) and page 107 (line 1):

> "The finding of the jury was that you always took the complainant to school last dropping off all the other passengers first and it was the finding of the jury that you were causing the complainant to become accustom [sic] being alone with you in the taxi and to be dropped off last that allowed this offence to take place.
>
> There is a significant amount of premeditation."

[58] In addition, she stated that the appellant having transported the complainant's older sibling to school drove her to his home which was in the opposite direction of her school. We accept the learned trial judge's assessment of the evidence and her finding that there was premeditation.

[59] The mitigating factors are (i) his remorse; (ii) his favourable social enquiry report; and (iii) the fact that he has no previous convictions.

[60] We also bear in mind that whilst no weapon was used in the commission of the offence, the frequency with which similar offences have been committed in recent times cannot be ignored. Our citizens, especially children should be able to go utilize public transportation without the fear of being abducted. As was stated by Rowe JA (as he then was) in **R v Sydney Beckford and David Lewis** (1980) 17 JLR 202, while "[t]here is no scientific scale by which to measure punishment, yet a trial judge must in the face of mounting violence in the community impose a sentence to fit the offender and at the same time to fit the crime".[10] Whilst the above statement was made in respect of mounting violence, it is in, our view, applicable to the prevalence of sexual offences being committed against children in our society.

[61] The principles of sentencing must also guide the process. The learned trial judge correctly identified those principles. However, she fell into error when she failed to indicate how she arrived at the sentence in respect of this count.

[62] We have already stated that a starting point of five years should be used. When the age of the complainant is taken into account we have added three years. The offer of the phone and the denial of the offence warrant an increase of one year. When the premeditation, prevalence of the offence and the effect of the offence on the complainant aggravating factors are taken into account the sentence is increased by

[10] Page 203

another four years. The fact that no weapon was used reduces the sentence by two years. His remorse, favourable social enquiry report and the absence of any previous convictions when combined would reduce the sentence by three years. In the circumstances, a sentence to nine years' imprisonment is appropriate.

Count 2- Sexual intercourse with a person under 16 years

[63] The maximum penalty which may be imposed for this offence is imprisonment for life. Where it is committed by an adult in authority there is a statutory minimum period of 15 years' imprisonment. The appellant is not a person in authority and as such would not be subject to the statutory minimum. As stated at paragraph [43] of this judgment the maximum penalty is reserved for the worst cases. This case, though reprehensible, does not fall within that category.

[64] The learned trial judge chose a starting point of 15 years' imprisonment which is the usual starting point for the offence of sexual intercourse with a person under the age of 16 years. She added five years based on her what was described as his lack of remorse. That issue has been addressed at paragraphs [49] to [53] of this judgment.

[65] Having found that the offence was premeditated, the learned trial judge added another five years to the sentence. The appellant's favourable social enquiry report, previous good character, time spent on remand, and the absence of any previous conviction, were used to reduce that time by five years. One year was deducted to account for "time served". She said:

"I credit one year for six weeks"[11]

This appears to be a reference to the period between conviction and sentence as against pre-trial detention and, as such, the learned trial judge fell into error. She would also have erred in crediting the appellant with one year for six weeks. As stated by Morrison P in **Meisha Clement v R** at paragraph [56], "...[It] is now clear from the authorities, the allowance to be given by the sentencing judge under this head should reflect the actual time spent in custody pending trial". That point was also made in **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ), where it was observed that:

> "...The judge should state with emphasis and clarity what he or she considers to be the appropriate sentence taking into account the gravity of the offence and all mitigating and aggravating factors, that being the sentence he would have passed but for the time spent by the prisoner on remand. **The primary rule is that the judge should grant substantially full credit for time spent on remand in terms of years or months** and must state his or her reasons for not granting a full deduction or no deduction at all."[12] (Emphasis added)

[66] The learned trial judge also appears to have made a mathematical error when she sentenced the appellant to 20 years' imprisonment instead of 19 years as her narrative suggested.

[67] The Sentencing Guidelines state that the normal range of sentences for this offence is 15 to 20 years' imprisonment. In **Jermaine McKenzie v R** [2020] JMCA Crim 9, the court stated that a sentence of 12 to 13 years' imprisonment would have been appropriate in the circumstances of that case. In that case, the complainant was

[11] Page 108 line 13
[12] Paragraph [26]

12 years old at the time of the commission of the offence. She testified that the appellant asked her to have sexual intercourse and she "agreed". The appellant, like the appellant in the instant case, had no previous convictions, received a favourable social enquiry report and was previously of good character.

[68] The aggravating and mitigating factors have already been identified and considered at paragraphs [55] to [59] of this judgment. Having weighed those factors, we have concluded that when the aggravating factors are considered the sentence would be increased to 23 years. The mitigating factors would reduce it to 18 years' imprisonment.

Should the order that a record be made in the Sex Offender Register be set aside?

[69] The appellant has also asked this court to set aside the order that the details of his conviction are to be recorded in the Sex Offender Register. Section 30 of the Sexual Offences Act states:

> "30.- (1) **The particulars of every conviction for a specified offence committed after the coming into operation of this Part shall be furnished, in the circumstances specified in subsection (2), to the Sex Offender Registry**-
>
> (a) if the conviction is recorded in the Supreme Court at Kingston, by the Registrar of the Supreme Court;
>
> (b) if the conviction is recorded in a Circuit Court, by the Clerk of the Circuit Court; or
>
> (c) if the conviction is recorded in the Court of Appeal, by the Registrar of the Court of Appeal.
>
> (2) The circumstances referred to in subsection (I) are that-

(a) the specified offence is an incest offence;

(b) the offender has been previously convicted for a specified offence; or

(c) **the offence has not been exempted, pursuant to subsection (3), from the registration and reporting requirements of this Part**.

(3) A Judge of the Supreme Court (whether or not the Judge before whom the specified offence is tried) **may** direct that a person who has been convicted of a specified offence (hereinafter called 'the offender') be exempt from any or all of the registration and reporting requirements of this part by virtue of-

(a) the conviction of the offender being a first time conviction for a specified offence;

(b) the offender being a child;

(c) the sentence imposed for the offence being of minimal severity (being of such category as may be prescribed); or

(d) **the Judge being satisfied that the effect of the imposition of such requirements on the offender, including his privacy or liberty, would be grossly disproportionate to the public interest to be achieved by registering the offender as a sex offender**." (Emphasis supplied)

[70] This section mandates the recording of all convictions of specified offences in certain circumstances. The first requirement is that the conviction must be a specified offence which is an incest offence. Secondly, the offender must have been previously convicted of a specified offence. Thirdly, the offence was not exempted by the judge from registration. The circumstances in which an exemption may be granted are set out in subsection (3). Among the list of specified offences are the offences for which the appellant has been convicted.[13] They are not incest offences and the appellant is not a repeat offender and as such, their registration would not be mandatory. However,

[13] See section 2 and the First Schedule of the Act

subsection (3) gives a judge the discretion in certain circumstances to grant an exemption from registration where, for example, the offender is being convicted for the first time, is a child or where the effect of its registration on the offender would be disproportionate to the public interest. The learned trial judge did not grant an exemption from registration. Based on the views expressed in her summation in respect of the offender, he would not have met the criterion specified in section 30(3)(d).

[71] The decision as to whether an exemption ought to be granted is clearly discretionary. In this particular case, there is no indication on the record that any application was made for an exemption. In our view, in such circumstances, pursuant to section 30 of the Act, the offence would have to have been recorded.

Conclusion and disposal of the appeal

[72] Having applied the principles set out above, we have concluded that a sentence of nine years' imprisonment would have been appropriate in this case in respect of count 1 and 18 years' imprisonment in respect of count 2. We agree with counsel for the appellant that the learned trial judge erred in her approach to sentencing and thereby imposed sentences that were manifestly excessive.

[73] However, it is to be borne in mind that the values assigned to the aggravating and mitigating factors are specific to the circumstances of this case and are not of general application.

[74] In the circumstances, it is ordered as follows:

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

(2) The sentence of 15 years' imprisonment for the offence of forcible abduction is set aside and the sentence of nine years is substituted in lieu thereof.

(3) The sentence of 20 years' imprisonment for the offence of sexual intercourse with a person under 16 years is set aside and the sentence of 18 years is substituted in lieu thereof.

(4) The order that a record be made in the Sex Offender Register is affirmed.

(5) The sentences should be reckoned as having commenced on 22 September 2017.