[2025] JMCA Crim 9

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE SHELLEY-WILLIAMS JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 63/2018

CHAVON BAILEY v R

Mrs Emily M Shields for the applicant

Miss Kathy-Ann Pyke for the Crown

7, 8 March 2024 and 11 April 2025

Criminal law – Sentence – Guilty plea – Treatment of contested aggravating factor – Consideration of social enquiry report – Whether a Newton hearing ought to have been conducted – Totality principle – Whether the imposition of consecutive sentences was appropriate

SIMMONS JA

[1] The applicant, Mr Chavon Bailey, was charged on an indictment with two counts of grievous sexual assault and one count of rape. On 28 June 2018, the applicant pleaded guilty in the Circuit Court for the parish of Saint Mary to one count of grievous sexual assault and one count of rape. On the second count of grievous sexual assault, the prosecution offered no evidence and he was consequently discharged.

[2] On 5 July 2018, he was sentenced to 18 years' imprisonment at hard labour on each count. The sentences were ordered to run consecutively, resulting in an aggregate sentence of 36 years' imprisonment. The applicant was ordered to serve a total of 20 years before being eligible for parole.

[3] On 20 July 2018, the applicant filed an application in this court for permission to appeal the sentences. His application was based on the following grounds:

(1) Unfair Trial: That based on the facts as presented the sentences are harsh and excessive and cannot be justified.

(2) That the learned trial judge did not temper justice with mercy as his guilty plea was not taken into consideration.

[4] A single judge of this court considered the application on 30 July 2019 and refused his application. The applicant renewed his application before this court as is his right. On 7 and 8 March 2024, this court, after hearing the application reserved its decision.

Background

[5] The complainant in this matter was a six-year-old girl who is the applicant's niece. At the time of the commission of the offences she lived with her mother and her brothers at her grandmother's home (the applicant's mother).

[6] Both offences were committed in 2017. However, the indictment did not particularise the dates of the offences. The first offence occurred at the complainant's grandmother's house. On that date, the complainant was asleep in her grandmother's bedroom when the applicant entered the room, picked her up, and took her to the bathroom where he inserted his fingers into her vagina. The second offence was also committed at her grandmother's house. The applicant, on that occasion, took the complainant into his bedroom and placed his penis in her vagina.

[7] The complainant repeatedly complained to her mother that she was experiencing pain and itching in her vagina. When asked if anyone had troubled her, the response was "no". On 31 January 2018, whilst the complainant and her mother were in the bathroom, the complainant showed her mother her panties that were wet and complained again of feeling pain and that there was a discharge from her vagina. On 1

February 2018, her grandmother took her to the doctor where she was examined and the doctor found that she had no hymen and that she was suffering from chlamydia and gonorrhea.

[8] On 5 February 2018, the applicant was brought to the Port Maria Police Station where he was informed that a report was made against him. When told about the offence of rape, he said "Miss, a only finger mi finger har, and a from 2016 that". When told of the offence of grievous sexual assault, the applicant upon being cautioned said, "Miss, fi tell you the truth, mi have a problem with pum-pum".

The application

[9] On 7 March 2024, the applicant sought and was granted leave to rely on the following supplemental grounds of appeal:

> "**Mitigating Circumstances**
>
> 1. The learned trial judge failed to give any weight to the commendations of community members of the applicant from the social enquiry report as a mitigating factor.
>
> **Contested Aggravating Fact**
>
> 2. The learned trial judge erred in law in the [sic] failing to properly consider a contested aggravating fact advanced by the Crown through the social enquiry report-that is, that the complainant contracted the sexually transmitted disease, gonorrhea- a disease, [that] the applicant's counsel represented the applicant displayed no signs of.
>
> 3. The learned trial judge erred in sentencing the applicant in:
>
> (a) accepting a contested aggravating fact advanced by the Crown through the social enquiry report-that is, that the complainant contracted the sexually transmitted disease, gonorrhea; and
>
> (b) using that accepted fact in a way which was extremely adverse to the applicant -when that fact was not approved by the prosecution, to the requisite standard of proof-beyond a reasonable doubt.

Consecutive Sentence

4. The learned trial judge erred in sentencing the applicant to serve consecutive sentences in circumstances where the offences though revolting, are of a similar nature; committed over a short period of time; and against the same victim.

5. The sentences being consecutive violate the totality principle.

Manifestly excessive sentence

6. The sentences imposed by the learned trial judge are manifestly excessive in that:

(a) The sentences are much higher than those imposed for more egregious acts of rape and grievous sexual assault;

(b) The learned trial judge though within the range for offences of the type for which the applicant was convicted - started at the starting point of twenty-five (25) years, contrary to sentencing guidelines and authorities of this court when there was no proper basis for doing so;

(c) The learned trial judge even starting at the point she did, did not properly use the formula outlined in the **Criminal Justice (Administration) (Amendment) Act, 2015** and therefore fell unto [sic] error in her calculations." (Bold as in the original)

Supplementary ground 1 - The Learned Trial Judge failed to give any weight to the commendations of community members of the applicant from the Social Enquiry Report as a mitigating factor

Submissions

For the applicant

[2] Mrs Shields, on behalf of the applicant, submitted that based on the decision of this court in **R v Evrald Dunkley** (unreported) Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered on 5 July 2002, the court when sentencing the applicant was obliged to consider his character.

[3] She stated that the learned judge gave no weight to the community's views, specifically that they described the applicant as a "productive citizen". She stated that

the learned judge substituted her opinions for those of the community when those views ought to have been treated as a mitigating factor. This approach, counsel submitted was plainly wrong.

For the Crown

[4] Miss Pike, on behalf of the Crown, submitted that the learned judge referred to the applicant's reputation in the community and gave him credit for that. Counsel stated that the learned judge balanced deterrence with rehabilitation because the applicant was 20 years old at the time of sentencing. She, however, stressed the importance of deterrence as the applicant committed the acts within six months of each other and his prospects for recidivism were very high based on the circumstances of the case.

[5] Counsel submitted that the learned judge gave full regard to the applicant's circumstances and the community's request for leniency. However, she quite rightly rejected that request as the community's view demonstrated a lack of appreciation of the seriousness of the offence and its impact upon the complainant. In this regard, Miss Pike referred to the portion of the transcript where the learned judge recounted the community's plea for leniency and stated that they may have "fallen prey to the cultural norm that it is okay to have sex with children". It was on this basis that she did not accede to their request.

[6] The learned judge did not reject the community's perception of the applicant as a whole but rather rejected the request for leniency. Counsel submitted that based on the cases of **R v Ball** (1952) 35 Cr App Rep 164 and **R v Alpha Green** (1969) 11 JLR 283, sentencing is a matter for the sentencing judge's discretion which is to be exercised in accordance with the relevant principles The learned judge having exercised her discretion rejected the recommendation of the community and as such did not fall into error.

Discussion

[7] A judge, in conducting a sentencing exercise, must have regard to any evidence raised as to the good character of the defendant. Such evidence is to be treated as a mitigating factor. This principle was explained by Harrison JA in **R v Evrald Dunkley** at pages 7-8:

> "A further discounting of the sentence, in favour of the appellant, for his evident good character, should have been effected by the learned Resident Magistrate. In so far as she did not state that she did so, it has to be assumed that she failed to do so and was also again in error. For that further reason we were of the view that the sentence of twelve (12) months was manifestly excessive.
>
> We note that there was no antecedent of the appellant presented to the Court. The appellant was sentenced without the learned Resident Magistrate having any knowledge of his character. This is undesirable and must not be followed. He must accordingly, be taken to have had no previous conviction.
>
> Every man's good character must be of some value."

[8] Counsel directed the court to the following remarks made by the learned judge during sentencing:

> "The fact that the community says that you are a good youth, I frown on that community, because clearly, the people who live in that community do not understand what has happened to that child or to that family. **For them to say that you should be given leniency by this court, means that it is not a community that I should have any regard for**. They have fallen prey to the cultural norm that it is okay to have sex with children, which is too pervasive in this parish in particular and in Jamaica as a whole. So I disregard what the community has to say entirely." (Emphasis supplied)

[9] Those remarks, Mrs Shields submitted, demonstrated that the learned judge disregarded the positive views expressed by the community as indicated in the social enquiry report. Respectfully, we disagree. The learned judge, in our view, considered the social enquiry report and ultimately decided to disregard the community's plea for leniency. The section of the social enquiry report to which the learned judge referred reads as follows:

> "It was stated by citizens that they do not see the applicant as a threat; however they did not condone his actions. He was described as a quiet young man who does not get into disputes with others due to his peaceful nature. They added that he is known to work by the tyre shop and simply goes from his house to his workplace. They stated he is considered to be a 'good youth'.
>
> Some community members wondered if his smoking marijuana is the reason behind this act of stupidity as it is totally contrary to the person whom they know him to be. They asked that the court be lenient towards him."

[10] Our view that the learned judge did not disregard the social inquiry report is buttressed by the following sentencing remarks:

> "**The Social Enquiry Report is positive**. You have not been in trouble with the law before. You are a hard worker and a good youth, out of character for you, according to the people that were interviewed in this report. Miss McKenzie argues that you don't deserve to be lost in the prison system and so I should balance the time, the desire for retribution in a case like this against punishment. But you need to be deterred Mr. Bailey, because these offences took place some six months apart…
>
> Unless you are given a sentence of imprisonment, there is nothing to prevent you from reoffending. So your prospects of recidivism are very high, and I weigh that against your prospects of rehabilitation…. **But your capacity for this sort of offence is shocking. This is a six year old child, your niece. You should have been the one to protect her, to safeguard her, to ensure that no one did this to her. She would have trusted you. You were left with her in the house because everybody trusted you around this child. So I am not swayed. I am not moved by the fact that you are a productive citizen. That you are a productive citizen and have committed a crime is something this court sees every day. You are supposed to be a productive citizen sir, so that is not going to get you any credit**.
>
> You are gainfully employed and you have no previous conviction. You are not making any excuses. That is where I will give you credit you have taken full responsibility for ruining the life of this child and her family." (Emphasis supplied)

[11] The above passage demonstrates that the learned judge did not disregard the good character of the applicant. Her remarks, in our view, sought to explain her reason for imposing a custodial sentence. The learned judge deducted five years from the sentence based on the mitigating factors which she described as not being "unusual". Sentencing is a matter for the discretion of the sentencing judge. Of course, the judge must be guided by the relevant principles.

[12] In the circumstances, this ground of appeal has no merit.

Supplementary ground 2 - The learned judge erred in taking into account as an aggravating factor, that the complainant had contracted two sexually transmitted diseases which was raised in the social enquiry report and was a contested fact

Submissions

For the applicant

[13] Mrs Shields stated that the assertion that the complainant had contracted sexually transmitted infections from the applicant first arose when the social enquiry report was produced. At that point his counsel asked the court to consider that he was not the source of the infections as there was no evidence that he was suffering from any of those afflictions. The learned judge, however, accepted that the complainant had contracted the diseases from the applicant and treated this as an aggravating factor and thus used a higher starting point.

[14] Counsel submitted that the principles relating to the treatment of contested aggravating facts were outlined in **R v Newton** (1982) 77 Cr App R 13 which was cited with approval in **Daniel Robinson v R** [2010] JMCA Crim 75. It was submitted that the learned judge erred when she failed to accept the version of the events which were most favorable to the applicant having not heard any evidence in the matter. This error, she said, was compounded by the fact that there was no mention in the indictment of the transmission of any sexually transmitted disease from the applicant to the complainant. Counsel further submitted that it is trite that an offender who pleads guilty

to an offence only admits to the offence as set out in the information or indictment. Reference was made to the decision of **R v Bryant** [1980] NZLR 264 (CA) in support of that submission.

For the Crown

[15] Miss Pike stated that the legal position on the requisite procedure and approach where there are disputes as to the facts on which a guilty plea has been entered or the facts on which sentencing is based are well settled. Reference was made to **R v Newton**, **R v Pearlina Wright** (1988) 25 JLR 221, **Gaynair Hanson v R [**2014] JMCA Crim 1 and **A v R** [2018] JMCA Crim 26. She submitted that, in such cases, there are three options open to the sentencing judge:

i. the matter may be left to a jury;

ii. the judge may make a determination having heard the evidence of both sides; or

iii. the judge may make a decision based on the submissions of counsel.

However, in the latter case, the version most favourable to the defendant must as far as possible be accepted.

[16] Counsel also referred to **R v Tolera** [1998] EWCA Crim 1219 in which the differing version arose from a pre-sentence report that was not accepted by the sentencing judge. She submitted that the requirement to resolve issues of fact only arises where those facts are in dispute. In the instant case, she stated that the defence abandoned the issue and that the learned judge could proceed to consider the social enquiry report. It was submitted that the learned judge had no basis to address the dispute and was entitled to sentence the applicant on the facts stated by the prosecution.

Discussion

[17] The applicant, as stated previously, pleaded guilty to the offences of grievous sexual assault and rape. When the prosecution outlined the facts to the court it was stated that the complainant, having been medically examined, had no hymen and was suffering from chlamydia and gonorrhoea.

[18] In the social enquiry report it was again stated that the complainant had contracted those diseases. When counsel for the prosecution applied for the social enquiry report to be taken as read, counsel for the applicant objected to any reliance being placed on that aspect of the report since the applicant had not been tested for those diseases. The transcript reads:

> "MISS V. McKENZIE: M'Lady, the report speaks to the complainant having a certain affliction which the accused has never exhibited any signs of such an affliction, nor has a test been conducted.
>
> HER LADYSHIP: What are you saying, Miss McKenzie?
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> MISS V. McKENZIE: M' Lady, if I can speak bluntly. The complainant has a certain infection, something that has never happened to him before. The accused has never been treated for this infection, has never exhibited signs, and there is no confirmation, medical or otherwise, to say that he has this condition. I suspect m' Lady, that further investigation should be carried out.
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> HER LADYSHIP: you see, Miss McKenzie, that is what Section 22, is for because as a Parish Judge, I would think in Section 22 order whenever sexual offences are before me -- I don't know if those are different days from these days, because then, such complications would not arise in that, while he is in custody, that medical inquiry would have to be made, and there could be no contamination at that point. But here we are now, what I hear you saying is that the child has contracted it elsewhere?
>
> MISS V. McKENZIE: I believe there may be other [sic] source.
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> HER LADYSHIP: What is the basis of that belief?

MISS V. McKENZIE: M'Lady, my client, the accused, m'Lady, would have had the benefit of medical examination for some time period.

HER LADYSHIP: Is that medical evidence going to be called at this hearing?

MISS McKENZIE: No m'Lady.

HER LADYSHIP: Because you can't give the evidence from the Bar.

MISS V. McKENZIE: M'Lady, that is why this issue was raised at the Parish Court level, and the argument was that it could be a case where he simply didn't show any signs, he does not know that he has...

HER LADYSHIP: So why didn't you ask the Court to make the order?

MISS V. McKENZIE: In relation to?

HER LADYSHIP: in relation to Section 22 Order. That would have settled it.

MISS V. McKENZIE: I crave your indulgence. If you could give me a few minutes.

HER LADYSHIP: It's a little too late for that now, Miss McKenzie, in any event. So what is your submission? Is it that the matter be adjourned to show the medical evidence that at the time he did not suffer from...

MISS V. McKENZIE: M' Lady, as it relates to that time, m'Lady, we do not have the benefit of the medical report of when the accused was taken into custody...

HER LADYSHIP: That is the material time. Is he able to say?

MISS V. McKENZIE: Other than saying, 'I have never had this…'

HER LADYSHIP: No. He can't say that. He is going to have to show by evidence that "My medical record produced to the court, the doctor who would have examined me is 'X', and these are my dockets and findings."

MISS V. McKENZIE: And on the flip side, m'lady, are we in a position to say that he contracted from the complainant...

HER LADYSHIP: I am certainly prepared to make that finding today, unless he is going to show me that it is not so. The child is six years old.

MISS V. McKENZIE: M'lady, There are a lot of unfortunate issues in this matter, extremely....

HER LADYSHIP: Miss McKenzie, are you saying that the police have gone and investigated, made an arrest, charged him, placed him before the court, an individual person, but there is someone else that they should have been looking at? Who, if they were to apprehend that person, that male person, would be the one that is responsible for the child contracting these infections?

MISS V. McKENZIE: The discussion I had with the investigator at the time, when the issue of this infection arose, was met with the response that the accused, simply put, does not know what he has. There didn't seem to be any interest beyond the accused.

HER LADYSHIP: That does not answer my question. Because you see, we are not about injustice in this court or these courts. So if you as defence counsel have information which is going to reopen this investigation, I am going to strike the plea, because I am not prepared, in the circumstances, to sentence him. But if you are making these allegations as an officer of the court, you had better be prepared to point the police in a direction that makes some sense.

MISS V. McKENZIE: I note your remark.

HER LADYSHIP: Now, for the record, you cannot just lightly say, well, he does not have it, and someone else must be, so they should go and look for that person, because that can't hide.

MISS V. McKENZIE: M'Lady, I commenced by saying, "I have some concerns".

HER LADYSHIP: Concerns are not evidence, Miss McKenzie, and suspicion neither. So if suspicion can't convict someone, when it is your client, I will not sentence him based on suspicion of the police. In this instance, what it is that you are saying? It does not even give rise to suspicion at this point.

> MISS V. McKENZIE: … M'Lady, in light of the fact that the accused, when he was arrested, was not tested, I will be guided by, m'Lady.
>
> HER LADYSHIP: Are you prepared to lead any medical evidence to show?
>
> MISS V. McKENZIE: M'Lady, the medical evidence would have to be obtained and had at this stage, because we do not have medical evidence that will assist the Court.
>
> HER LADYSHIP: It would have to be a record going back to the time he was arraigned.
>
> MISS V. McKENZIE: And so, m'Lady, we will simply proceed with the Social Enquiry Report."

[19] In **Daniel Robinson** Harrison JA cited with approval the statement of the law as set out in **R v Newton**, where the headnote reads:

> "Where there is a plea of guilty but a conflict between the prosecution and defence as to the facts, the trial judge should approach the task of sentencing in one of three ways: a plea of not guilty can be entered to enable the jury to determine the issue, or the judge himself may hear evidence and come to his own conclusions, or the judge may hear no evidence and listen to the submissions of counsel, but if that course is taken and there is a substantial conflict between the two sides, the version of the defendant must so far as possible be accepted."

[20] In **R v Nathan Tolera**, which was cited by the Crown, the court addressed the issue of the procedure that is to be adopted where there is a discrepancy between the basis on which a defendant pleads guilty and the case presented by the prosecution.

[21] In that case, the appellant when interviewed gave a different version of the facts and a Newton hearing was conducted. The English Court of Appeal approved this procedure. Lord Bingham of Cornhill CJ, who delivered the judgment of the court, stated at pages 4 -7:

> "The procedure raises no problem in a case where a defendant pleads not guilty and is convicted. That leads to the facts being

fully contested before the judge and he is then in a position, known to counsel, to make his own judgment on the facts of the case. The position may however be different where the defendant pleads guilty. In the ordinary way sentence will then be passed on the basis of the facts disclosed in the witness statements of the prosecution and the facts opened on behalf of the prosecution, which together we shall call the 'Crown case', unless the plea is the subject of a written statement of the basis of the plea which the Crown accept. The Crown should however consider such a written basis carefully, taking account of the position of any other relevant defendant and with a reasonable measure of scepticism. If the defendant wishes to ask the court to pass sentence on any other basis than that disclosed in the Crown case, it is necessary for the defendant to make that quite clear. If the Crown does not accept the defence account, and if the discrepancy between the two accounts is such as to have a potentially significant effect on the level of sentence, then consideration must be given to the holding of a *Newton* hearing to resolve the issue. The initiative rests with the defence which is asking the court to sentence on a basis other than that disclosed by the Crown case.

It often happens that when a defendant describes the facts of an offence to a probation officer for purposes of a pre-sentence report, he gives an account which differs from that which emerges from the Crown case, usually by glossing over, omitting or misdescribing the more incriminating features of the offence. While the sentencing judge will read this part of the pre-sentence report, he will not in the ordinary way pay attention for purposes of sentence to any account of the crime given by the defendant to the probation officer where it conflicts with the Crown case. If the defendant wants to rely on such an account by asking the court to treat it as the basis of sentence, it is necessary that the defendant should expressly draw the relevant paragraphs to the attention of the court and ask that it be treated as the basis of sentence. It is very desirable that the prosecution should be forewarned of this request, even though the prosecution will now ordinarily see the pre-sentence report. The issue can then be resolved if necessary by calling evidence.

A different problem sometimes arises where the defendant, having pleaded guilty, advances an account of the offence which the prosecution does not, or feels it cannot, challenge, but which the court feels unable to accept, whether because it conflicts with the facts disclosed in the Crown case or because it is inherently

> incredible and defies common sense. In this situation it is desirable that the court should make it clear that it does not accept the defence account and why. There is an obvious risk of injustice if the defendant does not learn until sentence is passed that his version of the facts is rejected, because he cannot then seek to persuade the court to adopt a different view. The court should therefore make its views known and, failing any other resolution, a hearing can be held and evidence called to resolve the matter. That will ordinarily involve calling the defendant and the prosecutor should ask appropriate questions to test the defendant's evidence, adopting for this purpose the role of an amicus, exploring matters which the court wishes to be explored…"

[22] Counsel for the Crown has submitted that based on the discussion between the learned judge and counsel for the applicant, the applicant's counsel abandoned the issue and opted to rely on the social enquiry report. In those circumstances, it was submitted that there was no need for the learned judge to address the dispute. Respectfully, we disagree. Counsel, in our view, having pointed to the lack of medical evidence connecting the applicant to the complainant's contracting of the diseases, appeared to have left it to the learned judge to determine whether there was any nexus between the applicant and the complainant's affliction.

[23] The learned judge, in addressing the issue, appeared to have exercised the third option as stated in **R v Newton** as reliance seems to have been placed on the submissions of counsel. She correctly stated that the medical status of the applicant ought to have been ascertained when the matter was first brought before the court. However, she erred when she used the evidence that the complainant had contracted the infections as an aggravating factor.

[24] In **Pearlina Wright** Rowe P, at page 2, stated:

> "The rule of law is that when a person pleads guilty, the learned trial judge, as the tribunal of fact, should sentence on the set of facts which are most favourable to the accused."

[25] It is noted that the applicant was never tested for the infections that have, unfortunately, been contracted by the complainant and was never charged with any

offence relating to them. Whilst the learned judge's abhorrence of the fact that the complainant is suffering and cannot be treated due to her tender age is understandable, the nexus between that fact and the applicant's assault was not established. The applicant, through his counsel, has denied responsibility for the complainant's affliction. In those circumstances, the benefit of the doubt ought to have been given to the applicant.

[26] The learned judge addressed this issue thus:

> "Now what you did too was come to this Court and asked this Court to make a finding that you are not responsible for the child's sexually infected transmission infection [sic], despite the fact that you confess to Miss Lorne, who turned you into the police. So you confessed these offences. It is as a result of the sexual offences that the child has contracted two sexually transmitted infections. She cannot be treated because she is too young to take the drugs that are prescribed for adults. She is living with it.
>
> So Miss McKenzie asks that I do not lose you in the prison system. But the complainant is lost in a prison of her own. She is bound to two diseases that she can do nothing about, at the tender age of six. There is no leniency that you're going to get from me. This Court views this as one of the worst offences that has every [sic] come before it. You are not the worst of the worst, because if you were, the sentence of the court would be the maximum prescribed by the Statute. So I will start at 25 years which is a place I would have started if you had been convicted after trial."

[27] It is clear from the above that the learned judge concluded that the complainant had contracted two sexually transmitted diseases from the applicant and used it as the basis for setting the starting point at 25 years' imprisonment. This finding would have been based on an inference. In that regard, it must be borne in mind that inferences must be reasonable and inescapable (see **Sophia Spencer v R** (1985) 22 JLR 238 at page 243). In the absence of any medical evidence or the applicant's admission that he had those diseases, it could only be suspected that he was the source of the complainant's infection. The learned judge erred when she used it to set the starting point. We, therefore find that there is merit in this ground of appeal.

Supplementary grounds 4 and 5 - Whether the sentence was manifestly excessive

Submissions

[28] Mrs Shields submitted that the sentences were manifestly excessive on two grounds. Firstly, that the sentences being consecutive violate the totality principle, and secondly, that the sentences are much higher than those imposed for more egregious acts of rape and grievous sexual assault.

Consecutive sentences

For the applicant

[29] Counsel submitted that concurrent sentences were more appropriate in circumstances such as this where the offences were committed against the same complainant within a relatively short period of time. In this regard, she directed the court's attention to **Kirk Mitchell v R** [2011] JMCA Crim 1. Mrs Shields argued that when one considers that the totality of the sentence is 36 years' imprisonment without being eligible for parole until he has served 20 years this is a violation of the totality principle as it exceeds the sentences that are typically imposed for similar offences.

For the Crown

[30] Miss Pike submitted that various circumstances are used to determine whether or not a consecutive sentence is appropriate. She directed the court's attention to the case of **Chin v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 84/2004, judgment delivered 26 July 2005, in which Smith JA stated some of the factors which are to guide the court when it is considering whether or not consecutive sentences are appropriate. Counsel submitted that the offences to which the applicant pleaded guilty were committed six months apart and the imposition of a consecutive sentence was, therefore, justified. It was further submitted that the totality

principle was not breached as the sentence was in accord with the normal sentence for cases of that nature.

Length of sentence

For the applicant

[31] Mrs Shields submitted that, based on **Carl Campbell v R** [2019] JMCA Crim 22 and **Percival Campbell v R** [2013] JMCA Crim 48, the sentences imposed were excessive. She pointed out that in **Carl Campbell**, where the appellant had pleaded guilty to the offences of forcible abduction, assault, grievous sexual assault, rape and robbery with aggravation, the sentence for rape was reduced from 45 years to 17 years. In that case the complainant was 13 years old and the appellant was 42 years old. In **Percival Campbell**, the appellant's sentence of 20 years' imprisonment imposed after trial was reduced to 18 years. In that case the complainant was 11 years old and the appellant was 47 years old. Counsel stated that the circumstances in the present case were not as egregious as those in **Carl Campbell** and, as such, the applicant's sentence was manifestly excessive. It was further submitted that the learned judge failed to follow the methodology set out in **Meisha Clement v R** [2016] JMCA Crim 26 by not identifying the usual range of sentences imposed for the offences and the point at which she applied the discount for the applicant's guilty plea. Reference was also made to **Daniel Roulston v R** [2018] JMCA Crim 20 in support of the submission that the usual range of sentences for rape and grievous sexual assault is 15 to 25 years.

[32] In the circumstances, it was submitted that 15 years would be an appropriate starting point in relation to both offences. When the aggravating and mitigating factors are balanced the sentence would be 17 years. The 46.66% reduction in the sentences employed by the learned judge would reduce the sentence to nine years and four months. When the six months spent in custody is accounted for the resulting sentence would be eight years and 10 months. The applicant would not be eligible for parole before serving two-thirds of that term which would be five years and 10 months.

For the Crown

[33] Miss Pike commenced by reminding the court of the principle that this court should not intervene to alter a sentence merely because it would have imposed a different sentence. She stated that such intervention was only appropriate where the sentencing judge erred in principle (see **Alpha Green v R** (1969) 11 JLR 283).

[34] Counsel submitted that the learned judge based on her sentencing remarks considered the correct principles of sentencing. Miss Pike, however, conceded that the methodology employed by the learned judge was incorrect. She, however, argued that the errors were minor. She stated that the learned judge erred when she applied the discount for the applicant's guilty plea before she weighed the aggravating and mitigating circumstances and did not identify the range of sentences usually imposed for those offences. Counsel also acknowledged that the learned judge nullified the credit she gave to the applicant for being gainfully employed when she stated that no credit would be given for being a productive citizen. However, when examined the sentence is not excessive. In this regard, she directed the court's attention to the following cases, which she summarised as set out below:

CASE NAME	**OFFENCE**	**CIRCUMSTANCES**	**SENTENCE IMPOSED/ SENTENCE IMPOSED POST APPEAL**
Green (Patrick) v R [2020] JMCA Crim 17	Illegal Possession of Firearm (eight counts) robbery with aggravation (five counts), rape (eight counts) and grievous sexual assault (two counts)	On diverse dates between July 9, 2013 to August 29, 2013 the appellant being masked held up eight different females robbed them of personal items, raped them and committed grievous sexual assault. The appellant pleaded guilty on all 23 counts.	Illegal Possession of Firearm - 10 years' imprisonment on each count Robbery with aggravation - 15 years' imprisonment on each count Rape - 38 years' imprisonment on each count Grievous sexual assault - 20 years' imprisonment on each count.

			Sentences to run concurrently with each other and appellant should not be considered for parole before he had served a minimum of 30 years in prison. **The Court of Appeal substituted the following sentences.** Rape - 19 years' and six months' imprisonment Grievous Sexual Assault - 14 years' imprisonment The appellant must serve a minimum of 10 years' before becoming eligible for parole. The sentences are to run concurrently.
Paul Allen v R [2010] JMCA Crim 79	Illegal Possession of Firearm Rape Indecent Assault Robbery with Aggravation	The appellant accosted the complainant at about 9:30 pm as she walked along a city street, 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	Illegal Possession of Firearm - Eight years' imprisonment Rape – 20 years' imprisonment Indecent Assault – Three years' imprisonment Robbery with Aggravation – 10 years' imprisonment **The Court of Appeal considered that the sentence of 20 years' imprisonment was "not inappropriate for this offence of rape"**
Oneil Murray v R	Incident 1	Incident 1	Incident 1

[2014] JMCA Crim 25	Illegal Possession of Firearm Rape Incident 2 Illegal Possession of Firearm Rape	On 19 March 2009, the applicant, armed with a gun, abducted and raped a 12-year-old schoolgirl. Incident 2 On 14 April 2009, the applicant, again armed with a gun, abducted and raped a young woman of 22 years. When pleaded on each of these indictments, the applicant pleaded guilty to the counts relating to illegal possession of firearm and rape.	Illegal possession – Five years' imprisonment Rape – Twenty-Three years' imprisonment. Incident 2 Illegal possession – Five years' imprisonment Rape – 19 years' imprisonment. Sentences to run concurrently **The Court of Appeal substituted the following sentences.** Incident 1 Rape - 18 years' imprisonment Incident 2 Rape - 15 years' imprisonment Sentences to run concurrently
David Gray v R 2012 JMCA Crim 4	Illegal possession of firearm – 15 years' imprisonment Forcible abduction – five years' imprisonment and	On 18 November 2011 sometime after 6:00 pm the appellant abducted the complainant from the waterfront by gunpoint robbed her of her handbag and then raped. The accused was tried and convicted.	Illegal possession of firearm – 15 years' imprisonment Forcible abduction – five years' imprisonment Rape – 25 years' imprisonment **The Court of Appeal ruled that** The sentence of 15 years' imprisonment for the offence

	Rape – 25 years' imprisonment		of illegal possession of firearm is affirmed. The sentence of five years' imprisonment for the offence of forcible abduction is affirmed. The sentence of 25 years' imprisonment for the offence of Rape is set aside and the Sentence of 25 years with the stipulation that the appellant serves 15 years before being eligible for parole (having been awarded credit for one year and six months) is substituted in lieu thereof.
Christopher Allen v R [2023] JMCA Crim 46	Rape Indecent assault	Appellant was tried and convicted. The complainant was seven years old at the time of the commission of the offence.	Rape – 18 years Indecent assault – three years. **The Court of Appeal ruled that** The appeal against sentence is allowed in part in that, while the sentences of 18 years' imprisonment for rape and three years' imprisonment for indecent assault, both at hard labour and to run concurrently, are affirmed, the appellant is to be credited with the period of two years and three months spent in custody on pre-trial remand so that, in effect, he will serve a sentence of 15 years and nine months' imprisonment

			at hard labour for rape and nine months' imprisonment at hard labour for indecent assault.
Delroy Bent v R [2015] JMCA Crim 28	Rape	Appellant was tried and convicted. The complainant was below the age of 12 years .	Appellant was sentenced to 15 years. Sentence was not appealed.
Levi Levy v R [2022] JMCA Crim 13	Rape Grievous sexual assault	Appellant was tried and convicted.	Rape - 18 years with the stipulation that the appellant serves 12 years before being eligible for parole Grievous sexual assault – 18 years **The Court of Appeal ruled that** The sentence for rape (count 1) of 18 years' imprisonment at hard labour with the specification that the appellant serves a period of 12 years before being eligible for parole is affirmed. The sentence for grievous sexual assault (count 2) of 18 years' imprisonment at hard labour is set aside. Substituted therefor is a sentence of 18 years' imprisonment at hard labour with the specification that the appellant serves 12 years before becoming eligible for parole.
Rayon Mason v R (unreported) , Court of Appeal,	Carnal abuse – 3 counts	The applicant pleaded guilty to having sexual intercourse with the	The applicant was sentenced to 4 years on each count. **The Court of Appeal ruled that**

Jamaica Supreme Court Criminal Appeal no 56/2007, judgment delivered 10 June 2008		complainant who was 13 years old at the time.	The sentences were not manifestly excessive and refused leave to appeal.

[35] Miss Pyke conceded that the imposition of the consecutive sentence breached the totality principle as it would result in a sentence of 36 years' imprisonment. In this regard, reference was made to **R v Simon Hoyte** (unreported), Court of Appeal, Jamaica Supreme Court Criminal Appeal No 72/1996, judgment delivered 2 June 1997 in which the applicant was tried and convicted for the rape of three children of tender years. He was sentenced to 20 years' imprisonment on each count, the sentences to run concurrently. His appeal was dismissed and the sentences were affirmed.

[36] It was submitted that a starting point of 25 years' imprisonment was appropriate for the offence of rape and 15 years for grievous sexual assault. She also submitted that after taking into account the aggravating and mitigating factors, the guilty plea, and the time spent in custody the sentence would be 16 years and six months for the offence of rape and 11 years and six months for grievous sexual assault. She suggested that an appropriate pre-parole period for rape would be 12 years and eight years for grievous sexual assault. Miss Pyke submitted further that, if the sentences are ordered to run consecutively, the result would be 28 years' imprisonment which would not breach the totality principle. Alternatively, the sentences could be ordered to run concurrently with a pre-parole period of 15 years.

Discussion

[37] Sentencing is a matter for the discretion of the sentencing judge. A judge is, however, required to consider and apply what has been described by Lawton LJ in **R v**

Sargeant (1974) 60 Cr App R 74, as the "four classical principles of sentencing". Lawton LJ said:

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

[38] These principles were endorsed by this court in **R v Evrald Dunkley**. The learned judge in the instant case demonstrated that she was cognisant of these principles and applied them.

[39] 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."

[40] However, as indicated by Hilbery J in **R v Kenneth John Ball** (1951) 35 Cr App R 164 at page 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 to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. **If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene**." (Emphasis supplied)

[41] It was conceded that the learned judge erred in principle in her approach to sentencing as she did not identify the usual range of sentences imposed for each

offence and did not employ the methodology set out in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') and **Meisha Clement v R**. It is also unclear whether the applicant was credited for the time spent in custody. In addition, the learned judge used a disputed fact, that she did not properly resolve, to set the starting point. By virtue of section 14(3) of the Judicature (Appellate Jurisdiction) Act, the court is entitled to consider the matter afresh.

[42] Section 6 of the Sexual Offences Act ('the Act') prescribes the sentences that may be imposed for the offences of rape and grievous sexual assault. It states as follows:

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

[43] A person convicted of either rape or grievous sexual assault may be sentenced to imprisonment for life. Such a sentence would, however, only be reserved for the worst cases. As stated by the learned judge, this case does not fall within that category. We agree that a fixed term of imprisonment for these offences is appropriate in the circumstances of this case.

[44] The methodology to be employed during the sentencing exercise is set out in the Sentencing Guidelines. This exercise was further clarified in the decisions of **Meisha Clement v R** and **Daniel Roulston**. In **Meisha Clement**, Morrison P stated:

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

[45] In **Daniel Roulston v R**, McDonald-Bishop JA (as she then was) stated thus:

> "[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:
>
> a. identify the sentence range;

b. identify the appropriate starting point within the range;

c. consider any relevant aggravating factors;

d. consider any relevant mitigating features (including personal mitigation);

e. consider, where appropriate, any reduction for a guilty plea;

f. decide on the appropriate sentence (giving reasons); and

g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."

[46] The usual range of sentences imposed for both offences is 15 to 25 years' imprisonment. The usual starting point is 15 years' imprisonment. In this regard, we have borne in mind the following passage in **Meisha Clement**, where Morrison P stated:

> "[29] **But, in arriving at the appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence. Although not a part of our law, the considerations mentioned in section 143(1) of the United Kingdom Criminal Justice Act 2003 are, in our view, an apt summary of the factors which will ordinarily inform the assessment of the seriousness of an offence. These are the offender's culpability in committing the offence and any harm which the offence has caused, was intended to cause, or might foreseeably have caused**.
>
> [30] Before leaving this aspect of the matter, we should refer in parenthesis, with admiration and respect, to the recent judgment of the Court of Appeal of Trinidad and Tobago in **Aguillera and others v The State** (Crim. Apps. Nos. 5,6,7 and 8 of 2015, judgment delivered on 16 June 2016). In that case, after a full review of relevant authorities from across the Commonwealth, the court adopted what is arguably a more nuanced approach to the fixing of the starting point. Explicitly influenced by the decision of the Court of Appeal of New Zealand in **R v Tauer and others**

([2005] NZLR 372), the court defined the starting point as '… the sentence which is appropriate when aggravating and mitigating factors relative to the offending are taken into account, but which excludes any aggravating and mitigating factors relative to the offender'. So factors such as the level of premeditation and the use of gratuitous violence, for instance, to take but a couple, would rank as aggravating factors relating to the offence and therefore impact the starting point; while subjective factors relating to the offender, such as youth and previous good character, would go to his or her degree of culpability for commission of the offence.

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

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

[33] As regards mitigating factors, P Harrison JA (as he then was), writing extra-judicially in 2002, cited with approval Professor David Thomas' comment that '[m]itigating factors exist in great variety, but some are more common and more effective than others'. Thus, they will include, again in no special order of priority, factors such as (i) the age of the offender; (ii) the previous good character of the offender; (iii) where appropriate, whether reparation has been made; (iv) the pressures under which the offence was committed (such as provocation or emotional stress); (v) any incidental losses

> which the offender may have suffered as a result of the conviction (such as loss of employment); (vi) the offender's capacity for reform; (vii) time on remand/delay up to the time of sentence; (viii) the offender's role in the commission of the offence, where more than one offender was involved; (ix) cooperation with the police by the offender; (x) the personal characteristics of the offender, such as physical disability or the like; and (xi) a plea of guilty. Again, as with the aggravating factors, this is not intended to be an exhaustive list." (Emphasis added)

[47] Under section 6 of the Act, a person who is convicted of the offences of rape and grievous sexual assault may be imprisoned for life or a term of years. The minimum period for eligibility for parole for both offences is 10 years.

[48] In this matter, the learned judge dealt with the principles of sentencing and treated with both offences together. The starting point was stated to be 25 years and 12 years were deducted to take account of the early guilty plea and the four months that the applicant was in custody. The learned judge also accounted for the aggravating and mitigating factors. The sentences were ordered to run consecutively with the stipulation that the applicant would have to serve 20 years' imprisonment before becoming eligible for parole. It is unclear whether the six months spent in custody were accounted for as the final sentences did not refer to that period.

[49] To arrive at an appropriate starting point, the seriousness of the offence must be taken into account. In so doing, this court may consider 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 (see **Meisha Clement v R**).

[50] Where the guilty plea is concerned, the Criminal Justice (Administration)(Amendment) Act, 2015 provides for discounts ranging from 15 - 50%. The question of the extent of the discount to be allowed in a particular case is a matter for the discretion of the court and is directly related to the circumstances of each case. In **Demar Shortridge v R** [2018] JMCA Crim 30, Morrison P, in his discussion of this issue, stated:

> "[15] So the question is whether the judge's order that the appellant should serve at least 25 years before parole in this case incorporated a sufficient discount for his plea of guilty. The extent of the allowable discount for a guilty plea is now governed by the Criminal Justice (Administration)(Amendment) Act, 2015, which provides for a reduction in sentence of up to 50%, depending on the stage of the proceedings at which the plea is offered and the nature of the offence with which the defendant is charged (see sections 42D and 42E)."

[51] The applicant spent six months in custody and must be given credit for that period. This issue was addressed in **Meisha Clement**, where Morrison P stated:

> "[34] … in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial. As the Privy Council stated in **Callachand & Anor v The State** ([2008] UKPC 49, para.9), an appeal from the Court of Appeal of Mauritius –
>
> > '... any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing'.
>
> [35] This decision was applied by the Caribbean Court of Justice in **Romeo DaCosta Hall v The Queen** ([2011] CCJ 6 (AJ), para. [32]), an appeal from the Court of Appeal of Barbados, in which Wit JCCJ, in a separate concurring judgment, remarked the emergence of '[a] worldwide view ... that time spent in pre-trial detention should, at least in principle fully count as part of the served time pursuant to the sentence of the court'."

[52] The offences will be dealt with separately.

a. Grievous sexual assault

[53] This offence was first in time. A reasonable starting point, in our view, would be 20 years' imprisonment in light of the complainant's age and the seriousness of the offence. The aggravating factors are: (i) the relationship between the parties as the

applicant is the complainant's uncle; (ii) the fact that the offence was committed at the complainant's grandmother's home, where she should have been safe; (iii) premeditation; (iv) the prevalence of sexual offences in Jamaica; and (v) the likelihood of recidivism.

[54] The mitigating factors are: (i) the applicant's good community report; (ii) the applicant was a first-time offender; and (iii) the applicant's early confession and expression of remorse.

[55] The aggravating factors would increase the sentence to 31 years. The mitigating factors would reduce the sentence to 28 years. The application of a 40% discount on account of the applicant's early guilty plea would reduce the sentence to 16 years and eight months. When credit is given for the six months that the applicant spent in custody, the resulting sentence is 16 years and two months' imprisonment.

b. Rape

[56] This offence was committed shortly after the grievous sexual assault. A reasonable starting point, in our view, would be 25 years' imprisonment in light of the complainant's age and the seriousness of the offence. The aggravating and mitigating factors are the same as those used in computing the sentence for the grievous sexual assault. The aggravating factors would increase the sentence to 36 years. The mitigating factors would reduce the sentence to 33 years. The application of a 40% discount on account of the applicant's early guilty plea would reduce it to 19 years and eight months. When credit is given for the six months that the applicant spent in custody, the resulting sentence is 19 years and two months' imprisonment. In the circumstances, the 18 years' imprisonment imposed by the learned judge cannot be said to be manifestly excessive and would, therefore, remain. This would result in a sentence of 17 years and six months' imprisonment taking into account the six months spent by the appellant on pre-sentence remand. We are, however of the view that the sentences should run concurrently based on the application of the totality principle.

Conclusion and disposal

[57] Applying the principles as set out above, we have concluded that, based on the totality principle, the sentence imposed was manifestly excessive (see **R v Simon Hoyte**).

[58] In the circumstances, the orders of the court are as follows:

(1) The application for permission to appeal sentence is granted.

(2) The appeal against sentence is allowed.

(3) The sentences of 18 years' imprisonment for the offence of rape and 18 years' imprisonment for the offence of grievous sexual assault with the stipulation that the applicant serves 20 years before being eligible for parole and ordered to run consecutively, are set aside.

(4) Substituted therefor are sentences of 17 years' and six months imprisonment for the offence of rape, credit having been given for the six months on pre-sentence remand, and 16 years and two months' imprisonment for the offence of grievous sexual assault, credit having been given for the six months on pre-sentence remand, with the stipulation that the applicant serves a minimum of 10 years' imprisonment, on each count, before becoming eligible for parole.

(5) The sentences are to run concurrently and are to be reckoned as having commenced on 5 July 2018, the date they were imposed.