[2022] JMCA Crim 21

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER PUSEY JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CRIMINAL APPEAL 2/2016

JERMAINE BURKE v R

Kemar Robinson for the applicant

Miss Sophia Thomas for the Crown

25 February, 1 March 2021 and 8 April 2022

SIMMONS JA

[1] On 8 December 2015, following a trial in the circuit court for the parish of Saint Catherine before Graham Allen J ('the learned trial judge'), Jermaine Burke ('the applicant') was convicted for the offence of rape. On 12 January 2016, he was sentenced to 25 years' imprisonment, with the stipulation that he serve 20 years' imprisonment before being eligible for parole.

[2] The defence was consent, and the applicant asserted that the complainant's allegation that he had raped her was motivated by jealousy. As such, the central issue at trial was credibility. The prosecution relied on three witnesses: the complainant, her father ('SB'), and Detective Corporal Andrea Allen. The applicant gave sworn evidence and called one witness; Mr Veibert Burke, his father.

[3] On 18 January 2016, the applicant filed an application to this court for leave to appeal conviction and sentence, on the following grounds:

(i) Unfair trial;

(ii) The verdict was unreasonable and was not supported by the evidence;

(iii) The jury was misdirected; and

(iv) The sentence is manifestly excessive.

[4] The application, which was considered by a single judge of appeal on 19 April 2018, was refused on the basis that the learned trial judge gave adequate directions on the main issue of credibility, as well as the inconsistencies and discrepancies in the evidence. The single judge found that any concern in relation to the learned trial judge's direction to the jury at pages 28 to 29 of the transcript that "…[their] first duty [was] to arrive at a unanimous verdict…" was mitigated by her directions at page 29. The sentence which was imposed by the court was found to be within the usual range of sentences imposed for the offence of rape.

[5] The applicant has renewed his application before this court, as is his right. After hearing submissions from counsel, the court requested that the parties file written submissions supported by authorities in respect of the issue of honest belief, on or before 1 March 2021. They did so, and the court's decision was reserved as of that date. The delay in the delivery of this judgment is sincerely regretted, and the court apologises for it.

Undisputed facts

[6] It is not disputed that, on 28 July 2013, the applicant and the complainant were both present at a party in the community of James Mountain, Sligoville in the parish of Saint Catherine. Sometime after the party ended, the applicant and the complainant engaged in sexual intercourse at the home of the applicant. The parties were well-known to each other, having been in a previous sexual relationship.

The prosecution's case at trial

[7] The evidence of the main witnesses for the prosecution is summarised below.

The complainant

[8] The complainant's evidence was that, on 27 July 2013, she attended a party in her community of James Mountain, Sligoville where she joined her brother and his girlfriend. Whilst there, she saw the applicant otherwise known to her as 'Tucker', whom she had known for more than 10 years. She stated that they had been in a relationship for about seven years prior to the incident. The applicant, she said, asked her to dance with him and she refused.

[9] After the party ended, she left for home in the company of her brother and his girlfriend. The applicant, she said, walked behind them. At a certain point in the journey, the complainant's brother and his girlfriend turned off the road, at which time the applicant began to walk beside the complainant. The applicant was said to have engaged the complainant in conversation during which she told him that she did not wish to be his friend and that she had moved on with her life.

[10] Upon approaching the gate to the applicant's home, he grabbed the complainant's hand and pulled her towards the gate, which resulted in her hitting the side of her head on the said gate. The complainant stated that she resisted and screamed repeatedly for him to let her go. He, however, managed to pull her inside his room and closed the door. They engaged in a tussle and the applicant removed a ratchet knife from his back pocket and used it to cut the two sides of the complainant's shorts. During the tussle, the complainant sustained a cut to her left hand and her middle finger.

[11] The complainant was able to escape to the bathroom and locked herself inside. She began screaming for help from the applicant's brother and father who both lived on the property and was able to get his father's attention. When his father came to the window the complainant told him that the applicant was trying to rape her and she showed him the cut on her finger. The applicant managed to break into the bathroom and went to the window to speak to his father who enquired of him what was taking place. It was the complainant's evidence that his father told him, "[you] can go to prison

for this, [you] can go to jail". He was said to have responded to his father, using indecent language.

[12] The applicant, with the knife in his hand, then pulled the complainant into the room by her blouse, which he later cut with the knife. They wrestled and he pushed her onto his bed, came on top of her, knife in hand, and forced her legs apart. The complainant, whilst crying and screaming for help, told the applicant that she did not want to have sex with him. The applicant held her down by her hands and forcibly had sexual intercourse with her. She pushed him off and told him that she needed to use the bathroom. He refused to let her go into the bathroom and she resorted to urinating on the bedroom floor. He then held her by the neck and started to choke her. At this time, the knife was in his other hand. He then resumed having sexual intercourse with her.

[13] The complainant grabbed the knife from the applicant, ran back into the bathroom and threw the knife through the window. The applicant ran outside and the complainant used a dresser to barricade the room door so as to prevent him from re-entering the room. She then called SB on the telephone and told him that she had been raped by the applicant. She remained in the bathroom and could see when SB arrived at the property with her step-mother, her brother and his girlfriend. The complainant removed the dresser and her brother's girlfriend entered the room and gave her a towel to cover herself.

[14] She explained that she had not tried to open the room door, as the applicant had a knife and she was afraid.

[15] The complainant went to the Sligoville Police Station where she made a report and gave a statement. She then went to the Spanish Town Hospital where she was medically examined.

Complainant's father

[16] SB recounted that, on 28 July 2021, he received a phone call from the complainant who told him that she had been raped by the applicant, who he knew as 'Tucker'. He

drove to the applicant's property with his girlfriend and, upon arrival, he saw the applicant outside with a knife in his hand. He stated that the applicant immediately ran towards the back of the house. SB stated that he then looked up, and saw the complainant at the window. She appeared to be naked and was crying for help.

[17] He left and went to the Sligoville Police Station where he made a report that " a young man, Tucker, hold on pon my daughter from the night before". Whilst at the station, he received a telephone call from his girlfriend advising him that the complainant had been taken out of the house. He then accompanied the police to the applicant's house.

The defence

[18] The applicant's defence was that he and the complainant had consensual sexual intercourse and she was lying to the court, as she was jealous of his relationship with his girlfriend. The applicant and his father gave evidence on behalf of the defence.

The applicant's evidence

[19] The applicant's evidence was that, on 28 July 2013, he was at a party in James Mountain, Sligoville, with his brother and friends. Whilst there, he saw the complainant whom he had known for about 13 or 14 years. His evidence was that they had been involved in an intimate relationship for about three to four years. The applicant stated that up to the time of the alleged rape, he and the complainant were still involved in a sexual relationship.

[20] His evidence was that, when he asked the complainant to dance, her response was "No, mi nuh want yuh gal dem si me and yuh". He reassured her that his 'woman' was overseas and the two then danced until the party ended. They left in the company of her brother and his girlfriend. He stated that the complainant's brother and his girlfriend eventually turned off and went in the direction of their home. He and the complainant continued to walk together and engaged in conversation. The applicant

recounted that the complainant had said that he was only interested in her now because his girlfriend had returned overseas.

[21] The applicant stated that when they entered his house and went into his room, the complainant questioned him as to why it was so untidy. His response was that his girlfriend had been there a few weeks before and had left a few items behind. He stated that the complainant became upset, reached for a knife that was on the dresser and threatened to destroy his girlfriend's items. It was his evidence that the complainant was jealous of his other intimate relationship.

[22] He and the complainant began to fight, and the complainant received a cut on her finger which bled. He took her to the bathroom to clean the cut. The complainant who was crying, went to the bathroom window and told the applicant's father who was outside, that the applicant had cut her with a knife. His father warned him that his actions could amount to time in jail to which he responded, "[n]o man, mi a nuh idiot, mi naa duh dat". His father then told him to be careful and questioned why he and the complainant were always fighting.

[23] The applicant stated that after he calmed down the complainant, they sat on his bed. The complainant then declared that she was ready to go home and got up from the bed. He did not want her to leave, and he held on to her shorts and asked her if they were not going to have sex. She said "no". The applicant asked her two more times and persuaded her to have sex with him. He indicated that she removed her shorts but she was still hesitant to have sex. He recounted that:

> "While she was on the bed sitting down, she lapped her two legs together and kept saying no. I talk [sic] to her, I begged her, that's when she opened up her legs. I go over her, try to insert my penis; that's when she said 'a weh you a do? Weh you a goh without condom?'…I found the condom, put it on…I insert my penis."

[24] The sexual intercourse between them ended abruptly as the condom burst and the complainant was said to have lost interest. In order to prevent the complainant from

leaving, the applicant took up her shorts and cut both sides with a knife. The complainant then took up the knife and threw it out the bathroom window. They resumed having sex again. He and the complainant subsequently argued about his intention to marry his overseas partner. It was at this time, that he went upstairs to get a pair of shorts for the complainant to wear home. When he returned to the room, he realised that the door was locked. He overheard the complainant on the phone telling someone that he had raped and cut her. He stated that he saw when SB arrived at the house. He ran as SB was alighting from the vehicle because he was afraid of him.

The grounds of appeal

[25] At the commencement of the hearing of the application, Mr Kemar Robinson, counsel for the applicant, with leave of the court, abandoned the original grounds of appeal, and, was granted permission to argue the following supplemental grounds of appeal in place thereof:

> "1. The learned trial judge failed in her direction to the jury to analyze the evidence properly so that the jury would be able to properly appreciate the effect of the inconsistencies and discrepancies which arose on the evidence of the complainant and the possible effect this could have on her credibility.
>
> 2. The learned trial judge erred in law on her direction to the jury on the very important issue of consent that the appellant raised in his defence, which resulted in a miscarriage of justice.
>
> 3. The sentence is manifestly excessive."

[26] During the hearing of the application, the applicant sought and was granted permission to abandon supplemental ground two and rely on the amended supplemental ground two as set out below:

> "The learned trial Judge failed to identify for the jury those aspects of the evidence that may have given rise to the applicant's honest belief that the complainant was consenting."

Supplemental ground one: The learned trial judge failed in her directions to the jury to analyse the evidence properly so that the jury would be able to properly appreciate the effect of the inconsistencies and discrepancies which arose on the evidence of the complainant and the possible effect this could have on her credibility

Submissions

For the applicant

[27] On behalf of the applicant, Mr Robinson submitted that the learned trial judge failed to identify and analyse for the jury, the material inconsistencies and discrepancies which arose in the prosecution's case. This omission was attributed to the delay of three days between the trial and the learned trial judge's summation. It was submitted that at that time, the evidence would not have been as fresh in the minds of the jurors. Therefore, the jury was denied the opportunity to correctly assess the complainant's credibility, which was central to the defence's case, that the two parties had engaged in consensual sexual intercourse.

[28] The inconsistencies and discrepancies identified by counsel are as follows:

i. At the preliminary enquiry, the complainant gave evidence that she was involved in a relationship with the applicant from when she was age 15 to when she was 19 years old. However, during cross-examination, she said that the relationship ended when she was 18 years old. This evidence was also inconsistent with her evidence given in examination-in-chief that she was now 24 years old and that the relationship ended seven years prior when she was 17 years old.

ii. The complainant gave evidence that she refused the applicant's request to dance, and he walked away. However, in cross-examination, she admitted that she told the police that they had danced at the party.

iii. The complainant gave evidence that she had no conversation with the applicant at the party and only told him "no" in response to his request to dance. However, in cross-examination, she admitted that in her statement to the police, she said she told the applicant at the party that they are not friends and that she did not want his girlfriend to see them dancing.

iv. The complainant gave evidence that she left the party at 5:30 am and at that time it was not that bright outside. SB, however, gave evidence that she told him that the applicant held her at his house from the night before.

v. The complainant gave evidence that she left the party with her brother, his girlfriend and other persons, however, in cross-examination, she admitted that in her statement to the police she stated that she also left the party with the applicant.

vi. The complainant gave evidence that when her brother and his girlfriend turned off the road, she was walking alone and the applicant caught up to her. However, she admitted in cross-examination that she had told the police that after her brother turned off, she continued walking with the applicant.

vii. In her examination in chief, the complainant stated that the applicant pulled her into his house and that she hit her head on the gate. This was not mentioned in her statement to the police although she said this was important.

viii. The complainant in her evidence omitted to tell the police that she was cut on her wrist with a knife. There was also an inconsistency as to whether it was a cut or a scrape.

ix. The complainant in her evidence stated that she did not try to leave the room because the complainant had a knife and she was scared. In cross-examination, it was revealed that there was no mention of this in her statement to the police.

x. The complainant in her statement to the police said that when she got the cut, the applicant used tissue to wipe away the blood. In cross-examination, she said that the applicant wiped the blood off the floor.

xi. In her statement, the complainant told the police that her shirt tore at the neck when the applicant pulled her from the bathroom. However, in examination-in-chief, she stated that the applicant used a knife to cut her blouse from the bottom up to the neck.

xii. In the complainant's statement to the police, she said that the applicant forced her to urinate on the floor. However, she gave evidence that it was her choice to do so.

xiii. The complainant in examination-in-chief stated that whilst she was urinating, the applicant held her by the neck, choked her and started having sex with her again. This was omitted from her statement to the police.

xiv. In her examination-in-chief, the complainant said that she grabbed the knife from the applicant, ran into the bathroom and threw it out the window. In cross-examination, it was suggested to her that she gave the police a different version of events. It was the complainant's response that she did not remember if she gave the police a different version of events as she had put the matter behind her.

[29] It was submitted, by counsel for the applicant, that the learned trial judge fell short in her duty to direct the jury on how to treat with the inconsistencies and discrepancies in the prosecution's case. This was especially important to enable the jury to determine the weight to be attached to the particular inconsistency or discrepancy and how it might affect a witness' credibility. Counsel highlighted that the learned trial judge did not give any direction on discrepancies and failed to assess the material inconsistencies which arose in the matter. He argued that it was not sufficient to merely recount the evidence without any assessment of how to treat with the inconsistencies or discrepancies. Additionally, he contended, there was no direction on the material discrepancy between SB's evidence and that of the complainant, pertaining to the time from which she was at the applicant's house. These failures, counsel submitted, were especially detrimental in a case where credibility was the central issue. Reliance was placed on the decisions in **Maitland Reckford v R** [2010] JMCA Crim 40, **R v Hugh Allen and Danny Palmer** (1988) 25 JLR 32 ('**Hugh Allen and Danny Palmer**') and **Vernaldo Graham v R** [2017] JMCA Crim 30 ('**Vernaldo Graham**').

[30] In all the circumstances, it was counsel's position that this is an appropriate case in which to apply section 14(1) of the Judicature (Appellate Jurisdiction) Act to set aside the conviction as being unsafe or unsatisfactory.

For the Crown

[31] Miss Thomas, on behalf of the Crown, submitted that the learned trial judge adequately discharged her duty to guide the jury on how to treat with the inconsistencies and discrepancies that arose in the case. The jury, she said, was advised as to what in law amounts to an inconsistency, and the learned trial judge highlighted the major inconsistencies in the case, and how these inconsistencies may affect a witness' credibility. The jury, she submitted, was cautioned that it was their responsibility to determine if there was an inconsistency and what weight, if any, ought to be attached to it. Miss Thomas also submitted that the learned trial judge was not required to identify every inconsistency in the evidence, as the jury once properly directed would be able to

make its own determination as to how that inconsistency may affect the case (see **Lloyd Brown v R** (unreported), Court of Appeal, Supreme Court Criminal Appeal No 119/2004, judgment delivered 12 June 2008, **R v Baker and others** (1972) 12 JLR 902 and **R v Fray Diedrick** (unreported), Court of Appeal, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991.

[32] Counsel submitted further that the alleged discrepancy between the evidence of the complainant and SB, regarding the time from which she was held by the applicant, was not material to the case. The crucial question for the jury, she argued, was whether the complainant could be accepted as a witness of truth, which would entitle them to reject the applicant's defence that she had consented to engage in sexual intercourse with him.

Discussion

[33] A trial judge in his or her summation is required to identify inconsistencies and discrepancies in the evidence and to explain their significance. There is, however, no duty on the trial judge to point out every inconsistency and discrepancy in the case. The jury's attention must be directed to inconsistencies and discrepancies which may be considered to be damaging to the Crown's case and the appropriate directions given. In **R v Fray Diedrick**, Carey JA, in addressing this issue, stated at page 9:

> "...Implicit in this contention is the belief, which we think to be without any foundation, that because a witness has been shown to have made some statement inconsistent with his testimony in Court, a resultant duty devolves upon a trial judge to show that the witness' evidence contains conflicts with other witnesses in the case.
>
> **The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred at the trial, whether they be internal conflicts in the witness'**

> **evidence or as between different witnesses**." (Emphasis supplied)

[34] In **Morris Cargill v R** [2016] JMCA Crim 6, Brooks JA (as he then was) stated the principle thus:

> "[30]...it must be pointed out that trial judges are required to explain to juries the nature and significance of inconsistencies and discrepancies and give them directions on the manner in which they should treat with those elements that occur in the evidence. Trial judges are not, however, required to identify every inconsistency and discrepancy that manifests itself during the trial. Nonetheless, it would be remiss of a judge to fail to mention such inconsistencies and discrepancies that may be considered especially damaging to the prosecution's case."

(See also **Lloyd Brown v R** and **R v Baker and others**.)

[35] In **Vernaldo Graham**, Edwards JA (Ag) (as she then was) stated that the duty of the trial judge in directing the jury in relation to inconsistencies and discrepancies is as follows:

> "[104] Where the discrepancy or inconsistency in a witness' testimony calls into question her credibility on a point which is material to the issue the jury has to decide, they must be told that they cannot make a positive finding of fact and accept and rely on the witness' evidence regarding that fact unless it is resolved by an explanation from the witness. See **R v Noel Williams and Joseph Carter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 51 and 52/1980, judgment delivered 3 June 1987. They should be reminded of the witness' explanation for the inconsistency and discrepancy, if there is one, and directed that it is for them to say if they accept it so as to find her a credible witness despite the discrepancy or inconsistency…
>
> [106] Based on the authorities, the duty of the trial judge in directing the jury in the case of inconsistencies and discrepancies appearing in the evidence at trial may be summed up as follows:

1. There is no duty to comb through the evidence to find all the inconsistencies and discrepancies there may be, but the trial judge may give some examples of them or remind the jury of the major ones.

2. The trial judge should explain to the jury the effect a proved or admitted previous inconsistent statement should have on the evidence.

3. The trial judge should point out to the jury what the result may be if the inconsistency or discrepancy were to be found by them to be material and how it may undermine the evidence.

Once this approach is taken, it is then a matter for the jury whether they consider the witness to be discredited."

[36] Edwards JA (Ag) also cited, with approval, the following passage from **R v Oliver Whylie** (1977) 15 JLR 163 at 166:

> "[109] It is of importance that the trial judge should not consider his duty fulfilled, merely by a faithful narration of the evidence on these matters. He should explain to the jury the significance of these matters, enlightening with his wisdom and experience what might otherwise be dark and impenetrable."

[37] What will amount to a sufficient direction will, however, depend on the particular circumstances of each case. In **Hugh Allen and Danny Palmer**, White JA stated at page 35:

> "It was certainly incumbent on the judge to direct the jury in what way [the witness'] testimony at the trial which was in conflict with the deposition would constitute the undermining of the evidence which she gave at the trial, no less as to what would be the result if they found that the discrepancy was material. This standard was not met by merely telling the jury that it was a matter for them."

[38] The learned trial judge, very early in her summation, correctly pointed out to the jury that the main issue was whether the complainant consented to have sexual intercourse with the applicant. She stated:

> "…what you will have to decide, is whether the complainant consented to having sexual intercourse with the [applicant]."

[39] The applicant, through his counsel, has taken issue with the learned trial judge's directions in relation to inconsistencies and discrepancies. An inconsistency as explained by the learned trial judge arises when a witness is proved to have said something different in relation to a particular aspect of the evidence on a previous occasion. A discrepancy arises where there is a conflict in the evidence given by witnesses on behalf of either the prosecution or the defence in relation to the same subject matter. The learned trial judge, in the instant case, did not give the jury any directions in relation to discrepancies or avert their attention to the discrepancy that arose in relation to the complainant's evidence of the time during which she was held at the applicant's house and that given by SB.

[40] In relation to the inconsistencies, the learned trial judge, in her directions to the jury, stated at page 14:

> "Where a witness has admitted or you may be satisfied that she previously made a statement that conflicts with her evidence, you may take into account the fact that she has made such a statement, when you consider whether that individual is believable as a witness."

She then proceeded to identify seven examples of inconsistencies that arose on the prosecution's case. They were as follows:

i. In her evidence-in-chief, the complainant said she did not dance with the applicant despite his attempts to dance with her. When she was asked in cross-examination if she told the police that the applicant had danced with her, the complainant said that she did not remember. However, when the complainant's statement to the police was shown to her, she said the applicant had danced with her;

ii. The complainant said that the applicant was not one of the persons with whom she left the party. However, she agreed in cross-examination, that in her statement to the police she had indicated that the applicant was among the persons with whom she had left the party;

iii. In her evidence in chief, the complainant said that she hit her head on the gate. However, in cross-examination, she stated that she could not recall whether she recounted this to the police. When her statement was shown to her, it was revealed that that assertion was not included;

iv. The complainant's evidence was that the knife scraped her on her left hand. However, it was revealed in cross-examination that there was nothing in her statement to the police reflecting this position;

v. When asked whether she had told the police that her blouse got torn at the neck when the applicant started to pull her out of the room, the complainant said that she did not remember in detail what happened. When her statement was shown to her, she confirmed that was so.

vi. In her evidence in chief, the complainant said she did not remember if the applicant told her to urinate on the floor. After seeing her statement, she stated that the accused told her to urinate on the floor but indicated that was not what happened. She also repeated that the applicant told her to urinate on the floor.

vii. The complainant stated that she did not remember if she told the police that the applicant held her by the throat and pulled

> her up. She agreed that she did not tell the police that the applicant held her by her throat and choked her. She also agreed that there was no assertion in her statement that the applicant choked her and had sex with her again. When asked to explain, she said that she had gone for counselling and had put the case behind her and could not remember every detail word for word.

[41] After providing these examples, the learned trial judge stated:

> "How do you approach the inconsistencies, listed, Mr Foreman and members of the jury? How do you approach inconsistencies – these inconsistencies, since they raise the issue of credibility of the complainant? Is there an inconsistency? Is there any explanation of the inconsistencies coming from the complainant, or from any other evidence? Is the inconsistency important? One way of deciding whether it is important, is deciding whether for you [the] point on which inconsistency [sic] occurred is vital to the case or credibility of the complainant. If you say that it is vital to the case or credibility of the complainant, you have two choices. One, you may say that she cannot be believed on that particular point, or two, you may say that the complainant is not to be believed at all, that is, you reject the complainant totally and completely. If the inconsistency is not important, you simply acknowledge it, as it [sic] existing, but that it does not affect the credibility of the complainant."

[42] The learned trial judge, therefore, not only gave the jury the standard directions on inconsistencies but also provided examples of the inconsistencies which arose in the complainant's evidence. As was stated in **R v Fray Diedrick**, **Morris Cargill v R** and **Vernaldo Graham**, the learned trial judge was under no duty to identify every inconsistency and discrepancy in the case. The sufficiency of her directions is to be measured according to the circumstances of the case (see **Hugh Allen and Danny Palmer**).

[43] Having pointed out to the jury how to treat with the inconsistencies, the learned trial judge later in her summation stated:

> "You must decide whether you are sure the complainant …did not consent to sexual intercourse with the [applicant]. That will require an assessment by you of the complainant's evidence. I must emphasize that the assessment is for you to make."

[44] It is our view that sufficient directions were given to the jury in relation to the inconsistencies. The failure to mention the discrepancy in relation to the time during which the complainant was held at the applicant's house is not fatal. There was no dispute that they were at the applicant's house after they left the party. The major inconsistencies, in our view, were highlighted by the learned trial judge and the jury was given clear instructions that they were to consider those inconsistencies in their assessment of the complainant's evidence and her credibility.

[45] When the applicant's evidence is juxtaposed with that of the complainant, there was enough material for the jury's consideration. The case for the prosecution was by no means weak. It was also buttressed by the applicant's evidence that it was whilst he and the complainant were wrestling for the knife her finger was cut; that he cut her shorts because he did not want her to leave; that the complainant locked him out of the room; and that he ran when the complainant's family arrived at the house. The central issue was whether the applicant had sexual intercourse with the complainant without her consent. This ground is, therefore, without merit.

Amended supplementary ground two- The learned trial Judge failed to identify for the jury those aspects of the evidence that may have given rise to the applicant's honest belief that the complainant was consenting.

Submissions

For the applicant

[46] Mr Robinson submitted that the complaint under this ground was two-fold. Firstly, the learned trial judge failed to identify for the jury any aspects of the evidence which may have given rise to the applicant's honest belief that the complainant was consenting to have sexual intercourse with him, and secondly, the learned trial judge failed to analyse aspects of the evidence that supported the applicant's defence of consent.

[47] Counsel submitted that, although it may be arguable whether the issue of honest belief arose on the facts of the case, the learned trial judge ought to have analysed the issue of consent for the jury, especially when it arose on both the prosecution's and the applicant's case. Reference was made to **Loveroy Henry v R** [2019] JMCA Crim 43, **Albert Edmondson v R** (unreported), Supreme Court Criminal Appeal No 55/2005 judgment delivered 3 February 2009, **Mervin Jarrett v R** [2017] JMCA Crim 18 and **R v Chester Gayle** (1988) 25 JLR 317, in support of that submission.

[48] It was submitted that the learned trial judge merely recounted the evidence instead of analysing it for the benefit of the jury and applying the relevant principles relating to the issues that arose on the evidence. Mr Robinson asserted that there were numerous aspects of the evidence in support of both defences which ought to have been brought to the jury's attention. They were stated to be: the complainant and the applicant were dancing at the party; they walked home together; they were in a previous relationship; the applicant's denial that he dragged the complainant into his house; and that whilst the applicant searched for a condom, the complainant made no attempt to leave.

[49] It was submitted that the summation was unfair to the applicant, as the learned trial judge failed to analyse those aspects of the evidence that supported his defence and only directed the jury's attention to aspects of the evidence that were not in his favour. In the circumstances, counsel argued that the summation was unbalanced and resulted in an unfair trial.

For the Crown

[50] Miss Thomas submitted that the sole issue was consent, as the applicant's evidence was that the complainant agreed to have sexual intercourse with him. Miss Thomas pointed out that consent and honest belief are different. She reminded the court that the applicant had asserted that the complainant had consented and not that he believed, based on her actions, that she had, in fact, consented. As such, the issue of honest belief did not arise on the evidence and there was, therefore, no need for the

learned trial judge to direct the jury in respect of that issue. It was submitted further that the applicant would have had to raise this issue and this was not done in either his sworn evidence or during the cross-examination of the complainant. It was counsel's position that such a direction would have been inappropriate in the circumstances and may have confused the jury as there was no evidence that raised this issue. Reference was made to **R v Aggrey Coombs** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 9/1994, judgment delivered 20 March 1995 and **R v Clement Jones** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 5/1997, judgment delivered 27 April 1998, in support of the above submission.

[51] It was submitted further that there was no evidence that indicated that the applicant misunderstood or misread the signals coming from the complainant.

[52] It was Miss Thomas' position that the learned trial judge thoroughly directed the jury as to the issue of consent. They were properly advised that, if they found on the evidence that the complainant had consented to have sexual intercourse with the applicant, then he should be acquitted. In assisting the jury in resolving this issue, the learned trial judge made mention of aspects of the evidence which tended to show that the complainant was not consenting. This, it was submitted, did not amount to any miscarriage of justice as it was clear to the jury that the evidence had to be considered in its totality before a decision could be made.

Discussion

[53] The learned trial judge in her summation reminded the jury that the central issue was whether the complainant had consented to have sexual intercourse with the applicant. She also informed them that consent is to be given its ordinary meaning. Having recounted the evidence, the learned trial judge stated that it was for them to decide whether the complainant consented to have sexual intercourse with the applicant. Further, they were instructed that it was the duty of the prosecution to prove that there was a lack of consent and that they would have to be satisfied, based on the evidence,

that the applicant intended to have sexual intercourse with the complainant without her consent or regardless of whether or not she was consenting.

[54] At page 28, the learned trial judge concluded on this issue by directing that:

> "He says that the complainant consented to him having sexual intercourse with her. **If you accept his evidence, you must find the accused not guilty. If you reject his evidence, it does not mean that he is guilty, you must go back to the Prosecution's case and see if they have made sure that the accused had sexual intercourse with the complainant without her consent and that he knew that she did not consent to sexual intercourse or was reckless, not caring whether the complainant consented or not**. If you are sure then you may convict." (Emphasis supplied)

[55] It is the applicant's complaint that the summation of the learned trial judge was inherently unfair, as she only recounted the complainant's version of the events. Further, that there was no focus on the evidence of the applicant and on his behalf, which may have supported his defence that the complainant had consented to have sexual intercourse with him.

[56] The learned trial judge, in her summation, recounted the evidence given by both the complainant and the applicant. Her directions on the issue of consent were thorough and cannot be faulted. The learned trial judge made it clear that it was for the jury to decide whether the complainant had consented to have sexual intercourse with the applicant. The jury was also directed that the case turned on the complainant's credibility and that they would have to determine whether her evidence was to be accepted or rejected.

[57] The applicant also complained that the learned trial judge failed to direct the jury in respect of honest belief. On this issue, the case of **R v Aggrey Coombs** is instructive. In that case, Wolfe JA (as he then was) stated at page 4:

> "This clearly was not an honest belief situation, consequently no direction on honest belief was required. **While it is incumbent on a trial judge to leave for the consideration of the jury every defence which properly arises on the evidence, there is no obligation on a trial judge to leave to the jury fanciful defences for which there is no evidential support** and a trial judge should not indulge in this kind of patronage.
>
> The question of honest belief in a case of rape only arises where the man misreads or misunderstands the signals emanating from the woman. **What the defence of honest belief amounts to is really this: I had sexual intercourse but I did so under the mistaken belief that she was consenting**. That plainly was not what the applicant put forward as his defence." (Emphasis supplied)

[58] Briefly, in that case, the applicant was convicted for the offence of rape. The applicant and the complainant were well known to each other. He admitted to having sexual intercourse with the complainant but said he did so with her consent. On appeal, it was submitted that the learned judge gave improper directions on the defence of honest belief. This ground was rejected by this court on the basis that the defence of honest belief did not arise on the evidence, as the appellant's assertion was not that he honestly believed that the complainant was consenting but rather, that they had sexual intercourse by arrangement. In the circumstances, no direction on honest belief was required.

[59] In **R v Clement Jones**, the appellant who was convicted for rape had asserted at the trial, that the sexual intercourse was consensual. On appeal, issue was taken with the trial judge's direction to the jury that the appellant would not be guilty if he believed that the complainant had consented and that belief was reasonably held. Briefly, in that case, the appellant and the complainant were members of the same church, and the appellant was accustomed to taking the complainant to church on Fridays. On the day of the offence, the appellant invited the complainant into his vehicle and confessed that he wanted to have an intimate relationship with her. She declined his offer, and he reacted by taking her to a secluded area where he slapped and punched her several times, threatened to kill her and then forcefully had sexual intercourse with her.

[60] The appellant's case was that he and the complainant regularly engaged in acts of consensual sexual intercourse and, on the day in question, they had consensual sexual intercourse by arrangement. The medical evidence revealed that the injuries sustained by the complainant were not consistent with voluntary sexual intercourse. Bingham JA stated at page 4 of the judgment:

> "Given these two diametrically opposite accounts, the matter resolved itself down to a credibility issue as to which of the two accounts, viz., that of the complainant or the appellant was to be believed…On the basis of her account, the appellant could not have understood her reaction to his advances in any other manner than that she was not consenting to having her person violated."

He continued at pages 5 to 6:

> "Given the facts in this case, however, this ground of complaint is untenable. On the basis of the appellant's account, if accepted, the result would be a situation in which there was consensual sexual intercourse between these two persons by arrangement supporting a verdict of not guilty. On the basis of the complainant's account, if accepted, the result would amount to a situation in which there was a forceful sexual assault on the complainant at knife point supporting the verdict arrived at."

At pages 6 to 7, Bingham JA stated further:

> "On these facts there was no room for any suggestion that the appellant, based on the complainant's conduct, may either have obtained mixed signals or got his signals all wrong and had indulged in sexual intercourse with the complainant in the mistaken belief that she was consenting when in fact she was not.
>
> In light of the defence put forward by the appellant there was no room for any direction on honest belief."

[61] In the instant case, the applicant, in his defence, asserted that the sexual intercourse was consensual and that the allegation of rape was borne out of jealousy. At no time did he state that, based on the complainant's actions, he thought that she was

consenting. Based on **R v Aggrey Coombs** and **R v Clement Jones**, it is clear that the issue of honest belief did not arise. On the facts, there is no room for any misinterpretation of the complainant's reaction to the act of sexual intercourse. She resisted the applicant's attempts from the very outset to take her to his home. Whilst there, they tussled and she resisted his attempts to have sexual intercourse with her. The applicant's own evidence was that he cut the complainant's shorts in an attempt to stop her from leaving. This does not suggest that the applicant was under the misapprehension that the complainant was desirous of having sexual intercourse with him and that she was, in fact, consenting to do so. There was no evidence which could have grounded a direction on honest belief.

[62] We have, however, noted that the learned trial judge did, in fact, address the issue of honest belief. She stated as follows:

> "Therefore, if the [applicant] believed, or may have believed, that the complainant consented to him having sexual intercourse with her, then there would be no such intent in his mind, and he would not be guilty of the offence of [r]ape. But, such a belief must be honestly held by the [applicant] at the time when intercourse was taking place, or when it began, that she was consenting to it."

[63] The jury, by its determination that the applicant was guilty of the offence, clearly, rejected the notion that he honestly believed that the complainant consented to have sexual intercourse with him.

[64] In the circumstances, it is our view that the learned trial judge's directions were both adequate and appropriate. There is therefore no merit in this ground.

Ground three- The sentence is manifestly excessive

Submissions

For the applicant

[65] Mr Robinson reminded the court that the normal range of sentences for the offence of rape is 15 to 25 years' imprisonment (see The Sentencing Guidelines for use by Judges

of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines')). Counsel submitted that the learned trial judge failed to conduct a proper analysis during the sentencing process and imposed the maximum sentence within the range, which was manifestly excessive.

[66] He submitted, further, that whilst the learned trial judge recounted the principles of sentencing, there was no indication that they were applied. Mr Robinson submitted that the learned trial judge, in her consideration of the aggravating factors, erred when she included the complainant's evidence that the applicant had pulled her into his house and assaulted her with the use of a knife. Counsel asserted that there were inconsistencies in those aspects of the complainant's evidence, which he posited were "dispelled in cross-examination". It was also submitted that the learned trial judge failed to consider the mitigating factors.

[67] Where the issue of the factors that may be considered to be aggravating is concerned, counsel referred to **R v Roberts** [1982] 1 ALL ER 609, where at page 610, Lord Lane CJ said:

> "Some of the features which may aggravate the crime are as follows. Where a gun or a knife or some other weapon has been used to frighten or injure the victim. Where the victim sustains serious injury (whether that is mental or physical). Where violence is used over and above the violence necessarily involved in the act itself. Where there are threats of a brutal kind. Where the victim has been subjected to further sexual indignities or perversions. Where the victim is very young or elderly. Where the offender is in a position of trust. Where the offender has intruded into the victim's home. Where the victim has been deprived of her liberty for a period of time. Where the rape, or succession of rapes, is carried out by a group of men. Where the offender has committed a series of rapes on different women, or indeed on the same woman."

[68] In respect of the length of the sentence, reference was made to **Percival Campbell v R** [2013] JMCA Crim 48, in which Morrison JA (as he then was), stated:

> "[16] On appeal, the appellant contended that the sentence of 30 years' imprisonment for rape was manifestly excessive. Delivering the judgment of the court, Brooks JA referred to two previous decisions in which the level of sentences in rape cases had been considered by this court. The first is **Sheldon Brown v R** [2010] JMCA Crim 38, in which the complainant was abducted from her home, taken to various places and raped several times by the applicant. The applicant then returned her to her home, where he raped her again. The trial judge imposed a sentence of 20 years' imprisonment at hard labour, which this court declined to disturb. The second is **Paul Allen v R** [2010] JMCA Crim 79, in which the complainant was abducted at gunpoint and taken to a house, where the appellant raped her, indecently assaulted her and robbed her of cash. On appeal, this court again declined to reduce the sentence of 20 years' imprisonment for rape."

[69] Mr Robinson also referred to **Sheldon Brown v R** [2010] JMCA Crim 38, where it was stated that a sentence of 20 years had been imposed after the appellant was convicted for rape. Counsel submitted that an appropriate sentence would be 15 years' imprisonment with the stipulation that the applicant serve 10 years before being eligible for parole. He also pointed out that the applicant was not credited with the eight months that he spent in custody.

[70] In the circumstances, it was submitted that the sentence ought to be set aside.

For the Crown

[71] Miss Thomas submitted that the sentence imposed by the learned trial judge was not manifestly excessive. It was also submitted that she adopted the correct approach in sentencing the applicant and considered both the mitigating and aggravating factors. Miss Thomas submitted, further, that the learned trial judge was not precluded from considering the complainant's evidence that the applicant was armed with a knife as the inconsistencies surrounding that evidence were evidently not found by the jury, to be material.

[72] Miss Thomas stated that the learned trial judge considered the principles of sentencing as articulated by Lawton LJ in **R v Sargeant** (1974) 60 Cr App R 74. She

indicated that the learned trial judge used the appropriate methodology in that, she identified a starting point and took into account the aggravating and mitigating factors. In this regard, reference was made to **Daniel Roulston v R** [2018] JMCA Crim 20. Miss Thomas pointed out that, in **Daniel Roulston**, the sentence of 20 years' imprisonment imposed on the appellant who had pleaded guilty to the offence of rape was reduced to 15 years. She submitted that the applicant in the instant case had gone through a trial and the sentence was justified, in light of the manner in which the offence was committed. Counsel listed the aggravating factors as the use of the knife, the applicant's refusal to allow the complainant to use the bathroom and the fact that the parties were known to each other. The mitigating factors, she said, were the fact that the applicant had no previous convictions, his good social enquiry report and the fact that he was the sole caregiver for his 11-year-old son. Miss Thomas agreed that the applicant ought to be credited with the eight months that he spent in custody.

[73] In the circumstances, it was submitted that the appeal against sentence ought to be dismissed.

Discussion

[74] 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."

[75] 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 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)

[76] 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, **Meisha Clement v R** [2016] JMCA Crim 26 ('**Meisha Clement**') and, more recently, in **Patrick Green v R** [2020] JMCA Crim 17.

[77] In **Meisha Clement**, the approach which is to be adopted by this court was stated thus:

> "[43] On 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. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[78] In **Meisha Clement v R**, the methodology to be employed by the sentencing judge was stated to be as follows:

> "[41] (i) identify the appropriate starting point; (ii) consider any relevant aggravating features; (iii) consider any relevant mitigating features (including personal mitigation); (iv) consider, where appropriate, any reduction for a guilty plea; and (v) decide on the appropriate sentence (giving reasons)."

[79] The procedure was further addressed in **Daniel Roulston v R** 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:

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)."

[80] At the time when the applicant was sentenced, the learned trial judge would not have had the benefit of these decisions, or the Sentencing Guidelines. However, this approach to the sentencing exercise received this court's approval in **R v Evrald Dunkley** (unreported) Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002.

[81] The learned trial judge, in her sentencing remarks, began by reminding herself of the purpose and principles of sentencing. She highlighted the need to have a proportionate sentence having regard to the gravity of the offence and the responsibility of the offender (see **R v Sydney Beckford and David Lewis** (1980) 17 JLR 202).

[82] She indicated that the maximum sentence for the offence of rape was life imprisonment and that the normal range of sentences imposed was from 15 to 25 years' imprisonment with the usual starting point being 15 years.

[83] The learned trial judge identified the aggravating factors as being:

i. The manner in which the offence was committed and the violence used on the complainant. It was noted that the applicant had grabbed the complainant by her hand and pulled

her into his house despite her protestations; a fight ensued between them during which, the applicant produced a knife and the complainant was injured;

ii. The evidence of the complainant that whilst she was urinating on the floor the applicant came and had sexual intercourse her; and

iii. The fact that the complainant left the house "literally" naked.

[84] The learned trial judge, although she acknowledged that there were mitigating factors, did not go further and identify those factors. She did, however, indicate, that the applicant's witnesses spoke of his good character. It is unclear whether any other factors were considered by her. She said:

> "Are there any mitigating circumstances in relation to you? Yes. Although your counsel didn't say it, but you have two previous convictions, firearm and ammunition, albeit it was committed in 2006, I believe the record shows.
>
> Your character witnesses, I will not, I will just bear in mind that does not have a bearing on the sentence I impose on you. I will pose emphasis on the fact that the nature and circumstances under which the offence which you have committed, for which you are convicted, was committed. Your four witnesses gave evidence that you are a quiet and good person,…they were not aware apparently that you have two previous convictions and for the offence of illegal possession of firearm and ammunition."

[85] The learned trial judge ultimately found that the mitigating factors were outweighed by the aggravating factors. She also stated that "…the mitigating circumstances that I find, which is, you have no previous convictions, that is the only mitigating factor in the circumstances which could suffice". The learned trial judge then concluded that a sentence of 25 years' imprisonment with the stipulation that the applicant serves 20 years before being eligible for parole was appropriate. No consideration was given to the eight months that the applicant spent in pre-trial

detention. It is settled that full credit must be given for time spent in custody. This issue was addressed by Morrison P in **Meisha Clement v R** who stated thus:

> "[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'."

See also **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ).

[86] In the circumstances, in accordance with the established practice of the court, we will proceed to consider the question of sentence afresh.

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

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

[88] From our examination of cases, where the offence of rape occurred with the use of a weapon or where the complainant was abducted, the usual range of sentences, after

a trial, can be said to be between 20 and 25 years' imprisonment (see **Paul Allen v R** [2010] JMCA Crim 79 ('**Paul Allen**'), **Sheldon Brown v R** [2010] JMCA Crim 38 ('**Sheldon Brown**') and **Oneil Murray v R** [2014] JMCA Crim 25 ('**Oneil Murray**')).

[89] In **Paul Allen**, the applicant was tried and convicted in the Western Regional Gun Court for the offences of illegal possession of firearm, rape, indecent assault and robbery with aggravation. His sentence of 20 years' imprisonment for the offence of rape was upheld by this court. In **Sheldon Brown**, the application to appeal the conviction and sentence for the offences of abduction and rape was refused. The applicant having been tried and convicted was sentenced to 10 years' imprisonment at hard labour and 20 years' imprisonment at hard labour respectively. In **Oneil Murray**, where a gun was used in the commission of two incidents of rape, the applicant was sentenced to five and 23 years' imprisonment respectively for illegal possession of firearm and rape in respect of the first incident and five and 19 years' imprisonment respectively for illegal possession of firearm and rape in respect of the second incident. The applicant had pleaded guilty. The sentences were set aside in respect of the offence of rape and sentences of 18 years and 15 years' imprisonment substituted therefor.

[90] In **Paul Maitland v R** [2013] JMCA Crim 7, where a young woman was raped by two men after being taken to an open lot, a sentence of 30 years' imprisonment was imposed for one of the accused men. On appeal, the sentence was reduced to 23 years taking into consideration the fact that the appellant was 35 years old at the time of conviction and did not use a firearm in the commission of the offence.

[91] In the instant case, taking into account the usual range of sentences for these types of offences, which involves abduction and the use of an offensive weapon during the commission of the offence, a reasonable starting point, in our view, would be 20 years' imprisonment. The aggravating factors are:

(1) The prevalence of the offence in Jamaica;

(2) The detention of the complainant after the applicant dragged the complainant into his house;

(3) The injury to the complainant's head when she was being dragged through the gate and that caused to her finger by the knife;

(4) The parties were known to each other;

(5) The applicant's cutting off the complainant's shorts to restrain her liberty;

(6) The complainant having to resort to urinating on the floor when the applicant refused to let her go to the bathroom; and

(7) The indignity suffered by the complainant caused by applicant's destruction of her clothing which left her naked until her family arrived.

[92] The mitigating factors are:

(1) The applicant has no previous conviction for a similar offence;

(2) The applicant's favourable social enquiry report; and

(3) The evidence of his witnesses that he was of good character albeit that the mitigating force of this would have been significantly eroded by his previous convictions for firearm offences which were not yet spent.

[93] When the aggravating factors are balanced with the mitigating factors, we are of the view that the aggravating factors far outweigh the mitigating factors. The aggravating factors would increase the sentence to no less than 27 years' imprisonment and the mitigating factors would reduce the sentence to no less than 25 years' imprisonment. We

find no fault with the sentence imposed by the learned trial judge, save and except her failure to take into account the time that the applicant spent in custody.

[94] The applicant spent eight months in custody. When full credit is given for the time spent in custody awaiting sentence, the sentence would be 24 years and four months' imprisonment. We are of the view that, in the interests of justice, the period before which he would be eligible for parole ought to be similarly adjusted given the resultant reduction in the determinate sentence. Accordingly, the period before which the applicant would be eligible for parole, would be 19 years four months.

Disposal

[95] In all these circumstances, we therefore make the following orders:

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

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

(3) The hearing of the application for permission to appeal sentence is treated as the hearing of the appeal.

(4) The appeal against sentence is allowed.

(5) The sentence of 25 years' imprisonment, with the stipulation that the applicant serves 20 years before being eligible for parole, is set aside. Substituted therefor is a sentence of 24 years' and four months' imprisonment with the stipulation that the applicant serves 19 years and four months before being eligible for parole, taking into account the eight months spent in pre-sentence custody.

(6) The sentence should be reckoned as having commenced on 12 January 2016.