[2022] JMCA Crim 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 37/2018

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE BROWN JA (AG)

CORNEL DAWNS v R

Miss Zara Lewis for the appellant

Mrs Christine Johnson Spence and Janek Forbes for the Crown

7 December 2021 and 25 March 2022

BROWN JA (AG)

[1] The appellant pleaded guilty to a four-count indictment which charged him with the offences of abduction, rape, grievous sexual assault and murder respectively, before a judge of the Supreme Court ('the learned judge'), sitting in the Clarendon Circuit Court, on 8 March 2018. On 26 March 2018, the learned judge sentenced the appellant to one year and six months, eight years, 15 years and life imprisonment with the stipulation that he not be eligible for parole before serving 20 years' imprisonment, on the respective counts. The sentences were ordered to run concurrently. The appellant was granted leave to appeal against the sentences imposed by a single judge of this court.

[2] The facts upon which the appellant was sentenced are as follows. On 1 May 2016, sometime in the night, the deceased, the appellant, friends of the deceased and others were in attendance at a party at Bottom Hall District in the parish of Clarendon. A friend of the deceased observed her leaving the party in the company of the appellant and another man, Javez Cooper. When the friends of the deceased were ready to leave the

party, they searched among the patrons of the party for the deceased but did not find her.

[3] The friend, who had seen the deceased leaving in the company of the appellant and Javez Cooper, confronted Javez Cooper about the disappearance of the deceased the following day. Later that day Javez Cooper led the police to a football field where the body of the deceased was found. The deceased had a wound to her head and her face was mangled. The appellant and Javez Cooper each gave a cautioned statement. Save for putting himself on the scene at the time the offences were committed, the appellant's statement under caution is entirely exculpatory. There is, therefore, no explanation for the commission of the offence, on the prosecution's case, in spite of the plea of guilty. It is against this background that we are constrained to resort, in a limited way, to the appellant's social enquiry report, prepared for use in the sentencing exercise.

[4] In addition to pleading guilty to the charges in the indictment, the appellant also admitted to killing the deceased to the probation aftercare officer in the social enquiry report. In his interview with the probation aftercare officer, the appellant admitted leaving the party in the company of the deceased and Javez Cooper but said it was in pursuance of a commercial sexual arrangement. According to the appellant, the deceased agreed to have sexual relations with himself and Javez Cooper in exchange for the payment of $8,000.00, before all three left the party. After the bargain was struck, they left to the football field.

[5] At the football field, the appellant stated that, the deceased fulfilled her end of the bargain but the men defaulted; the appellant informed the deceased that they only had $5,000.00. That led to a verbal confrontation during which the deceased started running while shouting "rape". The appellant said he threw a large stone at the deceased which hit her on her head, knocking her to the ground. There the deceased remained motionless. After that, the appellant and Javez Cooper fled the scene.

The ground of appeal

[6] The sole ground of appeal is that the sentence is manifestly excessive.

Submissions on behalf of the appellant

[7] Miss Zara Lewis, counsel for the appellant, submitted that the following sub-issues arise from the ground of appeal:

> "(i) The learned trial judge fell into error because she failed to take into consideration the factors relevant to sentencing of convicted persons who plead guilty at the first opportunity and in accordance with the guidance in Tafari Morrison v R [2020] JMCA Crim 34.
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> (ii) The Learned Judge [sic] failed to identify the starting point in arriving at the sentence for the Appellant [sic].
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> (iii) The Learned Judge [sic] erred and was wrong in law in failing to outline the mitigating factors and as a result failed to adequately take into account the mitigating factors in this case before arriving at a sentence.
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> (iv)The learned judge erred in failing to direct her mind to the four classical principles of sentencing before imposing the sentence.
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> (v) The learned trial judge erred and was wrong in law by failing to take into account the time spent on remand prior to the trial of the matter at the time of sentencing the Appellant by way of an arithmetic deduction."

[8] In so far as it concerned the sentence of life imprisonment, no complaint was made. The challenge in relation to this count was limited to the stipulated term to be served before becoming eligible for parole. Miss Lewis submitted that an appropriate starting point for the period stipulated to be served before parole, would be 20 years. The court was referred to **Anthony Russell v R** [2018] JMCA Crim 9 and **Trevor White and Ors v R** [2017] JMCA Crim 13, in support of this submission.

[9] In respect of the convictions for the sexual offences, Miss Lewis submitted that the appellant was entitled to a discount of up to one half of his sentence on the basis of his guilty plea. Miss Lewis submitted that the appellant pleaded guilty on the first opportunity he was given.

[10] Miss Lewis submitted that there was really one aggravating factor which the learned judge rightly took into consideration. That is to say, the offence of murder is a serious one which resulted in the death of a young woman whose death has devastated her family. The other possible aggravating feature, the two previous convictions recorded against the name of the appellant, counsel submitted the learned judge was correct in not taking them into account as they were committed when the appellant was a minor.

[11] Counsel next submitted on the mitigating factors. Adopting the language of Harrison JA in **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrate Criminal Appeal No 55/2001, judgment delivered 5 July 2002, counsel submitted that, having decided that a sentence of imprisonment was appropriate, the learned judge ought to have gone on to consider other factors, including mitigation. Miss Lewis helpfully extracted the list of mitigating factors which are set out in **Meisha Clement v R** [2016] JMCA Crim 26. She cited the age of the appellant at the time, 17 years, as one mitigating factor the learned judge should have taken into consideration. In her submission, this fact was a good indicator that the appellant had a very good prospect of rehabilitation. This submission was anchored in Lawton LJ's dictum in **R v Sargeant** (1974) 60 Cr App Rep 74, at page 78.

[12] Miss Lewis also submitted that the appellant had spent 22 months in custody before he was sentenced, which should have been deducted from the sentence.

[13] From her suggested starting point of 20 years, for the offence of murder, Miss Lewis invited the court to substitute a sentence of 11 years and six months, after applying a 33 1/3% deduction for the plea of guilty and credit of 22 months for time served on remand. That accorded with her answer to the court that, in her view, a sentence for

murder that would shock the public conscience would be one falling below 10 years' imprisonment. It was her further submission that the sentences on counts one and two (abduction and rape) were fair but the sentence on count three (grievous sexual assault) should be reduced to eight years, to bring it in line with the sentence on count two (rape).

Submissions on behalf of the Crown

[14] Mrs Johnson Spence agreed that the sentences on counts one and two are appropriate. Accordingly, the required stipulation of sentence to be serve before parole on count two should be five years and three months.

[15] Mrs Johnson Spence argued for the upholding of the 30% reduction in sentence which the learned judge imposed. In respect of count three, grievous sexual assault, counsel for the Crown proposed a starting point of 15 years. To that figure she added two years, taking into account the aggravating and mitigating factors which were assigned values of three years and one year respectively. A 30% reduction for the appellant's guilty plea would bring that to 12 years and, giving credit for the 22 months spent on remand, would result in a sentence of 10 years and two months. Accordingly, it was submitted that the period to be served before parole would therefore be six years and seven months.

[16] For count four, murder, Mrs Johnson Spence recommended the substitution of the period of 20 years with a period of 17 years and six months, to be served before parole eligibility. The period recommended was arrived at as follows. Learned counsel for the Crown selected a starting point of 25 years, relying on **Paul Brown v R** [2019] JMCA Crim 3, then increased that figure by two years, that being the difference between the values assigned to the aggravating features, three years, and the mitigating factors, one year. The same percentage discount for his guilty plea was applied and the sentence similarly reduced for time served on remand.

Discussion

[17] Three of the offences to which the appellant pleaded guilty carried prescribed mandatory minimum sentences. However, where a defendant pleads guilty, the court is allowed to impose sentences which fall below the stated statutory minima, except for murder, and the periods to be served before becoming eligible for parole are accordingly adjusted, by a statutory prescription of no less than two-thirds of the sentences ultimately imposed. Section 42D(3) of the Criminal Justice (Administration) Act ('CJAA') stipulates:

> "(3) Subject to section 42E, and notwithstanding the provisions of any law to the contrary, where the offence to which the defendant pleads guilty is punishable by a prescribed minimum penalty the Court may-
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> (a) Reduce the sentence pursuant to the provisions of this section without regard to the prescribed minimum penalty; and
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> (b) Specify the period, not being less than two-thirds of the sentence imposed, which the defendant shall serve before becoming eligible for parole."

It is in the endowment of this discretion to impose a sentence below that prescribed that the court is allowed to give full effect to other provisions of the CJAA, for example, a reduction of up to fifty percent after a plea on the first relevant date, for offences other than murder (see CJAA section 42D(2)(a)). There are, of course, other relevant considerations which touch and concern the sentencing exercise.

[18] The principles applicable to the sentencing phase of a criminal trial were distilled in **Meisha Clement v R**, the seminal authority in the area. In **Meisha Clement v R**, a 2016 decision of this court, and the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts ('the Sentencing Guidelines') which was published in 2017, a guide to the methodological approach to sentencing is provided. Also instructive is **Daniel Roulston v R** [2018] JMCA Crim 20, in which McDonald-Bishop JA refined the methodology articulated in **Meisha Clement v R** and the Sentencing Guidelines. At para. [17] the learned judge of appeal said:

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

[19] Where the sentencing judge has not faithfully applied the governing principles of sentencing, the learned judge would have erred. Accordingly, that error in the application of the relevant principles would warrant the intervention of this court: **Alpha Green v R** (1969) 11 JLR 283, applied in **Meisha Clement v R** at para. [42].

[20] This case was decided after the authorities cited above, as well as the publication of the Sentencing Guidelines. From the learned judge's brief remarks, it is not apparent that the methodology which sentencing judges are enjoined by the authorities to follow was adopted. Miss Lewis' complaint that the learned judge failed to indicate her starting point therefore has merit. Respectfully, however, the submissions in relation to the learned judge's failure to apply the decision in **Tafari Morrison v R**, are misconceived.

[21] In so far as the offence of murder is concerned, Miss Lewis submitted that 20 years is an appropriate starting point for determining the period to be served before the appellant becomes eligible for parole. There is no prescribed usual starting point for the offence of murder in the Sentencing Guidelines. This is left to the discretion of sentencing

judges. However, we must first determine the range of the sentence. In the circumstances of this case, where the learned judge imposed a sentence of imprisonment for life, the prescribed mandatory minimum period to be served before becoming eligible for parole is 15 years. The range of sentence is therefore 15 years to life imprisonment.

[22] Our next task is to decide on an appropriate starting point within this range. Although neither side referred the court to section 42F of the CJAA, this is the applicable section in deciding on a starting point where, as here, the sentencing judge decided the appropriate sentence is imprisonment for life. It is perhaps useful to quote the section:

> "42F. Where the offence to which the defendant pleads guilty is one for which the Court may impose a sentence of life imprisonment, and the Court would have imposed that sentence had the defendant been tried and convicted for the offence, then, for the purpose of calculating a reduction of sentence in accordance with the provisions of this Part, a term of life imprisonment shall be deemed to be a term of thirty years."

[23] In applying this section, this court, in **Tyrone Gillard v R** [2019] JMCA Crim 42, took 30 years as its starting point. From there the court went on to decide on and apply a percentage discount, after having regard to the factors set out in section 42H of the CJAA. In adopting this methodology, F Williams JA, at para. [11], based himself on what he discerned to be a "two-step process", outlined in **Lincoln Hall v R** [2018] JMCA Crim 17 by Morrison P. In F Williams JA's articulation, the first step appears to be to identify the statutory fiction of life imprisonment, deemed to be 30 years' imprisonment, by virtue of section 42F (relying on Morrison P, at para. [20] of **Lincoln Hall v R**).

[24] The next, in this "two-step" exercise, was to decide on the percentage discount, consonant with section 42H. According to F Williams JA, at para. [13]:

> "The second step was then "to determine the actual percentage by which the sentence should be reduced within the range indicated" in the CJAAA depending on the offence, having regard to the factors outlined in section 42H."

Having set out the procedure to be followed, the court went on to apply it to the circumstances in that case.

[25] The court considered first the appropriateness of the sentence of life imprisonment. Upon its consideration of the facts, the court distilled the following factors. Firstly, the trivial circumstances that gave rise to the killing and the gruesome nature of the murder. Secondly, a review of similar cases in which the defendants had pleaded guilty in similarly egregious circumstances which attracted a like sentence of imprisonment for life. Thirdly, it therefore could not be said that the imposition of a life sentence, in preference to a fixed term sentence, was manifestly excessive.

[26] It was against this background that the court in **Tyrone Gillard v R** took its "starting point" to be 30 years' imprisonment, as was said above. At para. [15], F Williams JA said:

> "…The issue in this case has arisen in respect of the stipulated pre-parole period. In seeking to arrive at the appropriate pre-parole period, our starting point in those circumstances would therefore be 30 years in accordance with section 42F of the CJAAA".

The court went on to apply a 30% discount, reducing the sentence to 21 years, then gave credit of one year for time spent on remand. That resulted in a sentence of 20 years' imprisonment before becoming eligible for parole. In arriving at that figure, the learned judge of appeal noted that the learned sentencing judge "gave the appellant a two-year reduction for not having any previous convictions". In declining to follow suit, F Williams JA said, at para. [17]:

> "…the consideration of no previous convictions is already a factor that would have been considered (pursuant to section 42H (f)) in arriving at the appropriate percentage discount."

[27] The application of section 42F was also considered in **Troy Smith, Precious Williams Andino Buchanan v R** [2021] JMCA Crim 9 ('**Troy Smith et al v R'**), in which **Lincoln Hall v R**, but not **Tyrone Gillard v R**, was considered. All three applicants

were initially indicted for capital murder of Clayton Byfield, who was shot and killed in the course or furtherance of the robbery of his gold necklace. After their arraignment and the empanelling of the jury, Troy Smith and Precious Williams asked to be arraigned afresh and both pleaded guilty to non-capital murder. Andino Buchanan proceeded to trial and was convicted on an amended indictment for non-capital murder. All three were subsequently sentenced to imprisonment for life, with the stipulation that Troy Smith and Andino Buchanan each serve 25 years and Precious Williams serves 20 years before becoming eligible for parole. All three applied for permission to appeal. Andino Buchanan wished to appeal both his conviction and sentence, while Troy Smith and Precious Williams sought to appeal their sentences only, having pleaded guilty. For present purposes, only the applications of Troy Smith and Precious Williams are relevant.

[28] In respect of Troy Smith, he did not challenge his sentence of life imprisonment. His complaint concerned the term of imprisonment recommended to be served before parole eligibility. His counsel argued that, in arriving at the term of 25 years, the learned judge failed to apply the principles set out in the Sentencing Guidelines and the law laid down in the CJAA. In particular, the learned judge neither indicated a range nor a starting point. She failed to say what percentage discount she gave for the guilty plea, reflect that credit was given for time spent on remand before the trial and consider the applicant's previous unblemished record. In submitting that the 25 years imposed should have been the starting point, **Lincoln Hall v R,** amongst other cases, was cited.

[29] As it related to Precious Williams, she too took no issue with the sentence of imprisonment for life. However, complaints similar to those made on behalf of Troy Smith were advanced in support of the ground that the sentence ordered to be served before becoming eligible for parole was manifestly excessive. It was submitted that the learned judge failed to: (a) indicate a starting point within the range of sentence for this offence; (b) show what weight was given to some of the factors she identified as pertinent to sentencing; (c) indicate that consideration was given to the fact of the applicant having a child and was a single mother; (d) mention that the applicant was 20 years of age and,

though unemployed at the material time, showed a willingness to be gainfully employed; recognise the fact that she had no previous convictions and had prospects for rehabilitation; and (e) consider the applicant's role in the commission of the crime (described as the most glaring omission).

[30] It was further submitted on behalf of Precious Williams that an examination of the cases revealed a range of between 20 and 30 years for the offence of murder. Citing **Lincoln Hall v R** and **Troy Jarrett and Jermaine Mitchell v R** [2017] JMCA Crim 38, it was submitted that the upper end of the range was normally left for the worst of the worst cases. Therefore, it was argued, a mid-point sentence of 25 years would be an appropriate starting point.

[31] Although the court in **Troy Smith et al v R** treated with the applications for leave to appeal against sentence for Troy Smith and Precious Williams separately, an identical approach was adopted in addressing the global challenge that their sentences were manifestly excessive. The approach employed was that articulated in **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002. The approach postulated in **R v Evrald Dunkley** was accepted in **Meisha Clement v R**, in which Morrison JA (as he then was) set out the applicable methodology. This methodology was later 'codified' and published in the Sentencing Guidelines. Although **Daniel Roulston v R** was not mentioned in **Troy Smith et al v R**, there was no departed from the refined methodology it advocated.

[32] Although neither **R v Evrald Dunkley** (fraudulent conversion), **Meisha Clement v R** (fraudulent transaction) nor **Daniel Roulston v R** (sexual offences) were cases in which the appellants had been sentenced for murder, the methodological approach to sentencing which they established has always been treated as of general application. In its reasoning under this methodological rubric, the court in **Troy Smith et al v R** made two references to **Lincoln Hall v R**. Firstly, after setting out section 42H of the CJAA, it was said that this section clothes a sentencing judge with the discretionary latitude to determine the percentage discount in the sentence awarded ultimately to a defendant,

citing para. [22] of **Lincoln Hall v R** (see para. [132] of the judgment). Secondly, after concluding that its intervention was called for, Edwards JA, writing on behalf of the court, said, at para. [144]:

> "In **Lincoln Hall v R** this court (per Morrison P) considered that there was no basis to interfere with the learned judge's discretion not to grant any discount for the guilty plea, where she considered 30 years before being eligible for parole, to be an appropriate sentence, in the circumstances of that case. This was a matter, the court said, to be left entirely to the discretion of the sentencing judge, given the range of factors set out in section 42H of the CJA, which it found the judge had taken account of (see paragraph [24])."

[33] Three principles may be distilled from **Troy Smith et al v R**. Firstly, notwithstanding that life imprisonment is deemed to be 30 years' imprisonment, the sentencing judge is still required to stipulate a period to be served before becoming eligible for parole. Secondly, in stipulating that period, the statutory fictional term of 30 years is to be regarded as the upper limit of the pre-parole term of imprisonment. If 30 years is to be starting point, consistent with the principle that the more severe sentence is to be reserved for the worst of the worst cases, this would require the sentencing judge to expressly say so, underlining his characterisation with reasons. Thirdly, the sentencing court ought to consider a range of sentence within which to select a starting point (see paras. [141] to [142]).

[34] The court in **Troy Smith et al v R** considered a range of 25 to 30 years as appropriate.

[35] In this case, no issue was joined in the arguing of this appeal on the appropriateness of the sentence of life imprisonment. Notwithstanding that, the sentence was demonstrably warranted, not only from the wanton nature of the killing which was merely to silence the deceased, even giving minimal weight to what the appellant said to the probation aftercare officer, but also the desecration of her body. The extent of the

desecration resulted in a closed casket funeral service which, from the social enquiry report, increased the pain of the bereaved family. Therefore, the life sentence should be affirmed.

[36] In our view, the wantonness of the killing in this case equals that in **Troy Smith et al v R**. While we regard the killing as wanton, we hesitate to classify it as the most egregious, the desecration of the body notwithstanding. That being so, this case is distinguishable on its facts from **Tyrone Gillard v R**. In brief, the appellant in that case was one of a group of men who bludgeoned and chopped the deceased to death. The appellant, armed with a guava stick, summoned some friends who armed themselves with machetes and confronted the deceased. The deceased had been stalking and harassing the appellant's girlfriend, who previously had an intimate relationship with the deceased. The deceased had chop wounds to his head, neck, hand and feet. Although the court in **Tyrone Gillard v R** did not assign the epithet, 'worst of the worst', the sheer savagery of the killing, effectuated and aggravated by multiple participants, justified the higher starting point.

[37] In light of the dissimilarity between this case and **Tyrone Gillard v R**, we are disinclined to adopt the higher starting point. Therefore, consistent with **Troy Smith et al v R** and the submission of Mrs Johnson Spence for the Crown, relying on **Paul Brown v R**, we find 25 years to be an appropriate starting point in this case also. In **Paul Brown v R**, the deceased was chased and shot to death. His recommended term of imprisonment before parole was reduced from 35 years to 23 ½ years. After a review of the cases, the court in **Paul Brown v R** chose a starting point of 26 years. In setting the starting point of 25 years in this case, it is noted that although, by definition, murder inherently involves violence, in the circumstances of this case violence over and above that which was necessary for the commission of the offence is a factor that is taken into account. On the appellant's own account, the violence visited upon the deceased that resulted in her death

was in circumstances where she was fleeing after a sexual assault, which, in itself, involved an act of violence.

[38] After deciding on the starting point, the next step, according to the authorities, is to consider whether this notional sentence is to be adjusted upwards or downwards, by factoring in the aggravating and mitigating features. Although the learned judge did not use these platitudes, her language clearly reflects a mind exercised by the aggravating as well as the mitigating factors.

[39] From the meagre facts, we have been able to sift the following aggravating elements. Firstly, the offence was committed by more than one perpetrator. Secondly, as the learned judge correctly observed, one of the appellant's previous convictions (gun-related robbery when he was over 14 years of age) showed previous resort to violence. Indeed, the appellant's profile is that of a male given to escalating violence. To that extent, we disagree with the learned judge that the appellant's previous convictions should not be taken into consideration. Thirdly, the sexual offences and murder are prevalent offences.

[40] Leaving aside the aggravating indices for the moment, we will now collate the mitigating circumstances. Firstly, as counsel in the court below and Miss Lewis both highlighted, the appellant was yet to attain majority at the time he committed the offences. The learned judge took particular note of the fact that he was 17 years of age (when the offence was committed) and expressly said this had to be taken into account. The appellant was 19 years of age at the time he was sentenced. The only other mitigatory feature urged upon the learned judge was that the appellant was "in a 'rehabilitatory' state". Miss Lewis' submissions were similarly confined. While it is correct that the learned judge did not expressly say that the appellant was not beyond recall, the reference to his youth is an indication that he was being treated as someone who could be reformed.

[41] We think the mitigation category may usefully be enlarged by the following. One, the appellant's corresponding immaturity as a consequence of his youth. Two, the appellant's confession to the crime can be seen as co-operation with the police. Three, by his plea of guilty, the appellant had expressed remorse, notwithstanding the contrary view expressed by the probation aftercare officer (see **Keith Smith v R** (1992) 42 WIR 33, applied in **Meisha Clement v R**). The probation aftercare officer arrived at that opposite view by virtue of the fact that the appellant "smiled and laughed quietly at intervals" and otherwise showed "no visible evidence of remorse".

[42] When both the aggravating and mitigating indices are weighted, the aggravating factors tip the scale. We would, therefore, add five years to the sentence, making it 30 years. For the mitigating factors we reduce the sentence of 30 years by two years. The sentence before applying a percentage discount for the fact of the appellant's guilty plea is therefore 28 years' imprisonment.

[43] The next step is to consider whether the sentence of 28 years' imprisonment should be reduced by virtue of the fact that the appellant pleaded guilty. The level of the possible discount is regulated by statute (see section 42E of the CJAA and para. 10.10 of the Sentencing Guidelines). Section 42E is set out below:

> "42E. – (1) Subject to subsection (3), where a defendant pleads guilty to the offence of murder, falling within section 2 (2) of the *Offences Against the Person Act*, the Court may, in accordance with subsection (2), reduce the sentence that it would otherwise have imposed on the defendant had the defendant been tried and convicted of the offence.
>
> (2) Pursuant to subsection (1), the Court may reduce the sentence in the following manner –
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> a) where the defendant indicates to the Court, on the first relevant date, that he wishes to plead guilty to the offence, the sentence may be reduced by up to thirty-three and one third *per cent*;
>
> b) where the defendant indicates to the Court, after the first relevant date but before the trial commences, that

he wishes to plead guilty to the offence, the sentence may be reduced by up to twenty-five *per cent*;

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

(3) Notwithstanding subsection (2), the Court shall not impose on the defendant a sentence that is less than the minimum penalty for the offence as provided for pursuant to section 3(1)(b) of the *Offences Against the Person Act*.

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

[44] Consistent with the scheme in the CJAA, section 42E creates a direct relationship between the maximum allowable discount and when the plea of guilty is entered. It is not apparent on the record at what stage the appellant entered his guilty plea. Miss Lewis, in her written submissions, submitted that the appellant pleaded guilty when the case came up for trial on 8 March 2018. That suggests that the appellant's plea was not entered on the first relevant date. In spite of that, Miss Lewis went on to submit that the appellant "pleaded guilty to all four counts at the first opportunity he was given". In any event, extrapolating from the percentage discount the learned judge applied, it appears the plea was treated as having been entered on the first relevant date. Having regard to the uncertainty on the record concerning the stage at which the appellant pleaded guilty, we are inclined to accept the learned judge's treatment of the issue. Therefore, in accordance with the provisions under section 42E(2)(a) of the CJAA, the appellant's sentence for murder may be reduced by up to 33 1/3%.

[45] Acceptance that the plea was tendered on the first relevant date does not, however, dispose of the question of the percentage discount that may be applied, in acknowledgement of the appellant's plea of guilty. Since a sentence of life imprisonment

was imposed, the court must resort to the special regime under section 42F of the CJAA in calculating the percentage reduction in the appellant's sentence.

[46] The applicability of section 42F was considered in **Lincoln Hall v R**. In that case, the complaint was that the learned sentencing judge failed to take into account, either sufficiently or at all, what was described as the appellant's entitlement to a discount in his sentence on account of his plea of guilty and the inordinate delay of 10 years in bringing the case to trial. That is, having imposed a sentence of life imprisonment, following the appellant's plea of guilty, the sentencing judge refused to award the appellant any discount in his sentence in recognition of the entry of his guilty plea, on account of the appellant's manifest recidivism.

[47] Addressing the first complaint, the court observed that the category of murder to which the appellant had pleaded guilty, arising as it did under section 2(2) of the Offences Against the Person Act, concluded that it fell to be dealt with under section 42E of the CJAA. So that, by virtue of when the plea was entered and, in accordance with section 42E(2)(b), the sentence could be reduced by up to 25%, in that case.

[48] In this case, it was agreed on both sides that the appellant should receive a discount in his sentence on account of his guilty plea. In order to decide whether, and to what extent, the percentage discount, up to 33 1/3% under section 42E(2)(a), may be applicable, we must have regard to the factors laid down by the legislature in section 42H of the CJAA. For ease of reference we quote the section below:

> "Pursuant to the provisions of this Part, in determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made by a defendant within a particular period referred to in 42D (2) and 42E (2), the Court shall have regard to the following factors namely –
>
> a) whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;

b) the circumstances of the offence, including its impact on the victim;

c) any factors that are relevant to the defendant;

d) the circumstances surrounding the plea;

e) where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all the offences;

f) whether the defendant has any previous convictions;

g) any other factors or principles the Court considers relevant."

Having considered the above factors in the round, notwithstanding the appellant's two previous convictions, we find this case to be distinguishable from **Lincoln Hall v R**. In that case the court declined to interfere with the decision of the learned judge to forfeit the application of any discount. The question of whether the appellant in that case was entitled to any discount was considered to be "entirely a matter for the court's discretion," to be exercised within the parameters of the law generally, the facts of the case and the ambit of the factors in section 42H of the CJAA, per Morrison P, at para. [24]. This was consistent with the view expressed by Phillips JA in **Joel Deer v R** [2014] JMCA Crim 33, at para. [8], that ["t]he amount of credit to be given for a guilty plea is at the discretion of the judge". Accordingly, we adopt the position of both counsel that the appellant should receive a discount in his sentence by virtue of the fact that he pleaded guilty. What then should be the percentage discount in sentence?

[49] Counsel for the appellant submitted that in the circumstances of this case, the appellant is entitled to a discount in his sentence of the full 33 1/3%. We are unable to accept this submission. Having considered the factors in section 42H, in the light of the facts of this case, applying 33 1/3% would reduce the appellant's sentence to a figure below 20 years' imprisonment which, in our opinion, would trivialise the offence, making it one that would shock the public conscience. In the circumstances of this case, we think a 20% reduction in the appellant's sentence is just and appropriate. In applying a 20%

reduction, the appellant's sentence is reduced to 21 years and eight months. This, however, results in an increase in the appellant's sentence, which presents a procedural difficulty for the court.

[50] This court has the statutory jurisdiction to increase the sentence imposed on an appellant if, on a consideration of the sentence imposed at the sentencing hearing, this court thinks that a different sentence ought to have been passed. This authority is conferred upon the court by section 14(3) of the Judicature (Appellate Jurisdiction) Act ('JAJA'), which is quoted below:

> "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."

The exercise of the discretion given under the section is, however, circumscribed by principles of natural justice and, therefore, cannot be arbitrarily exercised.

[51] In **Earl Williams v The State (Trinidad and Tobago)** [2005] UKPC 11 (15 March 2005), ('**Williams v The State'**), the Privy Council considered a similarly worded section in the enabling legislation from Trinidad and Tobago as section 14(3) of JAJA. In that case, the Court of Appeal refused the application for leave to appeal against conviction and sentence, but went on to summarily increase the appellant's sentence from 25 years' imprisonment, to 30 years' imprisonment.

[52] In allowing the appeal, the Privy Council, confirming its earlier decision in **Skeete v The State** [2003] UKPC 82, laid down the following principles, at para. 5 of the judgment:

> i. the court must first consider the sentence imposed by the trial judge and form the view that a different sentence should have been passed;

ii. if leave to appeal has not already been given, the court must give leave and convert the application into an appeal; and

iii. the court must then quash the sentence passed at the trial and pass such other sentence in substitution of the previous sentence, as it thinks fit.

It appears that, procedurally, the sentence of a convicted person cannot be increased where leave to appeal has not been given and, as a corollary, where the appeal has been abandoned.

[53] This case is distinguishable from **Williams v The State** in one respect. That is, where as in **Williams v The State** it was an application for leave to appeal, in this case it is an appeal that was argued before us, the application for leave to appeal having been considered and granted by a single judge. Their Lordships acknowledged that the approach is different from that articulated above where it is an appeal that is under consideration (see para. 11 of the judgment). This case is also distinguishable on the facts from **Linford McIntosh v R** [2015] JMCA Crim 26, in which the principles of **Williams v R** were applied. In **Linford McIntosh v R,** there was a de facto withdrawal or constructive abandonment of the appeal.

[54] In spite of that factual distinction (perhaps a distinction without a difference), the general principles laid down in **Williams v The State** are inescapably applicable to this case. The actuation of the statutory power to increase the sentence of an appellant is subordinated to the time-hallowed principles of natural justice. In particular, the appellant must be afforded an opportunity to be heard, which presupposes notice being given of the court's intention to vary his sentence to his disadvantage. According to Lord Carswell, at para. 10, their Lordships:

> "…consider that an appellate court which has power to increase a sentence and is considering the exercise of that power should invariably give the applicant for leave to appeal against his sentence or his counsel an indication to that effect

> and an opportunity to address the court on the increase or to ask for leave to withdraw the application ..."

[55] In this case, although this was an appeal, no notice was given to either the appellant or his counsel that the sentence stipulated to be served before becoming eligible for parole would be increased. Consequently, no opportunity was extended for arguments to be canvassed to persuade the court away from this position. As the Privy Council observed in **Williams v The State**, at para. 10, arguments advanced against an increase in sentence may be of a different hue from arguments deployed for its reduction.

[56] We are, therefore, constrained by authority from disturbing the stipulated sentence to be served by the appellant before becoming eligible for parole, save to account for time spent on remand. To do otherwise, as Lord Carswell declared, would be "unfair and a breach of natural justice" (see para. 10 of the **Williams v The State**). Accordingly, we would impose the same sentence of 20 years' imprisonment before eligibility for parole.

[57] That takes us to time spent on remand. Although the learned judge was alert to enquire about the time the appellant had spent on remand, the quantitative answer received does not appear to have further engaged her contemplation of the appropriate sentences. In **Meisha Clement v R**, this court accepted the learning in **Callachand & Anor v The State of Mauritius** [2008] UKPC 49 and **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ), that an offender should receive full credit for time spent on remand. The appellant had spent one year and 10 months in custody before he was sentenced. His sentence should therefore be reduced accordingly. That would reduce the recommended sentence to be served before parole eligibility to 18 years and two months' imprisonment.

[58] We will now turn our attention to counts one and two (abduction and rape respectively). We will take first the sentence imposed on count one for the offence of abduction. Both Miss Lewis and counsel for the Crown agreed that the sentence on count one is appropriate. The court agrees with the assessment. Beyond our concurrence, we observe however, that there was no departure from the governing principles to warrant

our intervention. That the learned judge applied the principles is inferable from the transcript.

[59] The learned judge first addressed the question of the appropriate sentences for the appellant's then co-accused, who was charged only with abduction and rape. For the offence of abduction, the learned judge correctly identified a range of three to 15 years; the usual starting point of five years, which she adopted (see Appendix A of the Sentencing Guidelines); applied a 30% discount for the fact of the guilty plea; and gave full credit for time spent on remand, which she rounded up to two years. That exercise resulted in the sentence of one year and six months.

[60] Having completed that process in respect of the appellant's co-accused, the learned judge simply transposed her reasoning to the appellant. This is obvious from her comment, at page 31 of the transcript, lines 6-9:

> "So, in respect of count one which is for Forcible Abduction, the same will go for you one year and six months."

The same sentence here is indicative of the same methodology employed in respect of the appellant's co-accused. In the circumstances of this case, the learned judge cannot be faulted for this transposition.

[61] In respect of the sentence of eight years' imprisonment imposed for rape on count two, the same may be said. Firstly, the learned judge took note of the statutory minimum sentence for rape, 15 years (section 6(1)(a) of the Sexual Offences Act) and her statutory authority to impose a sentence below the prescribed statutory minimum sentence in cases where a defendant pleads guilty (see section 42D(3)(a) of the CJAA). Secondly, the learned judge similarly discounted the sentence arrived at by 30% and generously rounded up the time spent on remand to two years. It was by that methodology that the learned judge arrived at the sentence of eight years' imprisonment for the appellant's co-accused. When the learned judge's later apparent summary imposition of the identical term of eight years upon the appellant is viewed against the background of the sequence

of the respective sentencing exercise, together with her remarks quoted above, it becomes obvious that the appellant's sentence was the product of the application of the relevant principles also.

[62] The learned judge's notable omission was in her failure to stipulate a term of imprisonment for the applicant to serve for the offence of rape before becoming eligible for parole, as required by section 6(2) of the Sexual Offences Act. Section 6(2) states:

> "Where a person has been sentenced pursuant to subsection 1(a) or (b) (ii) [rape, and grievous sexual assault committed in the Circuit Court, respectively] 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 the person shall serve before becoming eligible for parole."

However, since the learned judge was allowed to impose a sentence below the statutory minimum under section 42D(3)(a) of the CJAA, consonant with this provision, the learned judge was required to recast the parole eligibility period to at least two-thirds of the reduced sentence (see section 42D(3)(b) of the CJAA). Applying the formula laid down under section 42D(3)(b) to the term of eight years' imprisonment, the appellant is to serve five years and three months' imprisonment for this offence, before becoming eligible for parole.

[63] The sentence on count three seems also to call for our intervention as the learned judge did not follow the applicable principles when a defendant pleads guilty. The learned judge simply, and summarily, imposed the prescribed mandatory minimum sentence of 15 years. The learned judge was also required to stipulate a minimum period of imprisonment to be served before parole eligibility (see section 6(2) of the Sexual Offences Act, quoted at para. [62]).

[64] We will treat the 15 years' imprisonment imposed as the starting point. Applying the net addition to the appellant's sentence of three years, when the aggravating and

mitigating factors are taken into account, the sentence would be increased to 18 years. Equally, we apply a discount of 30% to the sentence of 18, resulting in a reduction of five years and four months, to make it 12 years and eight months. When the appellant is given credit for the time spent on remand, one year and 10 months, the time to be served would be 10 years and 10 months. Accordingly, the parole stipulation on this count would be seven years and two months.

Order

[65] By majority (Foster-Pusey JA dissenting) the orders of the court are as follows:

1. The appeal against sentence is allowed in part:

   (a) the sentence of one year and six months' imprisonment for the offence of abduction is affirmed;

   (b) the sentence of eight years' imprisonment for the offence of rape is affirmed. The appellant shall serve five years and three months' imprisonment before becoming eligible for parole;

   (c) the sentence of 15 years' imprisonment for the offence of grievous sexual assault is set aside and a sentence of 12 years and eight months' imprisonment is substituted therefor. However, in giving credit for the time of one year and 10 months spent in custody before trial, the time to be served by the appellant is 10 years and 10 months, with the stipulation that the appellant serves seven years and two months' imprisonment before becoming eligible for parole; and

   (d) the sentence of life imprisonment for the offence of murder is affirmed. The stipulation that the appellant serves 20 years' imprisonment before becoming eligible for parole, is set aside and substituted therefor is the stipulation that he shall serve 18 years

imprisonment and two months, credit having been given for the period of one year and 10 months spent in pre-sentence custody.

2. The sentences shall be reckoned to have commenced on 26 March 2018 and are to run concurrently.