JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 29/2015

TERRON WHITE v R

Ms Jacqueline Cummings for the applicant

Adley Duncan and Miss Cindi-Kay Graham for the Crown

2 June 2021 and 4 February 2022

V HARRIS JA

[1] This court, having considered Mr Terron White's ('the applicant') renewed application for leave to appeal his conviction and sentence, and having heard submissions on behalf of the applicant and the Crown, made the following orders on 2 June 2021:

> "1. The application for leave to appeal conviction and sentence is granted.
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> 2. The hearing of the application is treated as the hearing of the appeal.
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> 3. The appeal against conviction is dismissed.
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> 4. The appeal against sentence is allowed.
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> 5. The sentences of 15 years' imprisonment at hard labour for illegal possession of firearm, 18 years' imprisonment at hard labour for rape and 10 years' imprisonment at hard labour for robbery with aggravation are set aside to allow credit for time served on pre-sentence remand.
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> 6. The following sentences are substituted: on count 1 for illegal of firearm, 13 years and 6 months' imprisonment at hard

labour; on count 2 for rape, 16 years and 6 months' imprisonment at hard labour with the stipulation that the applicant shall serve a period of 12 years' imprisonment at hard labour before becoming eligible for parole; and on count 3 for robbery with aggravation, 8 years and 6 months' imprisonment at hard labour.

7. The sentences are to be reckoned as having commenced on 10 April 2015 and are to run concurrently."

The court promised that written reasons would follow. We now fulfil that promise.

Factual background

[2] The applicant was charged on an indictment containing three counts for the offences of illegal possession of firearm (count 1), rape (count 2) and robbery with aggravation (count 3). He was tried in the High Court Division of the Gun Court by George J ('the learned trial judge') without a jury. On 12 January 2015, he was convicted of all three offences. On 10 April 2015, the applicant was sentenced to 15 years' imprisonment at hard labour for illegal possession of firearm, 18 years' imprisonment at hard labour for rape and 10 years' imprisonment at hard labour for robbery with aggravation. The sentences were ordered to run concurrently. However, a pre-parole period for the offence of rape was not stipulated by the learned trial judge as provided by section 6(2) of the Sexual Offences Act ('SOA').

[3] At the trial, the case for the prosecution was that, on the evening of 31 August 2012, at approximately 8:30 pm, the complainant was sitting on her verandah in a community located in Yallas in the parish of Saint Thomas, with three of her five children. At the time of this unfortunate incident, the ages of her children, four girls and one boy, ranged between 16 years old to six years old. Having sent her eldest daughter KB into the house for something, the complainant observed three men walking down the lane towards their home. Eventually, one man passed the house, but she did not see where the other men went. KB returned to the verandah and said something to the other two children (a 12-year-old girl and a nine-year-old boy). Both children immediately ran towards the complainant's bedroom. Upon realising that something was amiss, the

complainant ran into the house and closed the door. She then heard male voices coming from her bedroom, saying, "nuh look pon mi, nuh look pon mi, unooh nuh look pon mi". Another voice said (referring to one of her daughters), "Hey gal, mi a goh kill you". As the complainant walked into her bedroom, a gun was pointed in her face. She was instructed not to look and to go onto the bed. She noticed two men in the room along with four of her children. The three youngest children were on the bed, KB was behind the door, and she did not know where her third daughter was.

[4] The complainant could not see the face of the man who held the gun because he had a handkerchief covering his nose and mouth. Both men also wore caps. While attending to her children on the bed, the man with the gun stood over her and began touching her. She was lying on her stomach when he put his hands on her leg and inserted his finger into her vagina. He then pulled down his pants and pushed his penis into her vagina.

[5] At some point, he set his sights on a "chaparrita" (a colloquial word for "bracelet") which was on one of her hands. He enquired if it was gold, to which she responded that it was silver. The man ordered her to remove the chaparrita, but she was unable to do so. On his instruction, she covered her eyes so that he could remove it himself. The complainant testified that, at this time, she had an opportunity to observe the man's face, with the aid of the light from her television, for approximately 10-15 seconds as she "peeped" through her fingers. She could view his entire face because the handkerchief had fallen from his face and was around his neck. The complainant recognised the applicant as her second cousin, whom she knew "almost all [her] life". Once the chaparrita was removed from her hand, the applicant pulled the handkerchief over his nose and mouth. He also removed the silver chain she was wearing.

[6] The complainant overheard the other man, who was in another room, telling someone to perform oral sex on him. It was her testimony that she pleaded with the applicant, "please nuh mek him rape her, please nuh mek him rape her" (referring to one of her daughters). The applicant then instructed the other man, more than once, to leave

that particular girl alone and rape the older girl. Finally, on the third occasion, when he told the other man to "leave the girl alone", the applicant stood up and walked away. Both men subsequently left. In addition to seeing and recognising the applicant's face, the complainant also testified that she recognised his voice when he spoke.

[7] The complainant went to her neighbour and told her what had happened. The incident was reported to the police. When the police arrived, the complainant and her children were taken to the Yallahs Police Station, where she gave a statement and named the applicant as her assailant.

[8] Three police officers gave evidence on the prosecution's case. Their testimony can be summarised as follows:

> (i) Sergeant Sheryl Robinson testified that on the night in question, after receiving the complainant's report, she along with a team went to a dwelling house in Newland District, Yallahs, sometime after 10:00 pm, in search of the applicant. He was not found there, but a message was left with a woman who was at the house;
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> (ii) Detective Constable Shandy Scott conducted the applicant's question and answer interview. She testified that when she cautioned him, the applicant said, "how mi fi rape mi family, a fish fry mi guh and come back when mi hear she [sic] police a look fi mi"; and
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> (iii) Constable Kemar McLeary recorded the applicant's question and answer interview. The document containing the record of the question and answer interview was admitted into evidence as an exhibit.

[9] Expert evidence was also adduced from three forensic analysts about DNA (deoxyribonucleic acid) samples retrieved from the complainant and the applicant; they were:

(i) Mrs Yeonie Campbell-Simpson, a forensic scientist employed at the Government Forensic Science Laboratory ('FSL') and assigned to the biology department;

(ii) Dr Judith Mowatt, the director of the FSL; and

(iii) Miss Sherron Brydson, the government analyst and deputy director in charge of the biology department at the FSL.

The significance of the evidence of those expert witnesses will be discussed below.

[10] At the end of the prosecution's case, counsel for the applicant made a submission of no case to answer, which was rejected by the learned trial judge. The applicant then made an unsworn statement from the dock denying the allegations and raising an alibi. Specifically, the applicant stated that he did not rape anyone and was at a fish fry on the night in question. He also asserted that the articles of clothing admitted into evidence ascribed to him were not his. The applicant claimed that he did not know from whom or where the police officers obtained those items of clothing since he left the police station, after being admitted to bail, in the same clothes he wore when he first went there. No witnesses were called on the applicant's case at trial.

[11] At the end of the trial, as indicated previously, the learned trial judge convicted the applicant on all counts of the indictment and sentenced him to several terms of imprisonment (see para. [1] above).

The application for leave to appeal

[12] Aggrieved by the outcome of the trial, on 4 May 2015, the applicant applied for leave to appeal against his conviction and sentence. On 31 July 2018, the application was considered and refused by a single judge of this court on the basis that the learned trial judge's directions properly dealt with the issues regarding identification and the DNA evidence in the matter. Additionally, it was determined that, in respect of the sentences, the learned trial judge gave due consideration to the appropriate principles. Finally,

notwithstanding her failure to credit the applicant for time spent in custody before the trial, the single judge of this court also found that the sentences imposed were within the normal range.

[13] As he is entitled to do, the applicant renewed his application for leave to appeal conviction and sentence before the court. Accordingly, on 21 August 2012, the following supplemental grounds of appeal were filed on the applicant's behalf:

> "(a) The verdict is unreasonable having regard to the totality of the evidence.
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> (b) The Learned Trial Judge failed to address the fact that the complainant gave no evidence that she did not consent to sexual intercourse that evening which was one of the elements of the offence required to be proved [sic] for her to convict the Applicant for rape.
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> (c) The Trial Judge failed to appreciate that the DNA evidence herein was circumstantial as there was no reference sample obtain [sic] directly from the Applicant's body for the DNA evidence to [be] accepted as be [sic] conclusive.
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> (d) The Learned Trial Judge erred when she failed to hold that the circumstances of the visual identification of the Applicant was poor and ought not to be relied upon.
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> (e) The Learned Trial Judge erroneously relied on voice identification of the Applicant when the conditions were not adequate for a proper recognition to have been made herein.
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> (f) The Learned Trial Judge failed to consider the several inconsistencies between the Complainant's evidence in chief and her subsequent admissions or changes in her testimony under cross-examination and in re-examination in determining her credibility in relation to her identification of the Applicant.
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> (g) The sentences of the Applicant were manifestly excessive having regard to the offences herein."

[14] Before us, learned counsel for the applicant, Ms Cummings, requested and was granted permission to abandon the original grounds of appeal and argue the seven supplemental grounds instead.

Discussion

[15] The main issues for the learned trial judge were identification and credibility since it was the applicant's absolute defence that he was mistakenly identified as the assailant. In an effort to impugn the learned trial judge's findings, the applicant asserted that the prosecution's evidence was unreliable and insufficient to sustain the convictions and that the learned trial judge failed to appreciate this.

[16] The applicant has not alleged any misdirections in law on the part of the learned trial judge. He has sought, instead, to challenge her findings of fact. It is trite that this court will only interfere with a trial judge's findings of fact, which depend on the view taken of the credibility of the witnesses, if satisfied that the judge was "palpably or plainly wrong" (see **Everett Rodney v R** [2013] JMCA Crim 1 and **R v Joseph Lao** (1973) 12 JLR 1238).

[17] The concerns raised in the supplemental grounds of appeal bear some degree of similarity. Supplemental grounds (a), (c), (d), (e) and (f) can be conveniently dealt with under the same issue, in assessing whether the learned trial judge was plainly wrong in her analysis of the evidence and in relying on same in support of her verdict. Supplemental grounds (b) and (g) will be addressed separately because they concern, respectively, whether the offence of rape was properly made out and whether the sentences imposed were manifestly excessive. Accordingly, the issues for our consideration were:

(i) Was explicit evidence of "lack of consent" required for the offence of rape?

(ii) Was the evidence so manifestly unreliable and insufficient that the verdict could not be supported?

(iii) Were the sentences manifestly excessive?

Issue (i)- Was explicit evidence of "lack of consent" required for the offence of rape? (supplemental ground b)

[18] The learned trial judge accepted the complainant's evidence that she was raped on the night in question. Ms Cummings submitted, on behalf of the applicant, that the complainant failed to indicate that she did not consent to sexual intercourse. Additionally, it was asserted that she did not use the word "rape", and there was no other evidence of lack of consent, which is a vital ingredient of the offence. Notwithstanding the circumstances of the incident, counsel submitted, the prosecution must prove that she did not consent.

[19] However, it was the Crown's position that the evidence in the trial disclosed clear circumstances of physical assault, as well as threats and fear of physical assault. Therefore, no explicit evidence of lack of consent was required. Reliance was placed on sections 3(1) and 3(2)(a) of the SOA, which provide:

> "3.- (1) A man commits the offence of rape if he has sexual intercourse with a woman-
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> (a) without the woman's consent; and
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> (b) knowing that the woman does not consent to sexual intercourse or recklessly not caring whether the woman consents or not.
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> (2) For the purposes of subsection (1), **consent shall not be treated as existing** where the apparent agreement to sexual intercourse is –
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> (a) **extorted by physical assault or threats or fear of physical assault to the complainant or to a third person**; or
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> (b) obtained by false and fraudulent representation as to the nature of the act or the identity of the offender." (Emphasis added)

[20] Given the pellucid language of the legislative provision, we found the submission by counsel for the applicant on this issue quite shocking. This was especially so in the light of the circumstances (based on the evidence of the complainant) where:

i) the complainant was ambushed in her home by two men;

ii) her children were intimidated by them;

iii) one of the men issued a death threat to one of her daughters;

iv) the applicant held a gun to her head and ordered her to get onto the bed; and

v) the applicant then had sexual intercourse with her in the presence of at least three of her children, with the gun still in his hand by her head.

[21] It is unequivocal, in our view, that the complainant, in those circumstances, did not need to expressly state in her testimony that she did not consent. It is also evident that the applicant was indifferent as to, or recklessly not caring, whether or not the complainant consented. So there was no need for her to verbally demonstrate her state of mind in that regard to him or the court.

[22] Once the learned trial judge found that sexual intercourse was extorted by physical assault or threats or fear of physical assault to the complainant and her children, she was entitled by virtue of the statute to find that the complainant did not consent. The evidential presumption is that consent was vitiated. For that reason, there was no merit in supplemental ground (b).

Issue (ii)- Was the evidence so manifestly unreliable and insufficient that the verdict could not be supported? (supplemental grounds (a), (c), (d), (e) and (f))

[23] The learned trial judge found that there was no real dispute that the complainant was raped and robbed with an illegal firearm. The real question for her determination was whether or not it was the applicant who, along with another man, committed those offences. In arriving at her verdict, she relied on the complainant's identification evidence and DNA evidence adduced in support. In his defence, the applicant asserted that the complainant's identification of him is mistaken, which made the credibility, reliability and sufficiency of the evidence against him of critical importance.

[24] In order to determine the credibility of identification evidence, an assessment of the inconsistencies and discrepancies was important. In this case, the learned trial judge found the complainant to be an honest and credible witness. Accordingly, her view was that "the few inconsistencies were not material and did not affect [the complainant's] credibility". Ms Cummings, however, took issue with that finding. She argued that the learned trial judge failed to consider the inconsistencies between the complainant's evidence in chief and cross-examination.

[25] Crown Counsel submitted that, on the contrary, the learned trial judge did, in fact, identify the inconsistencies and assessed their significance to the case as well as their impact on credibility. As the arbiter of fact, it was contended that the learned trial judge made appropriate findings within her judicial power.

[26] It is the duty of a trial judge sitting alone to make findings on the credibility of the witnesses. In doing so, the judge must identify the inconsistencies and discrepancies, and evaluate the weight to be attached to them. Then, depending on the degree of materiality attached to such conflicts in the evidence, the judge can make a further determination as to the credibility of the witnesses and/or specific aspects of the evidence. In delivering a summation, however, the judge is not required to vocalise every inconsistency and discrepancy (see **R v Junior Carey** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 25/1985, judgment delivered 31 July 1986).

[27] In arriving at our decision, we embarked on the following analysis of the learned trial judge's findings in the context of the visual identification, voice identification and DNA evidence, as well as the inconsistencies and discrepancies in the evidence.

Visual identification

[28] In this case, visual identification was a fundamental issue because this was how the complainant was able to confirm her assailant's identity, whom she said was the applicant. Ms Cummings submitted that the purported identification was made in difficult circumstances because of poor lighting, the complainant's restricted vision through one

eye, and the short time she had to observe her assailant. These factors, she contended, rendered the identification of the applicant unreliable.

[29] On the other hand, Crown Counsel contended that the visual identification evidence sufficed, as a matter of law, to support the applicant's conviction. Furthermore, it was argued that the learned trial judge accurately reminded herself of the evidence, identified the weaknesses, and warned herself on the dangers inherent in visual identification evidence.

[30] Given the factual matrix of the case and the issues that arose for her determination, the learned trial judge was called upon to closely examine the circumstances in which the visual identification was made before concluding that the evidence was reliable and sufficient to support the conviction. Therefore, this court's duty is to assess whether her verdict was unreasonable or not supported by the evidence.

[31] An examination of the transcript revealed that the learned trial judge reviewed the evidence in great detail. She warned herself of the special need for caution when relying on identification evidence to convict the applicant due to the inherent danger of an honest and convincing witness being mistaken. Given the undisputed evidence that the complainant and applicant were second cousins, known to each other for several years before the incident, the learned trial judge correctly noted that this was a case of recognition. She appropriately reminded herself that mistakes can still be made in recognition cases (see **R v Turnbull** [1977] QB 224). In further applying the guidelines set out in **R v Turnbull** regarding disputed identification evidence (which are now so well known that there is no need to recite them), the learned trial judge assessed the strengths and weaknesses of the visual identification evidence and concluded that she felt sure that it was reliable.

[32] In her summation, we observed that the learned trial judge adequately captured the essence of the **Turnbull** guidelines. She assessed the complainant's credibility and reliability in light of the nature of the offences, her frightened state, and the conditions

that existed at the time of the purported identification of the applicant. The learned trial judge considered, among other things, the complainant's familiarity with the applicant, the lighting, the distance, and the time during which she had the applicant under observation.

[33] It was the complainant's evidence that her opportunity to have an unobstructed view of the applicant's face arose when he instructed her to turn onto her back and cover her eyes with her hand. At that point, his body was over her while he had sexual intercourse with her. She described his position as having one hand braced beside her head on her pillow with the other hand braced on the other side, still clutching the gun. In addition, he wore a cap that covered his forehead and a handkerchief covering his nose and mouth. At this stage, she could only see his eyes.

[34] The applicant, she stated, was facing the television (which provided the source of light that aided her identification) and "eased up" to take the chaparrita off her hand. At this stage, the handkerchief he was wearing to cover his nose and mouth fell from his face, and that was when she had the opportunity to see his entire face and immediately recognised her assailant as the applicant. She also demonstrated how her hand was positioned across her face (with one of her eyes exposed while her palm blocked the other eye), which enabled her to see.

[35] The complainant's testimony regarding her familiarity with the applicant revealed that when she moved to the parish of Saint Thomas, she worked on Market Road, where he lived. She saw him almost every day until she moved on 15 March 2012. He often assisted her with taking her children to school, and she likewise helped him with money at times.

[36] The learned trial judge accepted the complainant's evidence that she was lying on her back, looking up at the applicant while he was over her. That position, she found, would have enabled her to see his face with and without the handkerchief. She also accepted the complainant's evidence that she observed the applicant's face through her

fingers while he removed her chaparrita, and her view of his face was unobstructed at that time. However, the learned trial judge noted that the fact that the complainant was "peeping through her fingers" would be a weakness. Notwithstanding, because of her familiarity with the applicant, the learned trial judge concluded that the complainant's observation in those circumstances would be more reliable than if it had been made at a further distance and of someone she was less familiar with or did not know.

[37] The complainant gave evidence that the light that aided her vision emanated from a television on top of a chest of drawers. She estimated that the television was approximately four feet away from the bed, four feet above the ground and 24 inches in width. During cross-examination, she admitted that the television light was the only light in the house. Counsel for the applicant at the trial suggested that she had no electricity that night, which she denied. The complainant was also adamant that, while she was afraid during the incident, she was not confused.

[38] The learned trial judge scrupulously evaluated the purported presence and adequacy of the lighting. First, she highlighted the evidence, which she accepted as true, when the complainant entered the bedroom, and the applicant said, "nuh look pon mi, nuh look pon mi". Then, addressing her jury mind to the challenge that there was no electricity at the complainant's house on the night of the incident, the learned trial judge inferred that if the bedroom were in complete darkness, then it would not have made any sense for the applicant to have instructed the complainant and her children not to look at him, much less, to wear a handkerchief that covered his face. In her words, "he had a fear of being seen".

[39] The learned trial judge was undeterred in this finding, despite the absence of evidence from any police officer that went to the house that night as to whether the house was in complete darkness. She reasoned that because of the complainant's evidence that she was illegally obtaining electricity from her neighbour, it was not incredible that she would not have turned on the lights upon the police officers' arrival. For those reasons, she found as a fact that the complainant's house had electricity on the

night of the incident and that there was light in her bedroom that came from the television. She, however, found that light to be a weakness since it would not be as illuminating as an electric bulb.

[40] As it relates to whether that light was sufficient, the learned trial judge examined the complainant's evidence that the television was on a chest of drawers four feet away from the bed she was on and that at the time, she purported to identify the applicant, he was facing the television. She found this to be at a distance that was close enough to assist the complainant in seeing her assailant and that the light from the television at such a short distance would have been sufficient.

[41] Another weakness the learned trial judge identified was the applicant's query about whether the complainant's chaparrita was gold. It was argued on behalf of the applicant at trial that this was because there was no light in the bedroom, so the colour was not apparent. The learned trial judge, however, disagreed. She refrained from speculating as to a possible explanation for this. Instead, she placed this aspect of the complainant's testimony in the context of the evidence as a whole to assess what weight was to be given to it. In doing so, she observed that not "all gold is 'gold' in colour". She also indicated that while she found this aspect of the evidence "odd", it was not sufficient to "displace or effectively undermine" the evidence of the light.

[42] Further to a suggestion, the complainant agreed that the period she had the applicant under observation could have been "4, 5, 6 seconds". She also stated that it could have been as long as an hour since she did not have anything to tell the time. In re-examination, she acknowledged that in agreeing that the period of observation could be four or five or six seconds, she gave two different answers about how long she was able to view the applicant's face. She stated that the correct time would be about 15 seconds because the applicant took off the chaparrita before fixing his handkerchief. She explained that she only agreed to the suggestion "because [counsel for the applicant at the trial] was suggesting that it would be".

[43] The learned trial judge regarded this as another weakness in the identification evidence. However, in assessing that evidence, notwithstanding the complainant's inconsistent testimony regarding the time she observed the applicant's face unobstructed, from the totality of the evidence, the learned trial judge found that the viewing was over four seconds. Accordingly, she ultimately accepted the complainant's evidence that she had him under observation for 15 seconds when his handkerchief fell. She determined that the complainant's observation of the applicant was not a fleeting glance but was sufficient to "render reliable the recognition of someone who was familiar to the complainant in the circumstances of the identification evidence".

[44] This court has pronounced, in several authorities, that where the identification evidence is inconsistent because the witness indicates that he or she is not aware of the time (or for any other reason), it is for the trial judge to consider the chronology of events relative to the witness' opportunity to identify the purported assailant. Having done so, the trial judge is then to assess whether the quality of the identification evidence is so poor as to warrant its withdrawal from the jury (see **Bruce Golding and Damion Lowe v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 4 and 7/2004, judgment delivered 18 December 2004 and **Fitzroy Nelson and Leroy Nelson v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 32 and 33/2007, judgment delivered 23 January 2008 applied in **Separue Lee v R** [2014] JMCA Crim 12).

[45] In the present case, given the varying estimates of the time that the complainant said she had the applicant's face under observation, the learned trial judge considered the events as they unfolded in the complainant's evidence to determine whether she had sufficient time to correctly identify the applicant as her assailant. She ultimately concluded that the complainant's visual identification evidence was accurate and reliable. She also found that it was bolstered by the fact that the complainant identified the applicant as her assailant at the first available opportunity to the police. In our judgment, the approach of the learned trial judge was beyond criticism.

[46] Having regard to the above, we found that the learned trial judge's analysis could not be impugned. She duly considered the relevant principles in assessing the quality and sufficiency of the visual identification evidence, identified the weaknesses and inconsistencies, and came to a conclusion that cannot be deemed to be palpably or plainly wrong.

Voice identification

[47] During cross-examination, the complainant indicated that she was also able to identify the applicant by his voice. Her explanation for saying this for the first time was simply that she was not asked about it before. In her summation, the learned trial judge remarked that the complainant's evidence, that before the handkerchief fell, she had an idea of who her assailant was because she recognised his voice, made sense to her in the context of the complainant's examination in chief. Specifically, the complainant's evidence in chief was that when the handkerchief fell from the applicant's face, she realised it was someone she "definitely knew". For that reason, the learned trial judge found that although this evidence arose for the first time in cross-examination, it had not been recently fabricated and was credible evidence. Furthermore, this finding was buttressed by the complainant's explanation that it was when she was asked during cross-examination if she knew who her assailant was before the handkerchief fell off his face that she said she recognised his voice.

[48] The crux of the applicant's argument was that the voice identification was inadequate. Ms Cummings submitted that the complainant did not identify which of the men spoke first. Additionally, she contended that their voices would have been altered or distorted since they had handkerchiefs over their faces. The learned trial judge, it was submitted, should not have relied on that evidence since it came out in cross-examination for the first time. In support of those submissions, we were referred to the decisions of this court in **Rohan Taylor and Others v R** (1993) 30 JLR 100 and **Ronique Raymond v R** [2012] JMCA Crim 6.

[49] Crown Counsel contended that although the voice identification evidence was arguably sufficient to support a conviction on its own, when examined along with the visual identification evidence, there was sufficient evidence to establish the applicant's guilt. It was further contended that nothing turned on when the court received that evidence, and the learned trial judge was duty-bound to consider it and, having done so, was permitted to rely on it. Crown Counsel identified at least four distinct utterances made by the applicant on the night of the incident that the complainant heard. The learned trial judge, it was submitted, meticulously analysed the quality of the evidence, and properly relied on it in support of the visual identification evidence.

[50] The law on voice identification is well settled. In **Rohan Taylor and Others v R**, Gordon JA affirmed at page 107 of the judgment, the following *ratio decidendi* in **Bowlin v Commonwealth** 242 SW 604 195 Ky 600:

> "The law regards the sense of hearing as reliable as any other of the five senses, so that testimony [that a] witness recognized [an] accused by his voice is equivalent to testimony he was recognized by sight."

[51] Gordon JA's dictum at page 108, on the assessment of voice identification, has been repeatedly cited with approval by this court. The learned judge of appeal stated:

> "In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so as to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater necessity there is for mere spoken words to render recognition possible and therefore safe on which to act. …"

[52] During her examination in chief, evidence regarding the opportunities the complainant had to identify the voice of her assailant was adduced. She gave detailed testimony as to the words uttered by the applicant during the incident (to her, her children and the other assailant). She also gave evidence that demonstrated her familiarity with the applicant and his voice. They spoke whenever they saw each other, which was every other day when she still lived on Market Road. They would also ask certain favours of each other. However, because she had moved, the last time they spoke before the incident was sometime in August 2012 (the same month of the incident), although she could not recall exactly when.

[53] In evaluating the cogency and reliability of the evidence, the learned trial judge considered the complainant's familiarity with the applicant and his voice, the prior opportunities she had to hear his voice and the number of words used during the incident. She accepted the complainant's evidence that apart from being cousins, she knew the applicant since he was 10 or 11 years old, and they saw each other and spoke on several occasions throughout the years. The learned trial judge concluded that the complainant was very familiar with the applicant and his voice.

[54] The learned trial judge identified "no less than eight" times on the complainant's evidence that the applicant spoke in her presence during the incident, which she considered along with the complainant's degree of familiarity with the applicant's voice. Having done so, she found that sufficient words were spoken to enable the complainant to recognise his voice. However, the learned trial judge also took into account the fact that the applicant wore a handkerchief, which may have distorted his voice. She inferred that this was possibly why the complainant was not certain it was him until she had an unobstructed view of his face. In concluding on this issue, she viewed the voice identification evidence in the context of the cumulative evidence, including the visual identification and DNA evidence (which will be discussed in due course).

[55] In the case of **Ronique Raymond v R**, this court allowed an appeal in circumstances where a complainant sought to identify her assailant by, among other

things, his voice. McIntosh JA, in her judgment, made the following observations regarding the case of **Siccaturie Alcock v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 88/1999, judgment delivered 14 April 2000:

> "[31] In Siccaturie Alcock the judge had counted 13 instances when the accused had spoken during the incident and at the time when that complainant purported to recognize his voice he had engaged her in conversation, challenging his identification as her assailant, which was sufficient to afford her an opportunity to make the recognition. In the instant case, however, one utterance at the identification parade was all that the complainant used in her recognition and in those circumstances reliance could not properly be placed on that evidence. **It is also important to note that the Court of Appeal, while accepting that there was evidence of voice identification in Siccaturie Alcock, pointed out that there was also evidence of sufficient opportunity for the complainant to see the applicant's face to be able to identify him subsequently and that 'the evidence of voice identification was not decisive to the conviction' but was to be considered with the rest of the evidence in the case.**
>
> [32] Another unsatisfactory feature of the evidence of voice identification in the instant case was the fact that the handkerchief over the mouth of the assailant at the time of the incident may have impacted the sound of his voice and this was not simulated on the parade. No questions were asked of the complainant in that regard and the learned trial judge, in accepting the evidence of voice identification, gave no indication that this factor was considered." (Emphasis added)

[56] There are notable similarities between **Ronique Raymond v R** and the present case, but the prevailing distinction is that the complainant, in that case, did not know the applicant before the incident. She heard him speak for the first time during her assault and purported to identify his voice on an identification parade. However, it became clear from her testimony that other factors influenced her identification of him; for instance, the men were asked to hold their arms out, and the applicant refused. The appeal, in part, was allowed for that reason because the weaknesses in the identification evidence rendered the conviction unsafe. In our opinion, this case did not advance the applicant's submissions.

[57] We took the view that although the voice identification evidence was adduced during cross-examination, it still constituted evidence, and the learned trial judge was entitled to consider it and rely on it. She correctly warned herself that voice identification evidence could be vulnerable to mistake by an honest and convincing witness, as with visual identification evidence. Having evaluated the degree of familiarity between the complainant and the applicant, as well as the number and nature of the utterances the applicant made in the complainant's presence during the incident, the learned trial judge's findings cannot be faulted. This is especially so since she determined the weight to be given to the voice identification evidence in conjunction with the other evidence in this matter.

DNA evidence

[58] In support of the complainant's testimony, the prosecution sought to rely on the DNA analysis of a Sexual Assault Forensic Evidence Collection Kit ('the Kit') and certain items of clothing. Reliance on DNA evidence in support of a case is an established modern procedure. Still, DNA evidence is not without its weaknesses and necessitates expert evidence and specific warnings in assessing it.

[59] In the decision of **R v Doheny** [1997] 1 Cr App R 369, Lord Justice Phillips discussed the significance of DNA evidence at page 373:

> "The significance of the DNA evidence will depend critically upon what else is known about the suspect. If he has a convincing alibi at the other end of England at the time of the crime, it will appear highly improbable that he can have been responsible for the crime, despite his matching DNA profile. If however, he was near the scene of the crime when it was committed, or has been identified as a suspect because of other evidence which suggests that he may have been responsible for the crime, the DNA evidence becomes very significant... The reality is that, provided there is no reason to doubt either the matching data or the statistical conclusion based upon it, the random occurrence ratio deduced from the DNA evidence, when combined with sufficient additional evidence to give it significance, is highly probative."

[60] The complainant gave evidence that after making a report at the Yallahs Police Station, a policewoman brought her and KB to the Princess Margaret Hospital, where a doctor examined them. Subsequently, she returned to the police station, removed the yellow dress she was wearing, placed it in a bag and handed it to the policewoman.

[61] Sergeant Sheryl Robinson's account supported the complainant's evidence. She testified that on the night of the incident, she took the complainant and KB to the hospital along with two Kits. Both Kits were handed over to a doctor, and both women were medically examined. The doctor then handed to her two sealed and labelled Kits. Upon their return to the police station, she collected a yellow dress from the complainant and placed it in an envelope.

[62] The following day, around 9:00 am, when the applicant attended the police station, Sergeant Robinson informed him of the report against him, cautioned him and took him into custody. She also collected the clothes he was wearing: burgundy briefs, multi-coloured underpants, grey shorts and a black, green and white t-shirt. Those items of clothing were placed in envelopes in the applicant's presence. All envelopes were handed over to Detective Constable Shandy Scott later that day and subsequently taken to the FSL for analysis. The clothes taken from the applicant were identified in court and admitted into evidence as exhibits.

[63] The applicant maintained in his unsworn statement that he did not give any clothes to the police. He also stated that the clothes he wore when placed in custody were the same clothes he wore when he left the station after being bailed. His premise, therefore, was that any conclusion founded upon the allegation that it was his clothes that were analysed for the presence of DNA evidence was misconceived.

[64] The learned trial judge recognised that the issue of whether the applicant's clothing was taken from him by Sergeant Robinson is "central to the issue of credibility". She observed that while the applicant stated in his unsworn statement from the dock that the clothes in question were not his, this was not put to Sergeant Robinson during cross-

examination. The learned trial judge acknowledged that there could be several reasons for the failure to challenge Sergeant Robinson on that issue, including inadvertence on the part of the applicant's trial attorney. She also indicated that she would neither speculate about the reasons for the lack of challenge to Sergeant Robinson's evidence nor make adverse findings against the applicant as a result. While recognising that that failure denied Sergeant Robinson the opportunity to respond to the applicant's assertion that the clothes that were said to be taken from him and tested for DNA evidence did not belong to him, the learned trial judge correctly reminded herself at this point that it was the prosecution's duty to satisfy her beyond a reasonable doubt that Sergeant Robinson had taken the clothes in question from the applicant.

[65] The second issue the learned trial judge contemplated regarding the DNA evidence was whether the chain of custody of all the relevant clothing was preserved so that she could feel sure that the integrity of the evidence was intact.

[66] The evidence on this issue was that on 1 September 2012, Detective Constable Shandy Scott went to the Yallahs Police Station, where she was introduced to the complainant and her daughter. She received two sealed Kits and labelled envelopes containing clothes taken from the complainant, her daughter, and the applicant. The Kits and envelopes were then stored at the Morant Bay Police Station, where Detective Constable Scott was stationed. Subsequently, she submitted the Kits and envelopes to the FSL for analysis. Detective Constable Scott described the clothes and identified them in court. Except for an inconsistency regarding when she received the clothes belonging to the applicant, the learned trial judge accepted her evidence and found that it corroborated that of Sergeant Robinson.

[67] On 13 September 2012, forensic scientist, Mrs Yeonie Campbell-Simpson received the following items from Detective Constable Scott and placed them in storage:

(i) A sealed Kit marked "A" which contained vaginal swabs and smears and sample of blood allegedly taken from the complainant (she also received a Kit for KB);

(ii) A sealed envelope marked "B" which contained a yellow dress allegedly taken from the complainant;

(iii) A sealed envelope marked "C" which contained a multi-coloured print underpants allegedly taken from the applicant;

(iv) A sealed envelope marked "D" which contained a pair of burgundy briefs allegedly taken from the applicant;

(v) A sealed envelope marked "E" which contained a pair of grey shorts allegedly taken from the applicant; and

(vi) A sealed envelope marked "F" which contained a green t-shirt allegedly taken from the applicant.

[68] Dr Judith Mowatt testified that she received the complainant's Kit and a yellow dress. She examined the dress and found human blood on the front and back, semen on the back and the "inner aspect" of the front of the dress. The semen found was confirmed by the presence of spermatozoa, which she explained, means that there was seminal fluid from recent sexual activity present on the dress. Semen with spermatozoa present and a trace of human blood were also found in the vaginal swab, which Dr Mowatt said, also indicated recent sexual activity. Dr Mowatt examined four envelopes that contained clothes allegedly taken from the applicant. No blood or semen was detected, but samples were taken for DNA analysis from areas of the briefs and underpants which would have contained skin cells.

[69] Miss Sherron Brydson tested those samples for the presence of blood, semen and DNA. She explained that a computer, in good working order, was used to generate the results, which yielded two full DNA profiles, three partial profiles and one mixed partial

profile. The first full profile was male, and it was found in the vaginal swabs, on the yellow dress and the briefs. The second full profile was female, and it was found in the sample of blood taken from the complainant. Two of the partial profiles found on the dress corresponded with the first full profile (male, found in the vaginal swabs, on the yellow dress and the briefs). The mixed profile was found on the briefs. It originated from at least two individuals, the major contributor of which was a profile similar to the first full profile. The other components could not be associated with anyone. The underpants did not yield any results. It was Miss Brydson's expert opinion, based on those results (page 287 lines 8-17 of the transcript):

> "…that the profile obtained from the semen found on the vaginal swabs and one area of the dress, corresponded or matched the briefs, the profile obtained from the briefs, one area of the briefs, allegedly from the [applicant]. Therefore, the source of the profile found on this pair of briefs cannot be excluded as being the same source found on the vaginal swabs and the dress of the complainant."

[70] Miss Brydson testified that the probability of finding a similar profile in Jamaica, unrelated to the source, was one in 92,000,000,000,000,000 (92 quadrillion). It, therefore, constituted a rare profile in the context of Jamaica having a population of approximately 2,700,000 people. She explained that a person's DNA profile is not unique, but the probability that it would match another person's DNA can be calculated. Therefore, it cannot be categorically said that particular DNA is derived from a particular source. This was especially so since she did not obtain a reference sample from the applicant for further comparison. During cross-examination, Miss Brydson was questioned about the process for obtaining and analysing DNA evidence in Jamaica. She indicated that there is no legislation (at that time) that provides for collecting DNA from suspects.

[71] The learned trial judge accepted that the complainant notified the police officers that her assailant was the applicant, and they went in search of him the very night of the incident. For that reason, she found it unlikely that the police officers would then conspire to take clothing from someone else to present as that of the applicant. In her words,

"what would they have achieved by this?" Moreover, she considered, on the totality of the evidence, the likelihood of DNA from someone else's garments matching the male DNA profile found in the complainant's vaginal swabs and clothing. She found that this was an "incredulous proposition". Finally, she considered the applicant's contention that there was no evidence before the court indicating how he received additional clothing but rejected his suggestion that this was a material gap in the prosecution's case. Accordingly, she found that the items of clothing were taken from the applicant whilst he was in custody.

[72] The learned trial judge also found that the forensic experts were reliable and credible witnesses, and she accepted their evidence. She concluded that there was no evidence that the integrity of the system was interfered with or compromised or that contamination occurred by the mixing of the dress and briefs. Reference was also made to the forensic analyst's evidence that contamination could not have occurred due to the different biological matter found on each and used as samples. The learned trial judge determined that the chain of custody of all the clothing and the integrity of the evidence were preserved and materially intact.

[73] When analysing the evidence of the expert witnesses, the learned trial judge reminded herself at least four times that the DNA evidence was not conclusive (page 506 line 3, page 528 lines 13-18, page 529 lines 23-24, and page 530 lines 9-10 of the transcript). She also accurately identified it as circumstantial evidence (see page 530 lines 6-10 of the transcript). Having found that the items of clothing used for the DNA analysis belonged to the applicant, the learned trial judge, in exercising her jury mind, was entitled to conclude:

> "…this rare DNA profile makes it highly improbable that the semen found in the vaginal swabs and on the dress of the complainant did not belong to [the applicant]. This improbability becomes even greater in the context of the supporting visual identification. …Accordingly, having considered the totality of the evidence and making the findings I have made, I find the [applicant], Mr. Terron

> White, guilty of the three counts on the indictment on which he was charged."

[74] It was submitted on behalf of the applicant that the learned trial judge did not appreciate the significance of not having a proper DNA sample from the applicant to compare with the male DNA profile found on the complainant's dress. Ms Cummings contended that that evidence was, therefore, not conclusive.

[75] Crown Counsel, however, contended that the chain of custody evidence established the requisite nexus between the applicant, through articles of clothes accepted by the tribunal to have come from him, and the semen found on the complainant's dress. It was further contended that the learned trial judge adequately and accurately addressed all matters of significance arising from the DNA evidence.

[76] The learned trial judge, in our view, demonstrated that she appreciated that the DNA evidence was not conclusive evidence that the applicant was the assailant. She referred to Miss Brydson's evidence that a reference sample from the accused was not tested and that she could only confirm that "the source of the DNA from one item is matching the other and so, it can be from the same person". This evidence was not relied on in isolation, but rather in conjunction with the visual and voice identification evidence that was found to be credible.

[77] The learned trial judge scrutinised all the evidence. She identified and accurately addressed the weaknesses in the identification evidence. She highlighted the discrepancies and inconsistencies which arose on the prosecution's case and demonstrated how she resolved them. Having adequately and accurately directed herself on all the material issues, the learned trial judge determined that the evidence in its totality was enough to convict the applicant. In our judgment, there was undoubtedly sufficient and compelling evidence on which she could properly make that decision. We could not, therefore, find any reason to disturb her findings. Consequently, supplemental grounds (a), (c), (d), (e) and (f) failed.

Issue (iii)- Were the sentences manifestly excessive? (supplemental ground (g))

[78] As already established, upon finding the applicant guilty for all three offences, the learned trial judge sentenced him to 15 years' imprisonment at hard labour for the offence of illegal possession of firearm, 18 years' imprisonment at hard labour for rape and 10 years' imprisonment at hard labour for robbery with aggravation. The applicant complained that the sentences were manifestly excessive and ought to be reduced. Ms Cummings argued, on his behalf, that the learned trial judge, in determining the appropriate sentence for each offence, failed to take into account mitigating factors such as his unblemished good character and behaviour, as well as the report from members of his community who described his actions as out of character and pleaded for leniency. She submitted that the learned trial judge did not indicate that the aggravating factors outweighed the mitigating factors, which would have justified the length of the sentences. It was also counsel's contention that the starting point for each offence was too high on the range. Further, the learned trial judge failed to give the applicant credit for the time he spent in custody awaiting trial.

[79] The Crown challenged those submissions by asserting that the learned trial judge gave reasons for the higher starting points, as they included the aggravating factors that she ascertained, and demonstrated how the mitigating factors were applied to arrive at the sentences she finally imposed. Finally, it was submitted that the learned trial judge did what the law required of her and that, in any event, the sentences given were appropriate for the offences committed.

[80] In determining whether the sentences were in fact manifestly excessive, this court assessed the learned trial judge's sentencing exercise in the context of the relevant law. It is now settled that an appellate tribunal will not lightly interfere with a sentence imposed by a judge of the court below. This principle was proficiently enunciated by Hilbery J in **R v Ball** (1952) 35 Cr App Rep 164, which this court adopted in **Alpha Green v R** (1969) 11 JLR 283, as follows:

> "… this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then the Court will intervene."

[81] At the time of sentencing, the learned trial judge did not have the benefit of the now well-known sentencing principles outlined in **Meisha Clement v R** [2016] JMCA Crim 26 and The Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'). Accordingly, in determining the relevant sentences, she would have given due consideration to the penalties outlined in the respective statutes. Section 20(4) of the Firearms Act imposes a maximum penalty of life imprisonment, with no stipulated minimum, for the offence of illegal possession of firearm contrary to section 20(1)(b). The penalty for rape is prescribed by section 6(1) of the SOA, which provides:

> "6. (1) A person who-
>
> (a) commits the offence of rape (whether against section 3 or 5) is liable on conviction in a circuit court to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years; or
>
> (b) ..."

Section 37(1)(a) of the Larceny Act stipulates that for robbery with aggravation, a convicted person would be liable to imprisonment with hard labour for a term not exceeding 21 years.

[82] In determining the appropriate sentence in accordance with those provisions, the learned trial judge would have had some guidance from cases of this court (see **Oneil Murray v R** [2014] JMCA Crim 25). Although not specifically referred to during sentencing, it is apparent from her sentencing remarks that she was cognisant of the basic approach to the sentencing process. The learned trial judge appropriately identified

the "normal sentence" for each offence as 15 years for illegal possession of firearm, 20 years for rape, and 10 years for robbery with aggravation. She reviewed the social enquiry and antecedent reports and stated the following as aggravating factors:

(a) the complainant and applicant were cousins;

(b) the complainant had five young children; and

(c) her children were in the bedroom during the incident.

She also found that the presence of her children would have enhanced the complainant's personal ordeal. Accordingly, taking into account his age of 26 years old, the learned trial judge specified starting points of 20 years for illegal possession of firearm, 25 years for rape and 15 years for robbery with aggravation.

[83] The mitigating factors contemplated by the learned trial judge further to the character evidence, social enquiry and community reports were that the applicant was a well behaved, hardworking, industrious young man with no previous convictions. In addition, she noted that the complainant spoke well of him, and she said she did not know him to be a criminal. The learned trial judge ultimately took this view (page 612, lines 7-13 of the transcript):

> "…What I have also recognized though is that being well behaved doesn't necessarily mean that you don't have occasions when you behave badly, and I believe this is one of those occasions, might have been aggravation or departed from the norm, extremely serious. Not only serious, callous."

[84] Consequently, the learned trial judge reduced his sentence on account of the mitigating factors. She reflected on the plea in mitigation, where it was said that he was remorseful. However, she observed that when the probation officer interviewed him, the applicant stated that he was sorry for the complainant's ordeal but denied committing the offences. As a result, the probation officer opined that the applicant was likely to re-offend since he did not appear to be remorseful. Still, the learned trial judge reflected on

his trial attorney's explanation that the applicant did not understand the probation officer's role and thought he worked for the police, but decided it did not make a difference. Nevertheless, to the applicant's advantage, she acknowledged that he was remorseful, accepted responsibility for the offences, and sentenced him accordingly.

[85] It is discernible from her sentencing remarks that the learned trial judge gave much consideration to the aggravating and mitigating factors in the case. In the context of the current Sentencing Guidelines, we observed that the sentences imposed for all three offences fell within the range of sentences typically imposed for offences committed in similar circumstances (seven-15 years for illegal possession of firearm; 15-25 years for rape; and 10-15 years for robbery with aggravation). The maximum sentence for illegal possession of firearm and rape is life imprisonment, and for robbery with aggravation, it is 21 years. In our judgment, the sentences for rape and robbery with aggravation are at the lowest end of their respective range despite the appalling circumstances.

[86] The evidence the learned trial judge accepted and which would have engaged her mind during the sentencing hearing was that the applicant and another man invaded the complainant's home. She was then raped and robbed at gunpoint in the presence of her young children by a member of her family with whom she had shared a relatively close relationship. The sexual offence was exacerbated by the threat of violence to the complainant and her children, who were also his relatives. This was an egregious breach of trust on the applicant's part. Additionally, in our judgment, the sentences were consistent with the normal ranges for these offences and in accordance with the relevant statutes. Therefore, we were satisfied that there could be no valid complaint about the term of years that the learned trial judge imposed.

[87] Notwithstanding the learned trial judge's thorough assessment, she made no indication that she considered or accounted for the time the applicant spent on pre-trial remand in arriving at the sentences. It is well established that full credit should be given for time spent in custody pending trial and/or sentencing. In the oft-cited case of

Callachand and Another v State [2008] UKPC 49, at page 781, Sir Paul Kennedy stated:

> "…In principle it seems to be clear that where a person is suspected of having committed an offence, is taken into custody and is subsequently convicted, the sentence imposed should be the sentence which is appropriate for the offence. It seems to be clear too that 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 …"

[88] That principle has since been emphasised in several cases, including **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ) (a decision of the Caribbean Court of Justice), **Ajay Dookee v The State of Mauritius and Another** [2012] UKPC 21 (a decision of the Privy Council) and **Meisha Clement v R,** a decision of this court. It can also be found in the Sentencing Guidelines.

[89] A judge, in his or her discretion, can deviate from the rule that full credit should be granted for the time spent on remand prior to sentencing in certain circumstances (see **Callachand and Another v State** and 11.4 of the Sentencing Guidelines). However, this is not a case that falls within those exceptions. In any event, the judge must give reasons for departing from that rule (11.6 of the Sentencing Guidelines), and no such reasons were given. We ascertained from the transcript that the applicant spent one year and six months in custody before he was sentenced. In the circumstances, we ordered that he should be given full credit for that time.

[90] We also noticed that the learned trial judge failed to stipulate a pre-parole period for the offence of rape, in accordance with section 6(2) of the SOA. That section provides that where a person has been sentenced pursuant to section 6(1)(a) (life imprisonment or a term of imprisonment not being less than 15 years), the court should specify a pre-parole period of not less than 10 years. As a result, we further ordered that the applicant serve a period of 12 years' imprisonment at hard labour before becoming eligible for parole.

Conclusion

[91] For all the foregoing reasons, we made the orders detailed at paragraph [1] above.