[2022] JMCA Crim 8

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 104/2015

ORAINE ELLIS V R

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

Ms Natallie Malcolm, Mrs Christina Porter and Marvin Richards for the Crown

15, 18 March and 1 April 2022

LAING JA (AG)

Background

[1] On 13 November 2015, after a trial before a judge and jury in the Circuit Court for the parish of Clarendon, holden at May Pen, Oraine Ellis ('the appellant'), was found guilty on an indictment charging him with the offence of rape, contrary to section 3(1) of the Sexual Offences Act ('the Act'). On 9 December 2015, he was sentenced to 20 years' imprisonment at hard labour.

[2] The appellant applied to this court for leave to appeal his conviction and sentence. His application was considered by a single judge of this court who granted leave to appeal against sentence only. The appellant, as is his right, has renewed his application to appeal his conviction before this court.

[3] On 18 March 2022, after previously having heard submissions, the court made the following orders:

1. The application for leave to appeal conviction is refused.

2. The appeal against sentence is allowed.

3. The sentence of 20 years' imprisonment at hard labour is set aside and a sentence of 20 years' imprisonment at hard labour with the stipulation that the appellant serves a period of 13 years' and 11 months' imprisonment at hard labour (with one year and one month on pre-trial remand having been credited) before becoming eligible for parole is substituted therefor.

4. The sentence is to be reckoned as having commenced on 9 December 2015.

[4] At that time, we promised to put our reasons in writing. This is a fulfilment of that promise.

The trial

The Crown's case

[5] On Sunday, 29 April 2012, the complainant SE, who was then 15 years old, attended church at Chapelton Road, in the parish of Clarendon. She was with her mother and female cousin. She was crying, and the appellant, who was the preacher at the church, invited her to the altar whilst he was delivering his sermon. The appellant spoke to her, and while praying, he poured olive oil in his hand and rubbed it all over her forehead. He then asked her where her mother was. SE identified her mother, and her mother joined them at the altar. He told SE and her mother that he wished to speak to them after the church service.

[6] At the end of the church service, the appellant again invited SE to the altar, where he asked her a series of questions. These questions were whether she had ever thought about getting baptized, whether she had a boyfriend, and whether she was a virgin. She

answered yes to all three questions. SE returned to the company of her mother. The appellant subsequently joined them. He asked for and was given her telephone number as well as that of her elder sister. He also told SE and her mother they were supposed to attend the night service.

[7] Later that day, SE received a text and attended the night service along with her mother, her cousin and a close family friend, who she referred to as her 'aunt'. Although not a blood relative, we will adopt that characterisation and refer to her as such for purposes of this judgment.

[8] SE documented personal issues she was facing on her laptop and attempted to have the appellant read what she had written. However, on that Sunday night, he told her that he was busy and could not do so that night. He instead invited her to return the following day for counselling if she would not be attending school.

[9] The following morning, sometime after 9:00 am, the appellant telephoned SE and asked whether she was at school. She indicated that she was not. He then told her he was on his way to the church and told her to come there. SE walked to the church and entered the door, which was open. The appellant was then sitting at the pulpit. After they exchanged greetings, the appellant invited her into his office, which was close to the pulpit. She joined him inside the office, and while there, they were both seated at a table. The appellant asked to see the document she had prepared. SE gave him the laptop, and while reading, he complimented her, telling her she was brilliant and noting that there were no grammatical errors.

[10] The appellant then said, "come here". SE went to him while he was still seated at the table, and he hugged her. SE told him to let go of her and used her hand to "press him off". She returned to her seat. At the appellant's invitation, SE again went over to where he was, and he put her to sit in his lap. The appellant kissed her on her lips, and she told him that she felt uncomfortable doing that.

[11] SE closed her laptop, and whilst putting it in her bag, the appellant asked her if she would allow him to bless her before she left. She said no. He poured olive oil in his hand and pushed her against the wall. She screamed, "no, no, no" and the appellant said, "nuh seh nutten, mi a tek it easy". He kicked her feet apart, pulled down her pants and underwear, inserted his oiled finger into her vagina. He then removed his finger, inserted his penis and had sex with her while she screamed in pain. He took out his penis, took up a tissue that was on the table and turned his back to SE. She noticed some grey liquid fell on the floor, and the appellant went behind the curtain.

[12] SE pulled up her pants, took up her bag, and was leaving the office when the appellant asked her if she was alright, dragged her by her arm into the office, pulled down her pants and underwear, and had sexual intercourse with her a second time against her will. After he was finished, he took out his penis and inserted his finger inside her vagina. When he removed his finger, SE said she saw blood on his finger. She pulled up her pants and ran.

[13] On her way home, SE stopped at her aunt's house and told her that she was raped by the appellant. Her aunt left her there and later returned with her mother, at which point SE was lying on the floor at the doorway of her aunt's house, crying. She had blood at the back of her pants.

[14] The appellant was accosted while he was on the street in the vicinity of Chapelton Road and Howard Avenue. He was pushed to the ground and his hands and feet bound. While restrained on the ground, the complainant's mother approached him and said, "Pastor ah you preach to we so last night and you rape mi daughter?" to which he did not respond. The police came, and the appellant was handed over to them. He was taken to the May Pen Police Station, where his underwear was taken by the police.

[15] SE, along with her mother, attended the May Pen Police Station, where they made a report. She was taken by the police officers to the church and the room where the event had transpired earlier that day. Rolled-up tissue was observed behind the curtain.

She was also taken to the Denbigh Hospital on 30 April 2012, where she was medically examined.

[16] The evidence of the medical doctor who examined SE on 30 April 2012, was that he observed bruising and swelling on the labia majora, which is the outer fold of her vagina. Bruising was also noted to the distal one-third of the vagina, which is the area that is closest to the entrance of the vagina. The examination also revealed that the hymen was ruptured, red and inflamed, and bleeding at three particular positions. This, in the doctor's opinion, was evidence of recent trauma.

The appellant's unsworn statement

[17] The appellant gave an unsworn statement from the dock in which he denied having sexual intercourse with the complainant. He stated that on Sunday, 29 April 2012, while delivering his sermon, he noticed SE. At the end of the sermon, he asked her for the telephone numbers of her sister, her mother and herself. He sent a text message inviting her to attend church that night.

[18] The following day at about 9:00 am, he returned a missed call to a telephone number indicated on his phone, and it was SE that was at the other end of the line. During the call, she asked if she could stop by the church, and he informed her that it would not be convenient for her to do so, but he would make arrangements. While he was inside the church, SE entered, and after they exchanged greetings, she went to the rostrum. He went outside and made a phone call to ascertain the whereabouts of a young lady who he expected to arrive. He then went inside the church and invited SE to sit inside the makeshift office, which did not have a door but only had a curtain, which he pulled aside.

[19] He read the document that SE had prepared on her laptop and complimented her on her brilliance as the document contained little to no grammatical errors. They spoke, then prayed together, and SE left a few minutes later.

[20] The appellant stated that whilst he was at the intersection of Chapelton Road and Howard Avenue, scratching off a phone card which he had just purchased at a church sister's home nearby, he was approached by two men, a woman and child. He was kicked and beaten by one of the men. His belt was removed and used to restrain his hands behind his back, and his shoelace was used to "bound his feet". A crowd also converged. SE's mother approached him while he was on the ground and said, "Pastor ah you rape my daughter", to which he did not respond. He was later taken by police to the May Pen Police Station, where he was charged with the offence of rape, which he denied.

The appeal

The grounds of appeal

[21] The appellant filed five original grounds of appeal, being "mis-identity by the witness", "lack of evidence", "unfair trial", "conflicting testimonies", "miscarriage of justice", and "sentence".

[22] Ms Melrose Reid, on behalf of the appellant, abandoned ground one, which was mis-identity by the witness. This ground was wisely not pursued, especially considering the concession made by counsel who had appeared in the court below, that identification was not in issue. Ms Reid was permitted by the court to consolidate the remaining grounds in relation to the appellant's conviction. Accordingly, grounds 1 to 4 were subsumed within one ground, being ground five, which is "miscarriage of justice".

The submissions

[23] The main contention of the appellant under the amalgamated ground is that a sample of his deoxyribonucleic acid ('DNA') was taken from him, and a DNA test was conducted, but the Crown had failed to put those results into evidence. It was posited in the written submissions that DNA evidence could assist in determining whether a person is guilty of an offence or not. That being so, in the instant case, the failure of the Crown to put the DNA results into evidence with all the other evidence resulted in a miscarriage of justice, as this could have exonerated the appellant.

[24] During her oral submissions, Ms Reid adopted a more nuanced argument. She conceded that there was no evidence that the DNA evidence exonerated the appellant, but submitted that the prosecutor as a minister of justice was, in any event, obliged to put the DNA evidence into evidence so that the jury could have a full picture of what had transpired. Counsel maintained that this was an accurate statement of the law, even if the DNA evidence was not capable of advancing the case of the Crown or exonerating the appellant.

[25] Counsel relied on the oft-cited authority of **Randall v The Queen** [2002] UKPC 19, a case from the Privy Council which concerned an appeal from the Court of Appeal of the Cayman Islands, where the Privy Council emphasised the point that the duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice.

[26] It was submitted by Crown Counsel, Mrs Porter, that full disclosure was made to the defence of the scientific evidence obtained as a result of the investigation. The Crown did not serve a notice to adduce the DNA evidence, nor was the name of any witness from whom evidence relating to DNA would have been adduced listed at the back of the indictment. Accordingly, there would have been no legitimate expectation on the part of the defence for the Crown to have presented such evidence for admission during the trial.

[27] It was also contended by the Crown that, in such circumstances, where the prosecution had clearly fulfilled its duty of disclosure, it would have been open to the defence to utilise the DNA evidence if it was of the view that it could have advanced its case.

[28] In further submissions on the ground of miscarriage of justice, it was contended by Mrs Porter that the learned judge's summation cannot be impeached as she gave adequate directions to the jury. She also outlined in clear and unequivocal terms the relevant areas of the law, including the ingredients of the offence and how the jury should

assess the credibility of witnesses. Specific directions on inferences, inconsistencies, contradictions and discrepancies were also alluded to by the learned judge.

[29] To summarise, Crown Counsel submitted that there was a clear evidential basis for the verdict, which was returned by the jury and accordingly, the amalgamated ground as prayed should fail.

Discussion

[30] In **Randall v R,** the Board adopted and agreed with the description of a prosecutor's role in a criminal matter as was elucidated by Rand J in **Boucher v The Queen** (1954) 110 Can CC 263, 270, a case emanating from the Supreme Court of Canada. At paragraph 10, Lord Bingham of Cornhill, in delivering the judgment of the Board, stated as follows:

> "It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

[31] This case does not support the assertion by the appellant that in his role as a minister of justice, a prosecutor has an obligation to put into evidence whatever documents or statements he possesses which is of evidential and probative value to the defendant.

[32] Whereas it cannot be gainsaid that prosecutors are ministers of justice, the prosecution has a significantly different role from that of defence counsel within the judicial process and, in particular, a trial. The primary objective of the prosecution is to present a case that conveys the guilt of the accused beyond reasonable doubt, and the

objective of the defence is to cast reasonable doubt upon that case advanced by the prosecution.

[33] In the case of **R v Richardson** (1993) 98 Cr App Rep 174, the prosecution served witness statements on the defence as unused material. None of the unused material was utilised by the prosecution at the trial. The appellant was convicted of murder and appealed against his conviction on the ground that the prosecution ought to have adduced that evidence. The court held that to have requested the prosecution to call those witnesses would in effect have required them to act as both prosecution and defence. On that basis, the appeal was dismissed. It was also noted by the court that the defendant had the opportunity to call the witnesses as part of its case (and more importantly, for purposes of the instant case) the court held that it was unclear what benefit the appellant would have received by a cross-examination of the witnesses whom the appellant argued should have been called.

[34] Ultimately, the issue is always one of fairness. We are in agreement with the submissions of the Crown that, as far as the DNA evidence is concerned, the prosecution had discharged any obligation it was under by disclosing such material to the defence, thereby availing the defence of the opportunity to utilise such evidence as it saw fit.

[35] We are cognisant of the fact that the defence at times finds it difficult to call witnesses or utilise materials because it may be detrimental to its case. However, on the particular facts of this case, there is no support for an argument that the DNA result was capable of supporting or casting doubt on the case for the prosecution where the sole issue was that of credibility. Additionally, Ms Reid was unable to demonstrate to us what benefit, if any, the appellant would have received by a cross-examination of any witness called by the prosecution in respect of DNA evidence. In the circumstances, we find that there was no unfairness to the appellant by the course adopted by the prosecution.

[36] Furthermore, the fact that no DNA evidence was presented to the jury would not have been in and of itself prejudicial to the appellant, even if the jurors anticipated such

evidence. The directions of the judge, although not expressly addressing the absence of DNA evidence, had the effect of assisting the jury in the event that they anticipated hearing such evidence and/or harboured any questions in relation to that scientific evidence. The learned judge, in her summation, prudently referred to the evidence of the appellant's underwear being collected and advised the jury not to speculate as to what happened to the underwear.

[37] We are, therefore, of the view that this complaint of the failure of the Crown to adduce DNA evidence is not supported by the authorities, and the amalgamated ground is without merit.

Sentence

[38] The appellant has dissected this ground into five subheadings as follows:

> "(A). The [learned judge] has misinterpreted the Law when she said that 15 years is only deserving for people who pleaded guilty, and therefore was of the misguided opinion that she was unable to impose the mandatory minimum of 15 years.
>
> (B). The [learned judge] erred in not stipulating a specific period before which the Appellant shall become eligible for parole.
>
> (C). The [learned judge] erred in not requesting a Social Enquiry Report (SER), in order to assist her in sentencing.
>
> (D). The [learned judge] failed to show how the Good Character of the Appellant assisted him in his sentence.
>
> (E). The [learned judge] failed to estimate arithmetically how she arrived at the sentence of 20 years."

Appellant's submissions

[39] For ease of reference, the submissions of Ms Reid can be summarised as follows:

(i) It is not stated anywhere in the relevant legislation that only persons who have pleaded guilty are deserving of the mandatory minimum.

(ii) The learned judge erred in law when she failed to act in accordance with section 6(2) of the Sexual Offences Act, which required her to specify the period the accused shall serve before becoming eligible for parole.

(iii) It can be deduced from sections 5(1) and 5(2) of the Probation of Offenders Act that a Social Enquiry Report ('SER') is a requirement of sentencing. Counsel identified a number of virtues of the SER and submitted that the learned judge fell into error when she failed to obtain a SER which could have assisted her in reaching an appropriate sentence for the appellant.

(iv) The learned judge did not demonstrate numerically how she took into consideration the positive attributes of the appellant that was tendered into evidence by his character witnesses.

(iv) It was also contended by Ms Reid that during the commission of the offence, no weapon was used by the appellant.

[40] In light of concessions by the Crown in respect of subheadings (A) and (B), Ms Reid firstly addressed the court on subheading (C), which dealt with the failure of the judge to have obtained a SER.

[41] Counsel Ms Reid argued that the information that usually comprises the SER is more extensive and captures a "broader spectrum" than the evidence elicited from a character witness during the trial. Counsel commended a number of cases to the court,

including **R v Errol Campbell** (1974) 12 JLR 1317, which she submitted demonstrates the value of a SER.

[42] Ms Reid accepted that counsel representing the accused in the court below declined the invitation of the judge to have a SER prepared. She posited that ultimately it was a matter for the judge's discretion, and by making that enquiry of counsel and honouring his wish, the learned judge had divested her responsibility to counsel to the prejudice of the appellant.

[43] In respect of subheading (D), Ms Reid emphasised the point that although the learned judge acknowledged that she was taking into consideration the appellant's good character, she did not demonstrate mathematically how she arrived at the sentence. She further contended that unless this was done, it would be impossible to determine if it, in fact, redound to the appellant's benefit.

[44] The overarching point on which Ms Reid concentrated was subheading (E), which was that the learned judge failed to state arithmetically how she arrived at the sentence of 20 years' imprisonment. For this point, counsel relied on a number of cases, including **Meisha Clement v R** [2016] JMCA Crim 26 and the approach suggested therein.

[45] In concluding, counsel Ms Reid urged the court to impose a sentence of 15 years' imprisonment, with a stipulation that the appellant serves 10 years' imprisonment before being eligible for parole.

Crown's submissions

[46] The Crown acknowledged that the learned judge would not have had the benefit of the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') or cases such as **Meisha Clement v R** and **Daniel Roulston v R** [2018] JMCA Crim 20 which have dictated the guiding principles to be applied when sentencing an offender. It was submitted that, nevertheless, common law guidance was in existence at the time of sentencing and the methodology employed by the learned judge was not in accordance with those well-

established principles. For that reason, it was graciously conceded by the Crown that to the extent that the learned judge departed from the required methodology, the process was flawed, and this court would be entitled to treat afresh with the matter of sentencing.

[47] As it relates to the learned judge's failure to request a SER, Mrs Porter noted that the case of **Michael Evans v R** [2015] JMCA Crim 33 highlights the utility of these reports but also expressly states that the failure to obtain one will not invalidate the sentence. Furthermore, there are some instances where the defendant or his counsel may opt not to have one, and the instant case is such an example.

[48] In addressing, the reasonableness of the sentence alluded to by Ms Reid, the Crown identified the following as aggravating factors:

(a) The betrayal of trust by the appellant in taking advantage of the access he had to SE in order to commit the offence.

(b) The fact that SE was 15 years of age and a virgin at the time of the offence.

(c) The appellant had a previous conviction for carnal abuse, a relevant offence for which he served a custodial sentence of four years.

(d) The offence was committed on the compound of the church.

(e) Personal violence was used.

(f) The offence was premeditated.

(g) The prevalence of the offence of rape.

[49] These factors, as listed, Mrs Porter stated, would increase the sentence from 15 years to 22 years. She submitted that the mitigating factors would be the appellant's good character and extensive work in the church, which would reduce the figure to 21

years. This would be further reduced by one year and one month for the time spent in custody while on remand, resulting in a figure of 19 years and 11 months' imprisonment with the stipulation that he serves 15 years before being eligible for parole.

Discussion

[50] In assessing the importance of the SER during the sentencing process and the failure of the learned judge to request one, we note the judgment from this court in **Michael Evans v R** in which McDonald-Bishop JA made the following observations at paragraph [9]:

> "[9] We do recognize the utility of social enquiry reports in sentencing and cannot downplay their importance to the process. Indeed, obtaining a social enquiry report before sentencing an offender is accepted as being a good sentencing practice. John Sprack in A Practical Approach to Criminal Procedure, tenth edition, page 395, paragraph 20.33, in his discussion of the provisions of the Powers of Criminal Courts (Sentencing) Act 2000, as they relate to the use of pre-sentencing reports in the UK, noted:
>
> > 'Even if there is no statutory requirement to have a [social enquiry] report, the court may well regard it as good sentencing practice to have one, particularly if it is firmly requested by the defence. Nevertheless, even where the obtaining of a pre-sentence report is 'mandatory', the court's failure to obtain one will not of itself invalidate the sentence. If the case is appealed, however, the appellate court must obtain and consider a pre-sentence report unless that is thought to be unnecessary.'"

[51] It is worth mentioning that in **Michael Evans v R**, the court observed that it could not have been said that the learned judge had denied an application for a SER to be obtained because there was nothing in the record that indicated that defence counsel had made such an application. However, even in the absence of any mandatory requirement or request from defence counsel, the court could have ordered one of its own volition and in its own discretion. Accordingly, the issue, in that case, was whether the learned judge erred in principle by his failure to obtain a SER in the circumstances of

that case, rendering the sentences manifestly excessive (see **Michael Evans v R**, paragraph [10]).

[52] In the instant case, not only was there no request by counsel for the appellant for a SER, but there was a positive refusal to have one requested when the learned judge made an enquiry. The relevant exchange is extracted from the transcript at page 57 as follows:

> "Mr. REECE: If it pleases you, m'lady, we will postpone sentence until the 25th of November.
>
> HER LADYSHIP: The 25th of November.
>
> MR. REECE: Just a moment, m'lady.
>
> HER LADYSHIP: Yes, Mr. Reece
>
> MR. REECE: Thank you
>
> HER LADYSHIP: You wish a report in the matter?
>
> MR. REECE: No, m'lady.
>
> HER LADYSHIP: So it's just for the antecedent on the 25th?
>
> MR. REESE: And any witnesses if we have."

[53] In the absence of a SER, the learned judge nevertheless acknowledged the evidence of the appellant's character witness, Reverend Sonia Seivwright, as to the appellant's leadership qualities and his contribution to the church. The learned judge noted:

> "So you are someone in the general scheme of things, who has a valuable contribution to make. Those things are to be taken into account, of course, because it is admirable when youth exhibits those qualities and so I will take that into account in the sentencing process, because it is important."

[54] It was also disclosed on the evidence of Reverend Seivwright that the church community had not abandoned the appellant and stood ready to give him support. The

learned judge, therefore, had before her, in substance, the positive feedback which one could have reasonably expected to be found in a SER had one been ordered. It is, therefore, our firm view that the failure of the learned judge to have obtained a SER was not an error in principle, which rendered the sentence excessive.

[55] In determining whether the sentence is manifestly excessive, we are guided by section 14(3) of the Judicature (Appellate) Jurisdiction Act, which provides that:

> "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."

[56] Due consideration must be given to the authority of **R v Kennett Ball** (1951) 35 Cr App R 164, at page 165 and the principles espoused therein, which have been repeatedly referred to by this court, that:

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

[57] It is common ground between the parties that the learned judge did not employ the sentencing methodology suggested in cases such as **Meisha Clement v R** and **Daniel Roulston v R**, and, as a consequence, it was not sufficiently demonstrated how she had arrived at the sentence imposed. For that reason, the learned judge erred in principle in sentencing the appellant. Therefore, it is the responsibility of this court to determine the appropriate sentence that ought to have been imposed after applying the relevant principles. We agree that this position is correct in law.

[58] In **Meisha Clement v R**, at paragraph [43], Morrison P, in delivering the judgment of the court, detailed the task to be undertaken by the court in imposing a sentence:

> "[43] On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[59] These principles have been affirmed and adopted in a number of cases by this court, and in **Daniel Roulston v R**, McDonald-Bishop JA, at paragraph [17], indicated that the following approach and methodology is to be employed:

> "a. identify the sentence range;
>
> b. identify the appropriate starting point within the range;
>
> c. consider any relevant aggravating factors;
>
> d. consider any relevant mitigating features (including personal mitigation);
>
> e. consider, where appropriate, any reduction for a guilty plea;
>
> f. decide on the appropriate sentence (giving reasons); and
>
> g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."

[60] It is not disputed that although the learned judge correctly identified the appropriate sentence range as being between 15 years' imprisonment and life imprisonment, she did not state a starting point. In **Meisha Clement v R** at paragraph [29], Morrison P offered the following guidance:

> "[29] But, in arriving at the appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence. Although not a part of our law, the considerations mentioned in section 143(1) of the United Kingdom Criminal Justice Act 2003 are, in our view, an apt summary of the factors which will ordinarily inform the assessment of the seriousness of an offence. These are the offender's culpability in committing the offence and any harm which the offence has caused, was intended to cause, or might foreseeably have caused."

[61] We accept the submission of both parties that the statutory minimum of 15 years is an appropriate starting point in the instant case. Whereas all rapes are egregious, we do not consider that the present case can be considered to be among the "worst of the worst" of this kind of offence so as to justify a higher starting point. To adopt the words of McDonald-Bishop JA in **Daniel Roulston v R** at paragraph [21]:

> "…there was nothing done by him to the complainant in committing the offence of rape, which went over and beyond the commission of that offence or which was not inherent in its commission that would justify a higher starting point. "

[62] We are also in agreement with the Crown that the following are aggravating factors:

1. The betrayal of trust by the appellant, being a 32-year-old pastor, who used his position to take advantage of the access he had to SE.

2. The fact that SE was 15 years of age and a virgin at the time of the offence. Apart from the expected emotional pain and distress of losing her virginity by the vile act of the appellant, the experience was also physically painful as a consequence of her being a virgin. SE's evidence was that she started to scream because she was feeling pain and the evidence was that she bled.

3. The appellant had a previous conviction for carnal abuse, a relevant offence for which he served a custodial sentence of four years. We have also considered the fact that the date of commission of this offence was in close proximity to the appellant's previous conviction, which similarly involved a minor.

4. The offence was committed on the compound of the church. There are circumstances where the place of commission of the offence can be considered as an aggravating factor (see **Daniel Roulston v R**, at paragraph [26]). In the instant case, the basis of such a finding is not because it can be considered to be a violation or misuse of a sacred place and therefore offensive to persons of faith, but because the church in Jamaica represents a place of safety where one does not expect to be sexually violated. It is a place where SE ought to have felt safe and secure and ought to have been secure. The fact that the appellant is in a position of trust as a function of him being a pastor in the church is a separate aggravating factor. However, in our view, the use of what is considered to be a safe space to have sexual intercourse with SE against her will is an independent aggravating factor deserving of its own treatment.

5. The offence was premeditated. We find the Crown's submissions in this regard to be compelling. The evidence of premeditation is demonstrated by the questions posed to SE initially, including whether she was a virgin and whether she had a boyfriend. The appellant, on Sunday, also invited SE to attend church for counselling on the following day if she was not going to school. On that Monday, he called SE by telephone and told her to come to the church where he would be. Additionally, when she arrived at the church, SE and the appellant were the only two persons

inside the church at that time, and there was sufficient privacy for him to have counselled her if that was his sole intent. Therefore, there was no good reason for him to have invited her into his office.

6. The prevalence of rape in the country.

[63] We do not accept that the fact that personal violence was used in this case ought to be an aggravating factor as the extent of the violence used was no more than was necessary to commit the offence.

[64] Having considered these aggravating factors as identified above, we are of the view that, collectively, they would result in an upward adjustment to the starting point to a sentence from anywhere between 21 and 23 years.

The mitigating factor

[65] We have found as a mitigating factor the appellant's good character, as stated by Reverend Seivwright, who had known him since he was a child. It was argued by Ms Reid that there is no evidence that he was given credit for his good character in the court below. However, we have considered and given credit to the appellant for his contribution to the church and, by extension, the wider community. We have also acknowledged the evidence that he is married and is considered by members of the church to be an upstanding member of the community.

[66] In the circumstances, this mitigating factor resulted in a downward adjustment of the starting point to a sentence in the range of 20 and 22 years. Therefore, the sentence of 20 years at hard labour imposed by the learned judge fell at the lower end of the range of sentences that the court could have imposed.

The pre-parole period and time spent in pre-trial custody

[67] The court is required by section 6(2) of the Act to specify a period of not less than 10 years, which a person convicted of rape shall serve before becoming eligible for parole.

Section 6(2) of the Act is declared to be in substitution for the provisions of sections 6(1) to (4) of the Parole Act.

[68] Section 6(2) of the Act provides as follows:

> "(2) Where a person has been sentenced pursuant to subsection (1)(a) or (b) (ii), then in substitution for the provisions of section 6(1) to (4) of the Parole Act, the person's eligibility for parole shall be determined in the following manner: the court shall specify a period of not less than ten years, which that person shall serve before becoming eligible for parole."

[69] Both counsel for the appellant and Counsel Crown agreed that where there is a failure of the learned judge to specify a period for parole, it would fall to this court to do so. We are inclined to order that the appellant is to serve 15 years before becoming eligible for parole.

[70] However, the appellant is entitled to credit for time spent in custody awaiting trial in keeping with the authorities of **Callachand and Another v State** [2008] UKPC 49, **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ) and **Meisha Clement v R**. He had spent one year and a month in pre-trial custody. We are of the view that, in the circumstances of this case and the particular circumstances of this offender, the credit to be given for time spent in pre-trial custody should be deducted from the pre-parole period and not from the determinative sentence of 20 years. Accordingly, we stipulated that the appellant should serve 13 years and 11 months before becoming eligible for parole.

[71] It is for these reasons we made the orders detailed at paragraph [3] above.