[2019] JMCA Crim 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 42/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE FRASER JA (AG)

PAUL HAUGHTON v R

Trevor Ho-Lyn for the appellant

Miss Cadeen Barnett and Malike Kellier for the Crown

24 June and 23 September 2019

MORRISON P

Introduction

[1] Section 6(1)(a) of the Sexual Offences Act ('the SOA') provides that a person who commits the offence of rape shall be liable on conviction in a Circuit Court to imprisonment for life or such other term as the court considers appropriate, not being less than 15 years.

[2] Section 6(2) provides that where a person has been sentenced under section 6(1)(a), "the court shall specify a period of not less than ten years, which that person shall serve before becoming eligible for parole".

[3] A conviction for rape therefore attracts a prescribed minimum sentence of 15 years' imprisonment and a minimum period of 10 years before becoming eligible for parole.

[4] Section 42K of the Criminal Justice (Administration) (Amendment) Act (CJAA)[1] provides that:

> "42K (1) Where a defendant has been tried and convicted of an offence that is punishable by a prescribed minimum penalty and the court determines that, having regard to the circumstances of the particular case, it would be manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty for which the offence is punishable, the court shall –
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> (a) sentence the defendant to the prescribed minimum penalty; and
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> (b) issue the defendant a certificate so as to allow the defendant to seek leave to appeal to a Judge of the Court of Appeal against his sentence.
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> (2) A certificate issued to a defendant under subsection (1) shall outline the following namely –
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> (a) that the defendant has been sentenced to the prescribed minimum penalty for the offence;
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> (b) that the court decides that, having regard to the circumstances of the particular case, it would be

[1] As amended by Act No 29 of 2015, the Criminal Justice (Administration) (Amendment) Act, 2015,

> manifestly unjust for the defendant to be sentenced to the prescribed minimum penalty for which the offence is punishable and stating the reasons therefor; and
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> (c) the sentence that the court would have imposed on the defendant had there been no prescribed minimum penalty in relation to the offence.
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> (3) Where a certificate has been issued by the Court pursuant to subsection (2) and the Judge of the Court of Appeal agrees with the decision of the court and determines that there are compelling reasons that would render it manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty, the Judge of the Court of Appeal may –
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> (a) impose on the defendant a sentence that is below the prescribed minimum penalty; and
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> (b) notwithstanding the provisions of the *Parole Act*, specify the period, not being less than two-thirds of the sentence imposed by him, which the defendant shall serve before becoming eligible for parole."

[5] The clear intent of section 42K is that a person who has been sentenced to a prescribed minimum sentence, in respect of which the sentencing judge has issued a certificate under section 42K(2), should have a direct right of recourse to a Judge of the Court of Appeal. However, unfortunately, and perhaps not unusually, no rules governing the exercise of this special jurisdiction have been prescribed and it is not at all clear by what means it is intended to be activated.

[6] But, by a companion measure passed on the same day as the Act which amended the CJAA to include section 42K, the Judicature (Appellate Jurisdiction) Act (JAJA), was also amended[2] to add subsections (1A) and (1B) to section 13 in the following terms:

> "(1A) Notwithstanding subsection (1)(c), a person who is convicted on indictment in the Supreme Court may appeal under this Act to the Court with leave of the Court of Appeal against the sentence passed on his conviction where the sentence was fixed by law, in the event that the person has been sentenced to a prescribed minimum penalty in the circumstances provided in –
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> (a) section 42K of the *Criminal Justice (Administration) Act*, and has, pursuant to that section, been issued with a certificate by the Supreme Court to seek leave to appeal to the Court of Appeal against his sentence; or
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> (b) section 42L of the *Criminal Justice Administration Act*.
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> (1B) For the purposes of subsection (1A), the reference to 'Supreme Court' shall include the High Court Division and the Circuit Court Division of the Gun Court established under the *Gun Court Act*."

[7] Section 13(1A) and (1B) of the JAJA, as amended, therefore gives a person who has been sentenced to a prescribed minimum sentence, and who has been granted a certificate by the sentencing judge under section 42K of the CJAA, a right of appeal to the Court of Appeal with the leave of the court in the usual way.

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[2] Act No 28 of 2015, the Judicature (Appellate Jurisdiction) (Amendment) Act, 2015

[8] On 14 December 2016, after a trial before Daye J ('the judge') and a jury in the Circuit Court for the parish of Saint James, the appellant was convicted of the offences of rape, robbery with violence and unlawful wounding. On 24 March 2017, the judge sentenced the appellant to concurrent terms of imprisonment of 15 years for rape, three years for robbery with violence and three years for unlawful wounding.

[9] With regard to the sentence for rape, the judge considered that, in the light of all the circumstances of the case, the appellant did not deserve to be given the prescribed minimum sentence of 15 years. In the judge's view, were it not for the prescribed minimum sentence, a sentence of seven years' imprisonment would have been appropriate. Accordingly, the judge issued a certificate pursuant to section 42K of the CJAA on the basis that, in this case, he considered it to be manifestly unjust for the appellant to be sentenced to the prescribed minimum penalty. We will consider the actual terms of the certificate in due course[3].

[10] By notice of application for permission to appeal dated 10 May 2017, the appellant applied for permission to appeal against the convictions and the sentences imposed by the judge. The application was considered on paper by a single judge of this court on 5 November 2018. The application for permission to appeal against the convictions was refused. However, not surprisingly, in the light of the parallel pathways to a Judge of Appeal and to this court which section 42K of the CJAA and section 13(1A) of the JAJA

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[3] See para. [26] below

respectively afford to an appellant seeking to challenge a prescribed minimum sentence, the single judge expressed some uncertainly as to his jurisdiction to consider the matter. He accordingly granted the appellant permission to appeal against sentence.

[11] In our view, as matters stood before him, the single judge dealt with this aspect of the matter appropriately. In point of form, the matter was before him pursuant to a notice of application for permission to appeal against conviction and sentence issued under rule 3.3(1)(b) of the Court of Appeal Rules 2002. Rule 3.3(3) provides that "[w]here the court has given permission to appeal the notice of application for permission to appeal shall stand as the notice of appeal". There can be no doubt therefore that, the single judge having granted permission to appeal, this is an appeal pursuant to section 13(1A) of the JAJA. We would only add that unless or until some route of access to a Judge of Appeal under section 42K of the CJAA is prescribed by regulation, it might be best for offenders who are aggrieved by the imposition of a prescribed minimum penalty to avail themselves, as the appellant did in this case, of the right of appeal to the court provided for by section 13(1A) of the JAJA.

[12] Following on from the ruling of the single judge, the appellant renewed his application for leave to appeal against his convictions. But, when the matter came on for hearing on 24 June 2019, counsel for the appellant, Mr Trevor Ho-Lyn (who did not appear in the court below), advised us that he would not pursue the application. However, in relation to the appeal against sentence, Mr Ho-Lyn sought and was granted leave to argue the following supplemental ground of appeal:

> "That in all the circumstances of this case, the minimum mandatory sentence of 15 years although designated as the appropriate sentence, is disproportionate to the circumstances of the offence in this case and therefore the mandatory sentence was manifestly excessive."

[13] The single issue which arises on this appeal is therefore whether, as the judge thought, the circumstances of this case are such as to make the imposition of the prescribed minimum sentence of 15 years' imprisonment for the offence of rape manifestly excessive and unjust; and, if so, what is the appropriate sentence to be imposed on the appellant instead.

The factual background

[14] Right from the very outset of her evidence at the trial, the complainant described herself[4] as a person who "solicit … [m]oney for sex". For his part, the judge, based on this evidence, characterised the complainant[5] as a "sex worker".

[15] The case for the prosecution may be summarised as follows. At approximately 1:00 am on 10 January 2013, the complainant and the appellant, whom she did not know before, met at a night club in Coral Gardens. They negotiated and arrived at a price of $5,000.00 for the provision of sexual services. Of this amount, the appellant paid the complainant $1,000.00 on the spot, with a promise of payment of the balance to follow

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[4] Notes of Evidence, page 1, lines 19-21
[5] Transcript of the summing-up, page 5, line 15

when she joined him in a taxi cab to travel to his home in Barrett Town, which is where he proposed that they should go to complete the transaction.

[16] Once the terms were agreed, the complainant and the appellant departed in a taxi cab. They were bound, as the appellant led the complainant to believe, for his home. Once they got into the taxi cab, the complainant asked the appellant on more than one occasion to give her the balance of the money which they had agreed to, but he did not do so. The driver of the taxi cab and the appellant appeared to be known to each other and, after about five minutes, on the appellant's instructions, the driver brought the vehicle to a halt in a bushy, unlit area. After letting off the complainant and the appellant, the taxi cab sped off. The complainant then followed the appellant up "a little hill", thinking that she was being led towards a house. The appellant started to rough her up and his tone of voice changed, becoming louder. He took up a stone and threatened the complainant with it, then used it to beat her in her face, causing it to bleed and in the end leaving a mark on her forehead. After dragging the complainant and tearing off her clothes, the appellant kicked away her feet from under her and she fell to the ground, on her back. The appellant came over her, even as she tried to get him off of her. Then, fearful of contracting a sexually transmitted disease, she pleaded with him, without success, to use a condom; and, when he proceeded to have sexual intercourse with her against her will, she begged him, again unsuccessfully, not to ejaculate inside of her. When he was done, the appellant took away the complainant's bag with her mobile telephone in it. The appellant then told her to go, whereupon she ran away and made a report to the Coral Gardens Police Station that same morning.

[17] Towards the end of the complainant's examination-in-chief, in answer to Crown counsel's question, "why do you say … that [the appellant] raped you?", the complainant said this[6]:

> "Because he had sex with me without my permission. If he didn't have the money and he wanted some sex, I would have obliged. But the main fact, the reason why I am so hurt, because him actually enter me without a condom. And the next thing, he actually discharge inside of me. I didn't like that; that's why I was very hurt."

[18] The complainant was also seen by a doctor at 11:30 am on the same morning of the incident. The doctor observed multiple abrasions around the complainant's body and to her forehead. Her opinion was that the abrasions to the forehead could have been caused by a blunt object, such as a stone. Describing abrasions[7] as "[l]ittle more than scratches", the doctor's evidence was that she did not observe any bleeding, though she conceded a possibility that there may have been bleeding initially and that this could have stopped by the time she examined the complainant. The doctor also observed bruises, which she described as superficial and temporary, to the outer side of the complainant's left thigh and her buttocks. The doctor reported[8] that her vaginal examination of the complainant revealed a sexually active person, but no "injuries or bleedings or anything".

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[6] Ibid, pages 34, line 23, to page 35, line 5
[7] Notes of Evidence, page 55, line 25
[8] Ibid, page 58, line 4

[19] The appellant made an unsworn statement from the dock. He acknowledged having sexual intercourse with the complainant on the night in question, but denied raping her. On his account, he and the complainant had agreed on a price of $2,000.00 for her services, after which they had consensual intercourse in an abandoned building nearby. He had used a condom, as the complainant requested him to do. After he had paid her the $2,000.00, the complainant asked him for $2,000.00 more, but he refused.

[20] The only issue in the case was one of credibility. It is clear from the jury's verdict, which the appellant no longer seeks to impugn, that they rejected the appellant's version entirely.

The sentencing exercise

[21] The appellant's antecedent report revealed that he was born on 7 November 1962. He was therefore 50 years old at the time of the offence and 54 years old at the date of sentencing. He had no formal education past the primary school level and he was illiterate. He earned a living through odd jobs in the construction industry and such other means as presented themselves, including the selling of fruits and other items to tourists. Married for the past 16 years, he had three non-dependent children, all over the age of 18 years. He had three previous convictions: the first was for the offence of Assault Occasioning Bodily Harm, for which he was sentenced to a fine of $300.00 or 30 days' imprisonment on 14 March 1990; the second was for simple larceny, for which he was sentenced to 10 days' imprisonment on 14 October 1992; and the third was for possession of ganja, for which he was sentenced to 10 days' imprisonment on 1 February 2000.

[22] At the request of the appellant's counsel, the judge ordered a Social Enquiry Report. The report stated[9] that the appellant "continues to maintain his innocence which indicates that he still has not accepted culpability for his offending behaviour". In the view of his community, the appellant was quiet, hard-working and got along well with members of the community. However, the report suggested that the appellant had a substance abuse problem, specifically in relation to the consumption of alcohol and cocaine, and that this may have had something to do with his conduct on the night in question. In her interview with the probation officer who prepared the report, the complainant requested that the court "extend minimal leniency as [the appellant] did not force her to engage in taboo sexual acts in which he had expressed an interest".

[23] At the start of his sentencing remarks, the judge observed[10] that '[t]he offence of rape occurred in circumstances with a sex worker". After noting[11] "the gravity of the offence and offences", the judge then went on to identify[12] a number of factors which, in his view, weighed in the appellant's favour:

> "I take into account that you admitted to previous convictions, but they are long ago and not of similar nature.
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> I also take into account favourably to you that you are – well, you did not have a formal education because of difficulty with how you were, the family life, but nonetheless you are an adult man now and you have lived your adult life and occupied yourself.

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[9] Social Enquiry Report dated 10 March 2017
[10] Transcript of the summing-up, page 79, lines 21-22
[11] Ibid, lines 23-24
[12] Ibid, pages 79-82

I understand you do odd jobs and construction and tried to make money in the tourist industry; that you have a family, children, and that you live with a paternal aunt -- that is what the report says – and that the community that you are from, they don't see you as a threat there or a problem.

You have a personal problem with substance abuse, that they say affected you at times when you drink and may have affected you on the day in question of the offence because the origin of the offence started when you were at a bar. You said you were approached; she said you approached her, then you left from the bar with the complainant.

She is an adult person as well as you are an adult. I take into account the circumstances that there was an agreement for sexual intercourse between you and this complainant and that there is money passed. According to you, you had paid her some money before she left, but she said that you had promised her $5,000.00 or she said her fee was $5,000.00; that you had given her a certain amount when you left, but later you forcefully had sexual intercourse with her at this lonely bushy place that you had gone into.

So there is some difference about money between you and her. I take that into account, but she said she went with you freely because she trusted you and you said you were going to take her to your home, away from the site that she was, and she drove with you in the back of the taxi; that the taxi man dropped both of you, and then the offence, as she described it, took place.

In looking at the circumstances of the offence, it did not take place with a weapon. There is no knife, there is no gun, there is no cutlass or anything like that which was on your person, or alleged that you used. I mentioned that to suggest that there doesn't seem to be any intent to do her any harm. The only thing that could be a question of deception is that you moved her from the site where you had more control, but this offence did not take place by the use of any weapon and you did pay her money, she said, but that was not the final sum and she went with you. So I do not see an intent, a premeditation on your part, to forcefully and violently have sexual intercourse with this woman without her consent.

> I take into account that if you were somebody that drinks, you could have misjudged the situation at the point when you think you have paid your money and when she was ready to have sex with you, having paid some amount of money."

[24] The judge next reviewed some aspects of the complainant's evidence. In his view, the evidence suggested that on the night of the rape the complainant's real concern had to do with the fact that, despite her entreaties, the appellant did not use a condom and ejaculated inside of her[13]:

> "So what I got from her evidence is that one of the things she said, what she said upsets her is that you didn't use a condom and that she explained that as a sex worker this is one of the biggest risk that she faces and that seem to have been, she said, her complaint.
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> Later on she said, in her evidence in cross-examination, if you didn't have the money she would still have sex with you. She said that in cross-examination, but her main problem was that you didn't use a condom or you refused to use a condom.
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> So these are the factors that I have to consider as to what was her request; of the issue of whether she said there was no consent, and it suggest [sic] that although you insisted that you used – she gave you a condom and you used it, but there is a difference there and because of her fear of you not using a condom, which is important in her industry.
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> After the event she went and did a medical examination to make sure that she was not infected by any sexually transmitted deceases [sic] or any fatal decease [sic]. She was medically examined. There was no report of anything up to that time.
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> So there is that element in this whole transaction, but the jury heard it and they found you guilty nonetheless and at the time

[13] Ibid, pages 83-85

> of the rape you used force. She said at [sic] time you used force and you took up a stone and hit her in her forehead. A doctor gave evidence and the doctor really says – and that relates to the wounding. The doctor said that what she observed on the complainant, 'I observed abrasion on the forehead, near the head route. There is little more than scratches. I did not observe any bleeding. I observed bruises on the left thigh.'
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> In cross-examination the doctor said, 'the injury I saw on the forehead would be bruises or abrasions. There was a single injury to the forehead and the nature of the injury is not serious. The nature of the force is not serious.' The weapon used on the spot was a stone, so all indicates that you didn't go there with a weapon to have sexual intercourse. You had gone there to have sexual intercourse, believe you paid some money, and did not follow the protocol, as far as the complainant was concerned."

[25] Having reviewed all the circumstances of the case, the judge went on to conclude that the conduct of the appellant did not warrant imposition of the prescribed minimum sentence of 15 years' imprisonment[14]:

> "There is no excuse to have sexual intercourse without her consent, but there are circumstances which caused a man in your position to misjudge and go beyond her request to have sexual intercourse, but not without the use of a condom, in her case. So these are all factors and so when I look at those factors I am of the view that your age and your background and that you are not a man, they said in your community, of violence and this thing didn't take place with any great violence …
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> In my view, I don't believe that you deserve the minimum of 15 years, when I look at all these circumstances …"

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[14] Ibid, pages 85-86

[26] Finally, after considering the relevant provisions of the CJAA, the judge, as he was bound to do, imposed the prescribed minimum sentence of 15 years. But, pursuant to section 42K(1)(b), he issued a certificate that, having regard to the circumstances of the case, he considered it to be manifestly unjust for the defendant to be sentenced to the prescribed minimum sentence. In the body of the certificate, the judge stated his reasons for issuing it as follows[15]:

> "(a) The offence occurred in circumstances where there was a willing transaction entered into by the complainant and the accused. There was no force or violence at the time.
>
> (b) The accused may have misjudged the actions of the complainant. He did not go to the place of offence with any weapon such as a knife or even an imitation firearm. It was a stone he used to injury [sic] the complainant.
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> (c) The social enquiry report shows that the personal early life of [sic] accused may have limited his approach to conflict resolution and disagreement in interpersonal relationship. Also his mental reason [sic] may have been affected by consumption of alcohol."

[27] The judge also expressed the view that, were it not for the prescribed minimum sentence, seven years' imprisonment would have been the appropriate sentence for the offence of rape in this case.

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[15] Judge's Certificate dated 21 June 2019. The actual document embodying the terms of the certificate was signed by the judge – and received in this court - long after the event, but the appeal proceeded on the basis that these were the terms in which he issued it.

The submissions on appeal

[28] Mr Ho-Lyn submitted that the judge erred in, first, not specifying the period to be served by the appellant before becoming eligible for parole; and, second, giving what was in essence an unreasoned sentencing decision. He characterised this as an unusual case, in that, while there was initially consent to sexual intercourse by the complainant, that consent was withdrawn before the sexual act commenced. This factor therefore made this a different kind of case from those contemplated by the Sentencing Guidelines[16], in which the recommended starting point for the offence of rape, based on the prescribed minimum penalty under the SOA, is 15 years. The case demonstrated that there was scope for the establishment of a secondary category of sentences for rape to accommodate cases such as this which fell outside the norm.

[29] Accordingly, proposing a starting point of five years in this case, Mr Ho-Lyn suggested a sentence in the range of five to seven years' imprisonment after taking into account the various aggravating and mitigating factors. In the former category, he included the manner in which the offence was committed, which he described as "totally inexplicable"; while in the latter category, he referred to the appellant's age and family circumstances, as well as the time spent by him in custody before the date of sentencing. With the kind assistance of Miss Cadeen Barnett, who appeared for the prosecution, it was ascertained that the time spent by the appellant in custody was three months and

[16] Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, issued December 2017

19 days; that is, from 5 December 2016, which was the first day of the trial, to 24 March 2017, the date on which the judge passed sentence on the appellant.

[30] Miss Barnett conceded the judge's error in not fixing a period to be served before parole, as section 6(2) of the SOA required him to do. She also accepted that the judge did not give a reasoned sentencing decision before issuing his certificate under section 42K(1)(b) of the CJAA. Nor did he deal with the time spent by the appellant in custody before the sentencing hearing. As regards the critical question whether the prescribed minimum sentence of 15 years' imprisonment was manifestly excessive, Miss Barnett's principal submission was that, in the light of previous decisions of this court, 15 years cannot be considered to be manifestly excessive. However, if the court were to take the view that it was, then it should adopt the judge's recommendation of a sentence of seven years' imprisonment.

Discussion

[31] Both Mr Ho-Lyn and Miss Barnett referred us to **Oneil Murray v R**[17], a case in which sentence was passed before the SOA came into force[18]. In that case, after a review of several earlier cases involving sentences for rape, the court indicated[19] that, "… these cases, which span a period of close to 15 years, suggest a sentencing range of 15-25 years' imprisonment, with 20 years perhaps more closely approximating the norm, on

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[17] [2014] JMCA Crim 25
[18] Although passed in 2009 (Act 12 of 2009), the relevant Part of the SOA did not come into force until 20 June 2011.
[19] At para. [23]

convictions for rape after trial in a variety of circumstances". It may be worth noting, however, that the majority of the earlier decisions canvassed by the court in **Oneil Murray v R** were cases involving the use of firearms or other weapons.

[32] Miss Barnett also referred us to the later case of **Daniel Roulston v R**[20], a post-SOA case. In that case, again after a review of some relevant authorities, including **Oneil Murray v R**, this court confirmed the sentencing range of 15-25 years' imprisonment for rape. The court also referred to the Sentencing Guidelines, in which 15 years was approved as the usual starting point for rape.

[33] There can be no doubt that the fixing of 15 years' imprisonment as the usual starting point for rape in the Sentencing Guidelines was done by reference to the prescribed minimum sentence in the SOA[21]. As a practical matter, given the fact that a sentencing judge has no power to go below 15 years in arriving at the appropriate sentence for the offence of rape, the framers of the guidelines obviously took the view that there was nothing to be gained by leaving the sentencing judge at large to fix the starting point in such cases. And, in the large majority of cases, in our view, this will be completely unproblematic.

[34] But, as we have indicated, Mr Ho-Lyn seeks to distinguish this case as one in which the complainant initially gave 'contractual consent'[22] to intercourse with the appellant,

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[20] [2018] JMCA Crim 20
[21] Sentencing Guidelines, Appendix A, page A-7
[22] The phrase is Mr Ho-Lyn's

but subsequently revoked that consent when intercourse took place without a condom. In this regard, Mr Ho-Lyn referred us to the United Kingdom Sentencing Council's Definitive Guideline for Rape[23], which sub-divides offences of rape into different categories of harm and culpability, each attracting punishment appropriate to the particular circumstances. It was submitted that a similarly nuanced approach in this case would readily demonstrate the inaptness of the starting point of 15 years' imprisonment. So, since the legislature has now provided for an appeal against the imposition of the prescribed minimum sentence in matters falling within section 42K(1)(b) of the CJAA, Mr Ho-Lyn invites us to revisit the approach taken in the Sentencing Guidelines by, in effect, laying down a sub-category of offences of rape to accommodate the circumstances of a case such as this.

[35] As always, Mr Ho-Lyn's submissions command careful reflection. Generally speaking, no judge enjoys having to impose a prescribed minimum sentence or, indeed, a mandatory sentence of any kind. By their very nature, such sentences severely curtail judicial discretion. They accordingly deprive sentencing judges of the power to make allowances for different kinds of cases which may, based on their peculiar facts, call for punishment of lesser severity. A graphic demonstration of the inflexibility of, and potential for injustice inherent in, a prescribed minimum sentence, is provided by this court's recent decision in **Ewin Harriott v R**[24]. In that case, in light of the provisions of section

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[23] https://www.sentencingcouncil.org.uk/wp-content/uploads/Sexual-offences-definitive-guideline-Web.pdf
[24] [2018] JMCA Crim 22

(6)(1)(b)(ii) of the SOA prescribing minimum sentences in relation to certain offences of a sexual nature, the court found itself completely unable to give effect to the now established sentencing principle that an offender should generally be given full credit for time spent on remand pending trial. In the result, the two years spent by the appellant in that case on remand before trial were, in effect, added to the prescribed minimum sentence of 15 years' imprisonment. As Pusey JA (Ag) observed[25], "[t]he judge's sentencing discretion is curtailed by the statutory imposition of a mandatory minimum sentence"[26].

[36] However, as attractively as Mr Ho-Lyn has made the argument, we are of the view that, so long as the prescribed minimum sentence laid down in section 6(1)(a) of the SOA remains, it is simply not possible for this court – or indeed the framers of the Sentencing Guidelines - to propose a starting point lower than 15 years in a case of rape. As it seems to us, any required mitigation of that position which may be indicated by the facts of a particular case must necessarily be addressed, as in this case, by resort to the procedure established by section 42K of the CJAA. By this means, this court may over time come to review the circumstances of a sufficient body of cases to enable it to, if necessary, develop the sub-category of cases of rape identified by Mr Ho-Lyn and to propose a suitable

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[25] At para. [15]
[26] See also **Donovan Barnett v R** [2019] JMCA Crim 26, paras [14]-[16]

starting point to be applied for the purposes of this court's review of the sentences in such cases.

Resolving the case

[37] We have set out the judge's sentencing remarks in some detail above[27]. As will have been seen from them, the judge took into account a number of factors in coming to the view that the appellant's case called for special treatment. Thus, the judge pointed out that the appellant did not use a weapon. This suggested that "there [didn't] seem to be any intent to do her any harm"; nor was there any "intent, a premeditation on [the appellant's] part, to forcefully and violently have sexual intercourse with [the complainant] without her consent"; so, perhaps, given his predilection for drink, the appellant "could have misjudged the situation at the point when you think you have paid your money and when she was ready to have sex with you, having paid some amount of money"; the complainant indicated that "[even] if [the appellant] didn't have the money she would still have sex with [him] … but her main problem was that [he] didn't use a condom or [he] refused to use a condom"; the doctor's evidence was that the nature of the force used by the appellant was "not serious"; the appellant did not go armed with a weapon to have sexual intercourse, but went "to have sexual intercourse, believe [sic] [he] paid some money, and did not follow the protocol, as far as the complainant was concerned"; and finally, though there was no excuse for the appellant "to have

[27] Paras [23]-[25]

intercourse without her consent … there are circumstances which caused a man in [his] position to misjudge and go beyond her request to have sexual intercourse, but not without the use of a condom, in her case".

[38] These considerations were largely mirrored in the reasons given by the judge in the body of the certificate issued under section 42K(1)(b) of the CJAA[28].

[39] We accept that the fact that the appellant was apparently unarmed at the time of the rape was a relevant consideration with regard to sentence. However, it seems to us respectfully that, save for that, most of the other factors which the judge took into account related to matters which, by their verdict, the jury had already resolved against the appellant.

[40] The best example of this is the judge's repeated reference to the possibility that the appellant, in his interaction with the complainant, might have "misjudged the situation". By this remark, we take the judge to mean that the appellant might have assumed that the complainant would not have had any objection to him having sexual intercourse with her despite the fact that he had not fulfilled the terms of payment. But this was, of course, completely contrary to the appellant's defence, from which no question of mistake or misunderstanding could possibly have arisen. It was therefore a purely gratuitous speculation on an issue which the judge had already – correctly - left

[28] See para. [26] above

specifically to the jury for their consideration as a matter affecting the appellant's guilt or innocence.

[41] In his summing-up to the jury, the judge explained that a man commits the offence of rape if he has sexual intercourse with a woman without her consent. The judge then added this[29]:

> "… That is the important part, without the woman's consent. So the woman's consent is the relevant fact in the offence of Rape.
>
> And it doesn't finish there. In law, having sexual intercourse without the woman's consent and knowing that the woman does not consent to sexual intercourse or recklessly not caring whether the woman consents or not.
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> So in law there must be the act of the sexual intercourse. But it doesn't end there, it must be without the woman's consent. But it doesn't end there, the man must know that the woman does not consent or recklessly not caring whether the woman consents or not."

[42] The issue of whether the appellant knew that the complainant was not consenting to sexual intercourse with him was therefore squarely placed before the jury for their consideration. Although not obliged to do so, the judge more than once warned the jury that they should approach the complainant's evidence with caution. He also told them specifically[30] that there was "no independent supporting evidence about the issue of consent". By their verdict, the jury must be taken to have accepted the prosecution's case

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[29] At pages 13-14
[30] At page 59

that, as the appellant well knew, the complainant did not consent to sexual intercourse with him in the circumstances described by her. In our view, therefore, the judge fell into error by approaching the sentencing of the appellant on the basis of the very hypothesis which the jury had plainly rejected.

[43] So, the question for the court is whether, all things considered, the prescribed minimum sentence of 15 years' imprisonment was, as the judge thought it was, manifestly excessive. In this regard, the first thing to be considered is whether, putting on one side the matters which weighed so heavily with the judge, there is anything in this case which takes it outside of the sentencing range of 15-25 years' for rape established by the pre-SOA decision of this court in **Oneil Murray v R**.

[44] In that case, the applicant, a 32 year-old family man with no previous convictions, was before the court on two indictments arising out of separate incidents less than a month apart. In each case, the applicant, armed with a gun, abducted and raped the female complainant. Each indictment therefore charged him with two counts of illegal possession of firearm and rape. Upon his plea of guilty to all four charges, the applicant was sentenced to five and 23 years' imprisonment for illegal possession of firearm and rape respectively on the first indictment; and five and 19 years' imprisonment on the second indictment. The principal reason for the disparity in the sentences for rape was the fact that, in the first case, the complainant was a 12 year old schoolgirl, a factor which

moved the sentencing judge to observe[31] that the rape in that case was not only an "egregious violation of a woman's right … [but] … a breach of trust …".

[45] On appeal against the sentences for rape only, this court reduced them to 18 and 15 years' imprisonment respectively on both indictments. The only basis for reducing the sentences on appeal was the court's conclusion that the sentencing judge did not make a sufficient allowance for the applicant's plea of guilty on both indictments. Indeed, as the court observed[32], the sentences of 23 and 19 years' imprisonment would "have been quite unexceptionable in this case had the applicant been found guilty after a full trial of the matter".

[46] We accept that the facts of this case bear greater analogy to the case involving the adult complainant in **Oneil Murray v R**, given the severely aggravating feature of the age of the minor complainant in that case. So, on this basis, the appellant having been convicted after trial in this case, a sentence of 19 years' imprisonment would have been, as the court described that sentence in **Oneil Murray v R**, "quite unexceptionable", given the usual range of sentences for rape. We are also prepared to accept the fact that no firearm or other weapon was used in this case as a factor which distinguishes it, in the appellant's favour, from **Oneil Murray v R**.

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[31] See **Oneil Murray v R**, para. [8]
[32] At para. [28]

[47] However, in a case in which the appellant clearly used personal violence to subdue the complainant, we do not think that this latter factor is sufficient to reduce the sentence in this case below the prescribed minimum sentence of 15 years' imprisonment. Or, put another way, it cannot be said that, in all the circumstances of this case, there are compelling reasons which render the prescribed minimum sentence manifestly excessive and unjust.

[48] On the evidence which the jury accepted and the appellant no longer challenges, he departed entirely from the arrangement which he and the complainant had made. The arrangement was that they should travel by taxi cab to his house in Barrett Town, which is where they would have intercourse, and that she would be paid the balance of $4,000.00 on the way there. The appellant did not pay the balance as agreed. Instead, he took the complainant to a dark and lonely area where he roughed her up; threatened her; beat her in her face with a stone; tore off her clothes; kicked away her feet from under her; threw her to the ground; had unprotected sexual intercourse with her without her consent; and, despite her pleas, ejaculated inside of her.

[49] So there can be no doubt that, on any view of these facts, whatever the nature of any 'contractual consent' previously given by the complainant, this was, as the jury obviously found, a case of rape plain and simple.

[50] But the issues of the period spent on remand by the appellant before sentence and the appellant's eligibility for parole remain outstanding. On the first issue, it is clear from the authorities that, however short the period spent on remand may be, the

appellant is entitled to have it reflected in the sentence[33]. Happily, once a certificate has been granted by the sentencing judge pursuant to section 42K(1) of the CJAA, it is open to this court to reduce the sentence below the prescribed minimum sentence[34]. This factor serves to distinguish this case from **Ewin Harriott v R**, in which the appeal did not come before this court through the section 42K gateway and the court was therefore powerless to dis-apply the prescribed minimum sentence in order to reflect the time spent on remand. On this point, therefore, we will allow the appeal and reduce the sentence of 15 years' imprisonment which the judge imposed by three months and 19 days to reflect the time spent on remand before sentencing. For ease of calculation, we will round this period up to four months.

[51] On the issue of parole, it is agreed on all sides that the judge erred by not specifying the period to be served by the appellant before becoming eligible for parole. Pursuant to section 42K(3)(b) of the CJAA, we will therefore specify that the appellant should serve a period of two-thirds of the sentence before becoming eligible for parole.

ORDER

[52] This is the order of the court.

1) The application for leave to appeal against conviction is dismissed.

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[33] **Meisha Clement v R** [2016] JMCA Crim 26, para. [34]; **Callachand & Anor v The State** [2008] UKPC 49, para. 9

[34] CJAA, section 42K(3)(a)

2) The appeal against sentence is allowed in part.

3) The sentence of 15 years' imprisonment is set aside and a sentence of 14 years and eight months' imprisonment is substituted therefor.

4) The appellant is to serve at least two-thirds of this sentence before becoming eligible for parole.