[2023] JMCA Crim 50

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO 88/2019

KEVIN TAYLOR v R

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

André Wedderburn, Ms Dainty Davis and Kemar Setal for the Crown

Criminal law- buggery – whether the offence is triable in the Gun Court- whether the offence is classified as a felony or misdemeanour – Firearms Act, section 25 and Gun Court Act, sections 2 and 5(2)

Criminal law – Sentencing - illegal possession of firearm, assault, grievous sexual assault, rape, buggery -whether sentences are manifestly excessive

27 June and 10 November 2023

SIMMONS JA

[1] The appellant, who was a licensed firearm holder, was tried in the High Court Division of the Gun Court in the parish of Kingston on 24, 30, 31 July and 3 September 2019, on an indictment charging him with eight counts. On 3 September 2019, he was found guilty on all counts and sentenced as indicated below:

Count 1 (illegal possession of firearm)	15 years' imprisonment at hard labour
Count 2 (assault)	3 years' imprisonment at hard labour
Count 3 (rape)	35 years' imprisonment at hard labour

Counts 4, 5, 7 & 8 (grievous sexual assault)	35 years' imprisonment at hard labour
Count 6 (buggery)	nine years' imprisonment at hard labour

[2] The appellant, aggrieved by this outcome, filed an application for leave to appeal his conviction and sentence dated 30 September 2019. On 20 September 2021, a single judge of this court refused his application for leave to appeal his conviction. He was, however, granted leave to appeal his sentence.

[3] The appellant renewed his application for leave to appeal his conviction before the full court, as is his right. In the written submissions filed on his behalf, counsel sought the court's permission to abandon the original grounds of appeal and to instead rely on the following six supplemental grounds of appeal:

> "Ground 1 – The Appellant was wrongfully convicted under section 20(1)(b) of the Firearms Act for illegal possession of a firearm.
>
> Ground 2 - The Learned Trial Judge (LTJ) erred in law when he heard and determined the sexual offences counts in the Gun Court, which were wrongly grounded vide section 20(1)(b) of the Firearms Act.
>
> Ground 3 – The LTJ lacked jurisdiction to hear and determine the offence of buggery in the Gun Court.
>
> Ground 4 – The LTJ erred in law when he heard and determined Count 2 being assault with a firearm vide section 20(1)(b) of the Firearms Act.
>
> Ground 5 – The LTJ erred when he stated in his summation that he had jurisdiction to hear the matters, when he lacked jurisdiction to have heard all the counts on the indictment.
>
> Ground 6 – The LTJ failed in his summation to give a balanced view of the case for the Appellant; and found him guilty on the evidence of the Complainant."

[4] The sentences imposed were challenged as follows:

"(1) The [learned sentencing judge] failed to apply the principles of sentences [sic] in all seven counts.

(2) The [learned sentencing judge] failed to apply the [l]aw in Count 2 – [a]ssault."

Background

[5] The facts in this matter are quite disturbing. However, they are being set out to provide a full understanding of the factors that had to be considered in arriving at a decision on the appropriate sentences.

[6] At trial, the Crown relied on the evidence of four witnesses; SW ('the complainant'), LV, Corporal Elvis Bowers, and Detective Sergeant Andrea Allen. The appellant gave sworn testimony.

[7] The complainant's evidence was that on or about 19 December 2017 at about midnight, she was standing at the Texaco gas station in Spanish Town, in the parish of Saint Catherine, awaiting a taxi to go home. The appellant, who was driving a motor car, drove up to her and asked if she wanted a lift. The complainant accepted and he took her to her home at Hampton Green in the same parish. On their arrival, the appellant came out of the car, pointed a gun at her, and entered the complainant's house. They went into the bedroom. Whilst still pointing the gun at her, the appellant told the complainant to take off her clothes. She complied and he pushed her on the bed.

[8] The complainant was then instructed to, "[s]kin out [her] p…y". The appellant then proceeded to put his finger in her anus. He then "pushed" his penis in her mouth and told her to suck it. He then had sexual intercourse with her without her consent. He also placed his penis in her anus. She stated that she tried to push him off because she was in pain. The appellant "boxed" her. When he was finished he pushed the gun in her mouth and told her to "suck off the gun" after which he placed the gun in her vagina and told her to "f..k [his] gun" whilst moving it inside of her. He then proceeded to place his mouth on the complainant's vagina. The complainant stated that she tried to push him off as it

was painful. The appellant also gave the complainant a substance to drink, spat in her face and dragged her hair.

[9] After it was over, the complainant pretended that she was looking for something, left the room and went into the kitchen where she grabbed a dress and ran barefooted to her brother, LV's house. Thereafter, LV reported the matter to the police. His younger brother L, the complainant and the police went to the complainant's home. The appellant, who was still there, was taken into custody.

[10] LV gave evidence that at the time when the complainant arrived at his house, she was not wearing shoes and told him that she had been raped. He also stated that it would have probably taken the complainant approximately 25 or 30 minutes to run to his house from where she lived.

[11] The appellant in his evidence stated that he was a police officer. His defence was that the complainant had consented to the acts for which he was charged.

The appeal

[12] At the commencement of this hearing, counsel for the appellant commendably sought and was granted permission to abandon grounds one, two, four, five and six of the grounds of appeal. Those grounds, except ground six, sought to challenge the jurisdiction of the court to hear the matter on the basis that the appellant, being a licensed firearm holder, was wrongly charged with illegal possession of a firearm pursuant to section 20(1)(b) of the Firearms Act. This issue was addressed in the recent decision of **Phillip Simpson and another v R** [2023] JMCA Crim 33, in which P Williams JA who delivered the decision of the court stated at para. [10]:

> "…it is noted that section 20 of the Firearms Act deals with the possession of firearms and ammunition and specifies that a person shall not be in possession of a firearm or ammunition except under and in accordance with the terms and conditions of a firearm user's licence. The section lists the category of persons who are exempted from that prohibition and the circumstances of possession that would not attract the

> penalty provided for in section 20(4). No other offence is created under the section. A firearm offence, therefore, must be one in which a firearm is involved, and the possession of that firearm must be unlawful. **Section 25 of the Act addresses circumstances where it can be established that the weapon that was used could have been an imitation firearm or where the person in possession of the firearm had a licence and would not be in illegal possession, per se. In those circumstances, if the firearm is used to commit certain offences, the possession is deemed illegal by virtue of section 20(5)(c) of the Act.** This is the interpretation of the interplay between these sections, which this court has found to be correct and has followed for these several decades…" (Emphasis supplied)

[13] The remaining grounds of appeal were ground three and those pertaining to the sentences imposed.

Ground three: The learned trial judge lacked jurisdiction to hear and determine the offence of buggery in the Gun Court.

Appellant's submissions

[14] Counsel for the appellant, Mrs Melrose Reid, submitted that the learned judge had no jurisdiction to hear and determine the matter in the Gun Court as the offence of buggery is neither a scheduled offence under the Firearms Act nor a felony. It was submitted that in the circumstances, the offence is only triable in the circuit court.

Respondent's submissions

[15] Ms Davis agreed with Mrs Reid's submission that the offence of buggery is not triable in the Gun Court and, as such, the learned judge had no jurisdiction to hear the matter. She stated that the offence of buggery is a common law offence and does not appear in the First Schedule to the Firearms Act. Additionally, there is no indication in the Offences Against the Person Act ('OAPA') as to whether the offence is a felony or misdemeanour. In this regard, Ms Davis stated that in the United Kingdom the offence has been classified as a felony by way of a statute.

Analysis

[16] Section 5(2) of the Gun Court Act which deals with the jurisdiction of the High Court Division of the Gun Court, states as follows:

> "5(2) A High Court Division of the Court shall have jurisdiction to hear and determine –
>
> (a) any firearm offence, other than murder or treason;
>
> (b) any other offence specified in the Schedule,
>
> whether committed in Kingston or St Andrew or any other parish, other than the parishes referred to in section 8A (3) or a parish designated under section 8D."

[17] A "firearm offence" is defined in section 2 of the said Act as:

> " (a) any offence contrary to section 20 of the Firearms Act;
>
> (b) any other offence whatsoever involving a firearm and in which the offender's possession of the firearm is contrary to section 20 of the Firearms Act;"

[18] The appellant, who was the holder of a Firearm User's Licence, was tried and convicted for the offence of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act as the firearm was used in the commission of the other offences for which he was charged. Section 20(1)(b) states:

> "(1) A person shall not –
>
> (a) ….
>
> (b) Subject to subsection (2), be in possession of any other firearm or ammunition except under and in accordance with the terms and conditions of a Firearm User's Licence."

[19] Section 25 of the Firearms Act is also relevant. It states as follows:

> "25. (1) Every person who makes or attempts to make any use whatever of a firearm or imitation firearm with intent to commit or to aid the commission of a **felony** or to resist or prevent the lawful apprehension or detention of himself or

some other person, shall be guilty of an offence against this subsection.

(2) Every person who, at the time of committing or at the time of his apprehension for, any offence specified in the First Schedule, has in his possession any firearm or imitation firearm, shall, unless he shows that he had it in his possession for a lawful object, be guilty of an offence against this sub-section and, in addition to any penalty to which he may be sentenced for the first mentioned offence, shall be liable to be punished accordingly." (Emphasis supplied)

[20] It is common ground that the offence of buggery is not specified in the First Schedule of the Firearms Act. The jurisdiction of the Gun Court is, therefore, dependent on whether it is classified as a felony or a misdemeanour.

[21] In the United Kingdom, the offence of buggery has historically been classified as a felony (see 25 Hen. VIII, c. 6, 'An Acte for the punyshement of the vice of buggerye', 1533) and the punishment for its commission was death. That act was repealed in 1547. It was later re-enacted in 1562 and the offence remained a capital offence until the passage of the Offences Against the Person Act 1861 (UK) ('the UK Act'). Sections 61 and 62, which are similar to sections 76 and 77 of the OAPA, state:

"61 **Sodomy and Bestiality**.

Whosoever shall be convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years.

62 **Attempt to commit an infamous Crime**.

Whosoever shall attempt to commit the said abominable Crime, or shall be guilty of any Assault with Intent to commit the same, or of any indecent Assault upon any Male Person, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for any Term not exceeding Ten Years and not less than Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour."

[22] Section 61 of the OAPA does not define the offence of buggery; it only speaks to the penalty for its commission. This changed with the enactment of the Sexual Offences Act, 1956 (UK). That Act has been repealed and was replaced by the Sexual Offences Act 2003 which is an entirely different statutory regime. Section 12 of the 1956 Act stated explicitly that the offence was a felony. It was an indictable offence and carried a maximum penalty of life imprisonment.

[23] The OAPA has its origin in the 1864 Offences Against the Person Law, chapter 268 (Jamaica). Section 76 of the OAPA under which the appellant was charged, like section 61 of the UK Act, does not define the offence or indicate how it is to be classified. The section states:

> "76. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned & kept to hard labour for a term not exceeding ten years."

[24] Section 77 of the OAPA which deals with the inchoate offence of attempted buggery provides:

> "77. Whosoever shall **attempt** to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a **misdemeanour**, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour." (Emphasis supplied)

[25] In Archbold, Pleading, Evidence & Practice in Criminal Cases, 36th edition the learned authors noted at page 1121 that "buggery has always been a felony at common law". In **Jacquet v Edwards** (1867) 1 Stephen's Supreme Court Reports 414 the issue of whether the common law of England was in force in Jamaica was considered by the court. The determination of that issue was stated to be dependent on whether Jamaica was considered to be a settlement or a conquered country. At page 417 Kemble J stated thus:

> "If, then (assuming Jamaica was a conquered colony), the laws of England did not take place there till declared so by the Conqueror or his successors (see *Blankard v Gaddy* (1693), 2 Salk. 411), such declaration would seem to have been made, and there has been an express recognition that the common law of England was in force in the colony. **It appears to me therefore that the Crown, by its own Acts (assuming that the Island was acquired by conquest), conferred on the early colonists the same rights they would have been entitled to as Englishmen had the colony been settled. It should therefore, under any circumstances, be treated as a settled colony**, and this is the view taken by the Court, in the year 1859, in the case of *Stultz v Wallace* (1839), McDougall's Reports, 44 when Rowe C.J., in delivering the judgment of the Court, expressed himself as follows: 'It should be remembered that this Island has been *treated as a colony* appended to the Crown of England, and not as a conquered or ceded country – a distinction which is very important, because, as a colony, the settlers here would bring with them all such laws of England as would be necessary to the new condition, which laws would confer on them the same rights and attach to them the same liabilities as if they had remained in the Mother-country'." (Emphasis added)

He continued at page 419:

> "…the entire body of the common law, without exception, cannot be taken to be in force in this or any other colony, but only such portions of it in each colony as are applicable to the situation and conditions of the colony itself and in the words of Mr. Justice Blackstone (1 Bla. Com. [107]: 'What shall be admitted and what rejected, at what times and under what restrictions, must in cases of dispute be decided in the first instance by their own provincial judicature…'."

[26] The Jamaica (Constitution) Order in Council, which established the Constitution of Jamaica, was enacted on 23 July 1962. Section 4(1) of the Order provides:

> "All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought

> into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order."

[27] The word "law" is defined in section 1 of the Jamaican Constitution as including:

> "… any instrument having the force of law and any unwritten rule of law and 'lawful' and 'lawfully' shall be construed accordingly."

[28] Based on section 4(1) above, the classification of the offence of buggery by virtue of the common law of the UK would have been adopted and continues to be in force in Jamaica.

[29] We have also noted that in **The Queen v Christopher Miller** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 169/1987, judgment delivered 21 March 1988 in which the applicant sought leave to appeal against his conviction and sentence for the offences of illegal possession of a firearm and buggery, Carey JA stated, albeit *obiter* at page two:

> "We should point out that this was a case where the allegation was that a firearm was used in the commission of a **felony** and by virtue of section 25(1) of the Firearms Act, even if the object was an imitation firearm, that would be enough to fix the applicant with guilt." (Emphasis supplied)

[30] It is, however, noted that the issue of whether the offence of buggery was properly tried in the Gun Court was not raised in that appeal and as such, the above statement was made in the absence of legal submissions on that point.

[31] The learned judge in the instant case found that the appellant had a firearm in his possession on the day in question and that the said firearm was used in the commission of the offence. On that basis, he concluded that he had the jurisdiction to deal with the matter.

[32] It does not appear that the issue of whether the offence of buggery is triable in the Gun Court has ever been raised and determined by this court. Based on the history of this offence and the comment by Carey JA in **R v Christopher Miller**, with which we agree, we are of the view that the offence of buggery is a felony and therefore triable in the Gun Court. In the circumstances, we find that this ground of appeal has no prospect of success. The appellant's application for permission to appeal conviction is therefore refused.

Whether the sentences are manifestly excessive

Appellant's submissions

[33] Mrs Reid submitted that the learned judge failed to apply the principles of sentencing in respect of all counts.

a) Illegal possession of firearm

[34] Counsel submitted that the learned judge failed to indicate how he arrived at the sentence of 15 years' imprisonment. In particular, he did not identify a starting point or the range of sentences for the offence. Reference was made to **Natalie Williams v R** [2020] JMCA Crim 19, **Meisha Clement v R** [2016] JMCA Crim 26 and **Daniel Roulston v R** [2018] JMCA Crim 20 ('**Daniel Roulston**').

[35] Counsel submitted that this was a case in which the use of the firearm was "minimal" in that it was not used to shoot or inflict injury, although the offence is a serious one. The court's attention was directed to the decisions of **Ferdinal Phipps v R** [2021] JMCA Crim 45, **Joel Deer v R** [2014] JMCA Crim 33, **Michael Evans v R** [2015] JMCA Crim 33 and **Michael Burnett v R** [2017] JMCA Crim 11. In those cases, sentences of between eight and 12 years' imprisonment were deemed to be appropriate. It was submitted that in light of the fact that the offence involved the use of a licensed firearm, a sentence of eight years' imprisonment would be reasonable.

b) Assault

[36] It was submitted that, based on section 43 of the OAPA, the maximum sentence for this offence is one year imprisonment. In this regard, the court's attention was directed to **Denmark Clarke v Regina** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 153/2006, judgment delivered 9 July 2009.

c) Rape

[37] Counsel submitted that the sentence of 35 years' imprisonment was excessive and that there was no clear indication of how the learned judge arrived at that sentence. She stated that the learned judge omitted to indicate the period before which the appellant would be eligible for parole. In this regard, reference was made to section 6 of the Sexual Offences Act which provides for a maximum penalty of life imprisonment with a mandatory minimum of 15 years' imprisonment. The statute also provides for a minimum period of 10 years' imprisonment before eligibility for parole. Mrs Reid submitted that there were no "unusual aggravating features" in this case. Having referred to **Levi Levy v R** [2022] JMCA Crim 13, **Sheldon Brown v R** [2010] JMCA Crim 38 and **Paul Allen v R** [2010] JMCA Crim 79, counsel suggested that an appropriate sentence is that of 18 years' imprisonment with the stipulation that the appellant serve a period of 12 years before being eligible for parole.

d) Grievous sexual assault

[38] Counsel submitted that the learned judge did not differentiate between the three counts and the gravity of each. She described the sentences imposed as a "blanket sentence" that was inappropriate because the particulars of the three counts were different. It was further submitted that where a sentence imposed is disproportionate to the offence, it may be deemed to be unconstitutional. Reference was made to the decisions of the Supreme Court of Mauritius in **Bhinkah v The State** 2009 SCJ 102 and the Canadian case of **R v Lee** 2012 ABCA 17 (Can LII) in support of that submission. She stated that the learned judge also erred by failing to indicate a period for eligibility for parole.

[39] Having referred to **Linford McIntosh v R** [2015] JMCA Crim 26 and **Levi Levy v R**, counsel suggested that the following sentences would be appropriate:

(i) Count 4 - 18 years' imprisonment with the stipulation that the appellant serves 12 years before being eligible for parole.

(ii) Count 5 - 15 years' imprisonment with the stipulation that the appellant serves 12 years before being eligible for parole.

(iii) Count 7 – 25 years' imprisonment with the stipulation that the appellant serves 15 years before being eligible for parole.

e) Buggery

[40] Counsel submitted that the maximum sentence for this offence is 10 years' imprisonment and the usual range is two to seven years. The imposition of a sentence of nine years' imprisonment she stated was done without any reference to a starting point and there is no explanation as to how the sentence was determined. She suggested that an appropriate sentence would be five years' imprisonment.

Respondent's submissions

[41] Counsel submitted that although the learned judge referred to the four principles of sentencing and identified the aggravating factors, he failed to identify all of the mitigating factors and a starting point. As such he failed to employ the methodology as set out in **Meisha Clement v R** and **Daniel Roulston**. It was conceded that the appellant was not given full credit for the time spent in custody. Counsel also stated that the learned judge failed to take into account the fact that the appellant had no previous conviction.

a) Illegal possession of firearm

[42] It was submitted that a starting point of 12 years would be appropriate. When the aggravating and mitigating factors are balanced it would result in a sentence of 12 years'

imprisonment. The deduction of the time spent in custody would reduce the sentence to 11 years' imprisonment.

b) Assault

[43] Counsel conceded that the learned judge erred when he imposed a sentence of three years' imprisonment for this offence. In this regard, reference was made to section 43 of the OAPA which states that the maximum sentence is one year. Reference was also made to **Leon Barrett v R** [2015] JMCA Crim 29 and **Denmark Clarke v R** in support of that submission.

c) Rape and grievous sexual assault

[44] It was submitted that based on the "gruesome nature of the case" the sentence of 35 years' imprisonment in respect of each count was appropriate. Counsel submitted that the aggravating factors are: the number of offences, the use of the firearm to commit the offences and the fact that the appellant was a police officer.

[45] The mitigating factors she stated were the appellant's good community report and the fact that the firearm was licensed. Counsel suggested that a starting point of 25 years was appropriate and that 12 years be added to take account of the aggravating factors. Two years would be deducted to take account of the mitigating factors as well as the 11 months that the appellant spent in custody. This would result in a sentence of 34 years and one month.

d) Buggery

[46] Counsel submitted that an appropriate starting point would be four years which would be increased to five years after consideration of the aggravating and mitigating factors.

Analysis

[47] Section 14(3) of the Judicature (Appellate Jurisdiction) Act provides:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case, shall dismiss the appeal."

[48] However, as indicated by Hilbery J in **R v Kenneth John Ball** (1951) 35 Cr App R 164 at page 165:

> "…this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses 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**." (Emphasis supplied)

[49] The learned judge, in his sentencing remarks, began by stating that the offences for which the appellant was found guilty were "very serious". The sole mitigating factor identified was the appellant's good community report. On the other hand, the aggravating factors were: the seriousness of the offences, the use of the firearm to commit the offences, the fact that several offences were committed against the complainant and the appellant was a police officer.

[50] He, however, failed to apply the recommended methodology.

[51] The Crown conceded that no consideration was given to the eleven months that the appellant spent in pre-trial detention. That was indeed an error, as it is settled that full credit must be given for time spent in custody. This issue was addressed by Morrison P in **Meisha Clement v R** who stated thus:

> "[34] … in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial. As the Privy

> Council stated in **Callachand & Anor v The State** ([2008] UKPC 49, para.9), an appeal from the Court of Appeal of Mauritius –
>
> > `... any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing'."

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

[52] The role of this court according to Morrison P in **Meisha Clement v R** at para. [43] is to determine whether the sentence:

> "(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."

[53] Where a sentencing judge has not erred in principle, and the sentence does not appear to be manifestly excessive, an appellate court will not disturb that sentence (see **R v Alpha Green** (1969) 11 JLR 283). In this case, it has been accepted that the learned judge erred in principle. In the circumstances, in accordance with the established practice of the court, we have considered the question of sentence afresh.

[54] The procedure to be adopted in arriving at an appropriate starting point was set out in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') and given further clarity in **Meisha Clement v R**. In that case, Morrison P stated:

> "[26] Having decided that a sentence of imprisonment is appropriate in a particular case, the sentencing judge's first task is, as Harrison JA explained in **R v Everald Dunkley**, to `make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any other factors that will

> serve to influence the sentence, whether in mitigation or otherwise'. More recently, making the same point in **R v Saw and others** ([2009] 2 All ER 1138, 1142), Lord Judge CJ observed that 'the expression 'starting point' ... is nowadays used to identify a notional point within a broad range, from which the sentence should be increased or decreased to allow for aggravating or mitigating features'.
>
> [27] In seeking to arrive at the appropriate starting point, it is relevant to bear in mind the well-known and generally accepted principle of sentencing that the maximum sentence of imprisonment provided by statute for a particular offence should be reserved for the worst examples of that offence likely to be encountered in practice. By the same token, therefore, it will, in our view, generally be wrong in principle to use the statutory maximum as the starting point in the search for the appropriate sentence."

[55] The procedure was further addressed by McDonald-Bishop JA in **Daniel Roulston v R** who stated thus:

> "[17] Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:
>
> a. identify the sentence range;
>
> b. identify the appropriate starting point within the range;
>
> c. consider any relevant aggravating factors;
>
> d. consider any relevant mitigating features (including personal mitigation);
>
> e. consider, where appropriate, any reduction for a guilty plea;
>
> f. decide on the appropriate sentence (giving reasons); and
>
> g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."

a) Illegal possession of firearm

[56] The appellant was sentenced to 15 years' imprisonment at hard labour for illegal possession of firearm. A person convicted under section 20(1)(b) of the Firearms Act may be imprisoned for life. The circumstances of this case, although egregious, would not warrant the imposition of the maximum sentence. The Sentencing Guidelines state that the normal range of sentences for this offence is seven to 15 years' imprisonment with a usual starting point of 10 years' imprisonment.

[57] This is borne out by an examination of similar cases from this court. In this regard, we have found the review conducted by Phillips JA in **Joel Deer v R** to be quite useful. The learned judge of appeal stated at para. [12] of the judgment:

> "[12]… In **Jermaine Cameron v R** [2013] JMCA Crim 60 at para [54], Morrison JA noted that '[s]entences of 10 years' imprisonment for illegal possession of a firearm and 15 years' imprisonment for robbery with aggravation are well within the usual range of sentences imposed at trial and approved by this court for like offences'. In **Kemar Palmer v R** [2013] JMCA Crim 29, sentences of 10 years and 15 years imprisonment respectively were imposed for illegal possession of firearm and robbery with aggravation; in **Wayne Samuels v R** [2013] JMCA Crim 10, the sentences of imprisonment were 10 years, seven years and 12 years for robbery with aggravation, illegal possession of firearm and shooting with intent respectively; and in **Andrew Mitchell v R** [2012] JMCA Crim 1, sentences of 10 years, 10 years and 17 years imprisonment were imposed for the offences of robbery with aggravation, illegal possession of firearm and shooting with intent respectively. In our view, unless the circumstances of a case of robbery with aggravation are extremely reprehensible or unless there are other compelling reasons to do otherwise, the sentence imposed should be in the range of 10-15 years."

[58] In **Lamoye Paul v R** [2017] JMCA Crim 41, McDonald-Bishop JA stated that, since that case did not involve the possession of a firearm "simpliciter", a starting point of anywhere between 12-15 years was appropriate. In that case a starting point of 12 years

was utilised in circumstances where the appellant had pleaded guilty to illegal possession of firearm and robbery with aggravation.

[59] In light of the above cases, we are of the view that an appropriate starting point is 12 years' imprisonment. The aggravating factors are:

i) the prevalence of firearm offences;

ii) the fact that the appellant was a police officer; and

iii) the use of the firearm in the commission of the other seven offences.

[60] The mitigating features are:

i) the appellant's favourable social enquiry report; and

ii) the fact that the appellant had no previous convictions.

[61] We thought it was appropriate to add six years for the aggravating factors. That would take the sentence to 18 years. We deducted one year to account for the mitigating factors. When the 11 months that the appellant spent in custody is subtracted the sentence would be 16 years and one month which is greater than that which was imposed. In the circumstances, there is no basis on which to disturb the sentence for this offence.

b) Assault

[62] We agree that the sentence imposed exceeded that which is prescribed by the OAPA. The sentence will therefore have to be reduced as the maximum sentence for this offence is one year imprisonment (see **Leon Barrett v R**).

[63] The evidence was that the appellant slapped the complainant in the face when she tried to push him off after he put his mouth on her vagina. The circumstances, in our view, warrant the imposition of a sentence of one year imprisonment.

c) Rape

[64] The appellant was sentenced to 35 years' imprisonment at hard labour for this offence. Section 6(1)(a) and (2) of the Sexual Offences Act (the Act) provides as follows:

"6 (1) A person who –

(a) commits the offence of rape (whether against section 3 or 5) is liable on conviction in a Circuit Court to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years: …

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

[65] The learned judge in sentencing the appellant failed to comply with section 6(2) which required him to specify a period that the appellant should serve before being eligible for parole. That specification is mandatory. He therefore erred as a matter of law.

[66] A person convicted of rape may be sentenced to imprisonment for life. Such a sentence would however only be reserved for the worst cases. This case cannot be categorized as such although the circumstances of the case are, as the learned judge said "particularly disturbing". We have determined that a fixed sentence of imprisonment for this offence is appropriate in this case. The usual range of sentences imposed for this offence is 15 to 25 years' imprisonment. The usual starting point is 15 years' imprisonment.

[67] In **Oneil Murray v R** [2014] JMCA Cr 25, Morrison JA (as he then was), having conducted a review of cases treating with sentencing for the offence of rape, stated at para. [23]:

"[23] In our view, these cases, which span a period of close to 15 years, suggest a sentencing range of 15-25 years' imprisonment, with 20 years perhaps most closely approximating the norm, on convictions for rape after trial in a variety of circumstances. For this purpose, we have disregarded ***Marvin Reid v R*** [2011] JMCA Crim 50], in which the sentence of 10 years' imprisonment appears to be plainly

> on the low side, and ***Lynden Levy et al v R*** [unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos. 152,155,156, 157 and 158 of 1999, judgment delivered 16 May 2022], in which the sentence of 30 years' imprisonment handed down to the first named appellant clearly reflected, not only the particularly heinous circumstances of that case, but also his role as the 'ring master'."

[68] In accordance with **Meisha Clement** and **Daniel Roulston** the next step for this court is to determine an appropriate starting point. In this regard, we have borne in mind, the following passage in **Meisha Clement**, where Morrison P stated:

> "[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."

[69] In our determination of the appropriate starting point in this matter, we took into account the fact that the appellant used his firearm to gain entry into the complainant's home and to subdue and keep her under his control for the duration of the assault. In this regard we have noted her evidence that at some point the appellant placed the gun in her mouth. That was an act of gratuitous violence. We also took into account the complainant's evidence that the appellant sought to force her to drink the contents of a beer bottle during the assault.

[70] Based on the circumstances of this case, we are of the view that an appropriate starting point is 24 years' imprisonment. The other offences for which the appellant was convicted have not been taken into account in our determination of the starting point.

[71] We have observed that the sentence imposed in the instant case does not fall within the usual range of sentences imposed for the offence of rape in other cases. It will

therefore have to be determined whether this departure from the norm was warranted. As stated by F Williams JA at para. [86] in **Neville Barnes v R** [2019] JMCA Crim 12, with whom we agree, the imposition of a sentence beyond the upper limit of the range does not without more mean that there has been an error in principle.

[72] In **Neville Barnes**, utilising a starting point of 18 years, a sentence of 31 years' imprisonment was found to be appropriate. In that case, the complainant was raped several times by applicant who had broken into her house.

[73] In **Patrick Green** [2020] JMCA Crim 17, a starting point of 27 years' imprisonment was used in circumstances where the appellant pleaded guilty to the commission of eight separate offences of rape that were committed in close succession to each other. When the guilty plea and the aggravating and mitigating factors were considered the sentence was reduced from 38 years' imprisonment on each count to 19 years and six months.

[74] In **Carl Campbell v R** [2019] JMCA Crim 22, the appellant, who had pleaded guilty, was sentenced to 12 years for forcible abduction and grievous sexual assault, 6 months for assault, 10 years for robbery with aggravation and 45 years for rape with the stipulation that he serve 35 years before being eligible for parole. On appeal, this court stated that a sentence of 25 years' imprisonment for the offence of rape would have been appropriate had the matter proceeded to trial, using a starting point of 15 years.

[75] In **Percival Campbell** [2013] JMCA Crim 48, the court substituted a sentence of 18 years for a sentence of 21 years where the appellant was convicted of raping the granddaughter of his wife. The court, in comparing that case to others such as **Paul Maitland** [2013] JMCA Crim 7, said at para. [21] that:

> "[21] …no firearm or other weapon was used by the appellant in the commission of the offence; there was no 'unusual' violence, beyond the single dreadful act of rape itself; the complainant was not subjected to further sexual indignities or perversions; and the appellant acted alone, rather than in concert with other persons. The absence of these factors, it seems to us, certainly serves in one way or the other to

> distinguish this case – in the appellant's favour - from **Sheldon Brown v R**, **Paul Allen v R** and **Maitland v R**."

The court in the circumstances found that the sentence of 21 years was excessive.

[76] In **Paul Maitland**, the complainant was forced by two men to walk to an open lot where she was raped by both of them. Afterwards, she was left in the lot where she was told to wait for a certain amount of time. The court at para. [38] stated:

> "[38] In the instant case, what must be considered would include the ordeal to which C was subjected, the fact that Mr Maitland was 35 years old at the time of conviction, did not employ a firearm in the commission of the offences and had a previous conviction for an offence involving the person of another, namely, robbery with aggravation. **An appropriate sentence would be 23 years imprisonment.** In the circumstances, the sentence of 30 years would be manifestly excessive. This court may, therefore, set it aside and substitute a lower term."

[77] In **Paul Allen v R** the appellant held the complainant at gunpoint and forced her onto premises where he robbed and raped her. On appeal, there was no reduction of the sentence of 20 years which was imposed for the offence of rape.

[78] In **David Gray** [2021] JMCA Crim 4 a sentence of 25 years' imprisonment with the stipulation that the appellant serves 15 years before being eligible for parole (having been awarded credit for one year and 6 months) was found to be appropriate.

[79] Having identified the starting point and the normal range of sentences, the aggravating and mitigating factors must now be considered. In **Neville Barnes v R** at paras. [88] to [91], F Williams JA in his determination of the aggravating factors stated thus:

> "**Aggravating factors**
>
> [88] **The circumstances of this case are egregious in that the applicant broke into the virtual complainant's home during the night, breaching the sanctity of her home and violating her in what she should have been**

able to regard as the safety and security of her bedroom. The applicant raped her in different sexual positions. During the rape she was subjected to sexual and other indignities. Among these indignities was the fact that the virtual complainant was menstruating at the time of the incident, however the applicant was not deterred when that fact was pointed out to him.

[89] **Further, the commission of the offence, on the evidence of the virtual complainant, seemed to have involved some element of premeditation,** including the fact that entry to the premises was gained by the sawing off of a part of an iron grille and that the applicant had been watching her or looking at her as she used a computer before going to bed, no doubt to determine the best time to break in. Additionally, pages 53-54 of the transcript disclose[d] that two dogs that were always left loose were, after the incident, found locked up in their kennel, apparently led there with a can of dog food with holes punched in it. The brand of dog food was one that the virtual complainant's family did not give to their dogs. Those facts suggest that the dogs were deliberately locked away by a stranger to the household.

[90] Another disturbing consideration is that, on the virtual complainant's testimony, when she asked the applicant why he was raping her, he callously responded (at page 37, line 20): '[b]ecause I choose you'. This could reasonably be construed as a show of power, intended to convey to the virtual complainant the inevitability of the fate that had befallen her, simply because he willed it. On the evidence of the virtual complainant, the applicant commanded her to give him good loving like she gives her boyfriend. He also commanded her to say words to him in effect requesting him to have rough intercourse with her. He demanded that she say the words louder, when she did not do so loudly enough for him. He also asked her if she wanted him to impregnate her (using less forensic language). On the evidence, the applicant also asked the virtual complainant if anyone had ever 'gone down; on her and whether she wanted him to 'go down' on her. At some point he also forced or tried to force his tongue into her mouth. The virtual complainant tried to dissuade him from raping her by asking him why he was doing what he was doing. His response was, on the evidence (at page 30, lines 21-22 of the transcript): 'I know what I am doing is wrong but is just soh it goh in Jamaica'. At least twice

during her ordeal she asked the applicant to have mercy on her, which request was ignored.

[91] Support for considering at least some of these matters as being of an aggravating nature may be found in the case of **Milberry, Morgan and Lackenby v R** [2002] EWCA Crim 2891. In that matter, the English Court of Appeal considered advice given to it by the Sentencing Advisory Panel ('the Panel') proposing a revision of the then-current sentencing practice in respect of the offence of rape. In endorsing that advice, the court considered the case of **R v Billam** [1986] 1 All ER 985 (cited by Mr Taylor). The court gave guidance that lower courts may properly consider the following factors, among others, to be aggravating factors in rape cases:

'Aggravating Factors

> 31. The Panel identify [sic] nine aggravating factors, the first five of which are the same as those identified in Billam. ...
>
> 32. The nine factors which the Panel identifies with which we agree are as follows:
>
> 'i. the use of violence over and above the force necessary to commit the rape
>
> ii. use of a weapon to frighten or injure the victim
>
> iii. **the offence was planned**
>
> iv. an especially serious physical or mental effect on the victim; this would include, for example, a rape resulting in pregnancy, or in transmission of a life-threatening or serious disease
>
> v. **further degradation of the victim, e.g. by forced oral sex or urination on the victim (referred to in Billam as 'further sexual indignities or perversions')**
>
> vi. **the offender has broken into or otherwise gained access to the place where the victim is living** (mentioned in Billam as a factor attracting the 8 year starting point)

> vii. the presence of children when the offence is committed (cf. Collier (1992) 13 Cr App R (S) 33)
>
> viii. the covert use of a drug to overcome the victim's resistance and / or obliterate his or her memory of the offence ix. a history of sexual assaults or violence by the offender against the victim'…' (Emphasis added)
>
> [92] It seems to us that, despite the difference between the legislative provisions and starting points in the English jurisdiction, on the one hand, and ours, on the other, these factors, which are not exhaustive, might also properly be considered in this jurisdiction." (Emphasis supplied)

[80] The aggravating factors in the instant case are:

i) the prevalence of sexual offences in Jamaica;

ii) the incident occurred at night;

iii) the offence was pre-meditated;

iv) the fact that the appellant was a police officer who is sworn to serve and protect;

v) the further degradation of the victim; and

vi) the incident was sustained.

[81] The mitigating features are:

i) the appellant's favourable social enquiry report; and

ii) the fact that the appellant had no previous convictions.

[82] When the aggravating and mitigating factors are balanced an appropriate sentence would be in the range of 34 to 36 years. The sentence imposed by the learned judge could not therefore, be described as being manifestly excessive. When the 11 months that the appellant spent in custody is subtracted the sentence would be 34 years and one month.

[83] Where eligibility for parole is concerned, we are of the view that the appellant should serve a period of 20 years' imprisonment before being eligible for parole.

[84] Based on the above, we are of the view that the sentence imposed though not manifestly excessive ought to be set aside and a sentence of 34 years' and one month imprisonment substituted therefor.

d) Grievous sexual assault

[85] The appellant was found guilty of four counts of grievous sexual assault. This offence carries a maximum sentence of life imprisonment and a minimum sentence of 15 years' imprisonment. The minimum period that is to be served before eligibility for parole is 10 years (see sections 6(1)(b) and 6(2) of the Sexual Offences Act).

[86] The acts which formed the bases of the offences are set out below:

Count 4 – the applicant put his penis in the complainant's mouth.

Count 5 – the appellant put his finger in the complainant's anus.

Count 7 - the appellant put the gun in the complainant's vagina.

Count 8 – The appellant placed his mouth on the complainant's vagina.

These acts were committed during the course of a sustained sexual assault on the complainant.

[87] We employed the same methodology as outlined above for the offence of rape, with the result that a sentence of 34 years' and one month imprisonment is appropriate for each offence, based on the particular circumstances of this case.

e) Buggery

[88] Section 76 of the OAPA, as stated previously, provides for a maximum sentence of 10 years' imprisonment for this offence. The Sentencing Guidelines state that the normal range of sentence is two to seven years with three years being the usual starting point.

[89] We have noted that there is a paucity of cases treating with the offence of buggery. In **Seian Forbes and Tamoy Meggie v R** [2016] JMCA Crim 20, the sentence of seven years' imprisonment was not disturbed. This was also the case in **Garfield Vassell v R** [2013] JMCA Crim 23 and **Constantine Atkinson v R** [2013] JMCA Crim 25 where sentences of 10 years' imprisonment and six years' imprisonment had been imposed, respectively. The brief facts in **Garfield Vassell v R** are that the applicant was convicted of buggery committed against his partner's daughter at the home where they all resided. The complainant who was 12 years old at the time of the commission of the offence was "tricked" into coming home under the guise that she was needed to iron clothes for her mother. While the complainant was putting away the clothes, the applicant pushed her onto the bed and forced his penis into her anus. His application for leave to appeal was refused and the sentence for buggery was not disturbed.

[90] An appropriate starting point in the instant case would be five years' imprisonment. The aggravating factors would increase the sentence to 10 years. The application of the mitigating factors would result in a reduction of two years to eight years. When the 11 months that the appellant spent in custody is subtracted the sentence would be seven years and one month.

Disposal

[91] We, therefore, make the following orders:

1) The application for permission to appeal the convictions is refused.

2) The appeal against the sentences is allowed in part.

3) The sentence of 15 years' imprisonment for the offence of illegal possession of firearm (count 1) is affirmed.

4) The sentence of three years' imprisonment for the offence of assault (count 2) is set aside. Substituted therefor is a sentence

of one month's imprisonment, the appellant having been credited with the 11 months spent in pre-sentence custody.

5) The sentence of 35 years' imprisonment for the offence of rape (count 3) is set aside. Substituted therefor is a sentence of 34 years and one month's imprisonment with the stipulation that the appellant serves 20 years before being eligible for parole, the appellant having been credited with the 11 months spent in pre-sentence custody.

6) The sentences of 35 years' imprisonment for the offences of grievous sexual assault (counts 4, 5, 7 and 8) are set aside. Substituted therefor is a sentence of 34 years and one month's imprisonment on each count with the stipulation that the appellant serve 20 years before being eligible for parole, the appellant having been credited with the 11 months spent in pre-sentence custody.

7) The sentence of nine years' imprisonment for the offence of buggery (count 6) is set aside and a sentence of seven years and one month's imprisonment substituted therefor.

8) The sentences are to run concurrently and are to be reckoned as having commenced on 3 September 2019, the date on which they were imposed.