JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00057

MARIO McDONALD v R

Miss Jacqueline Cummings instructed by Archer, Cummings & Company, Attorneys-at-Law for the appellant

Adley Duncan and Mrs Yanique Taylor-Campbell for the Crown

16 February and 8 April 2022

LAING JA (AG)

Background

[1] On 28 March 2019, after a trial before a judge and jury in the Home Circuit Court holden at King Street in the parish of Kingston, Mario McDonald ('the appellant') was found guilty on an indictment charging him with the offences of rape, contrary to section 3(1) of the Sexual Offences Act ('the Act') and forcible abduction, contrary to section 17 of the said Act. On 21 June 2019, he was sentenced to life imprisonment at hard labour for the offence of rape with the stipulation that he serves 18 years before being eligible for parole and 12 years' imprisonment at hard labour for the offence of forcible abduction. The sentences were ordered to run concurrently.

[2] The appellant at his trial gave an unsworn statement from the dock in which he raised consent as his defence. Thus, the main issue at trial was one of credibility.

[3] The prosecution relied on three witnesses, namely, the complainant, the police officer who apprehended the appellant, and the investigating officer. The statements of the police witnesses were agreed upon between counsel and read into the record without the need for them to be called.

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

The prosecution's case

[5] On 18 December 2014, the complainant, a security guard, was on her way to work. On reaching the bus stop along Duhaney Drive, Duhaney Park, in the parish of Saint Andrew, she saw the appellant selling fashion jewellery and other items. He told her that he was called "Fashion". She did not know him before that day. He asked her if she wanted anything to buy and while looking at his wares, she asked him if he knew anywhere around the area that was being rented. He told her he resided in a big house and his relatives were abroad and that he had a room available for rent. He told her if she wanted, she could come and look at it. She explained that she was on her way to work and the bus was almost there so she would talk to him at a later date. She gave him her telephone number with instructions to call her and, whenever she had the time to do so, she would view the place and decide whether she liked it or not.

[6] The appellant called her once on or about 26 December 2014 and asked her if she was coming to look at the place. She explained that she was at work and he would have to wait until she got a day off, at which time she would come and take a look.

[7] On 27 December 2014, at approximately 10:00 am, the complainant was at Duhaney Park when the appellant rode up to her on a bicycle and asked if she was going to look at the house. She told him that she was heading downtown and he encouraged her to come and view the house now since she had time. He went and placed his bicycle

across the street from the spot where he vended. The complainant walked with him to his home and they went to an entrance at the back of the house. The appellant took a key from his pocket opened the door and invited her to come and look. The complainant went inside the room which had signs of occupation including a bed, a closet, a dresser, and clothing. She asked him if that was the room that he was going to rent to her and he said yes, but he would sooner or later take out the items and put them in another room. The complainant admitted, during cross examination, that while she was in the room the appellant told her that he liked her and, if she wanted to stay there for free, he would let her do so, to which, she said "no".

[8] The appellant then closed the door and she asked him "why are you closing the door?". He reacted by throwing the key inside the open closet. He then asked her to stay with him for a little while and she told him no, she had to go to the market. Thereafter he insisted, and started to speak about himself and how he had had a bad relationship in the past. He then lit a cigarette and told her to take off her clothes, because he wanted to have sex with her. She responded by saying "no, I am not in for this, why are you doing this to me". He then took off all his clothes and asked her "you don't tek off your clothes yet?". He then used his hand to "box" her in the face, after which he shoved her and she fell on the bed.

[9] She recounted to the court that she started crying and said she was feeling "scared and afraid". She told him to stop but he would not stop and she started to take off her clothes "because he was acting in a very aggressive mode". He reached into a drawer for a condom and instructed her to go on her knees after which he inserted his penis inside her vagina. She asked him "why are you doing this to me?", and he responded by repeatedly saying "stop talking to me, stop telling me this".

[10] The appellant ejaculated while wearing the condom, then removed the condom and inserted his penis inside her again. The complainant kept telling him that she had to go and kept asking him to let her go, but he would not do so. She explained that she was afraid for her life because he was in an aggressive mode and she did not know what his

next step would be. She then stopped talking and kept calm in an effort to cause him to allow her to leave. She eventually asked him to let her go and he told her to put on her clothes and go.

[11] The complainant got dressed and headed in the direction of her home. Initially, the appellant was walking behind her and then he turned in the direction of the area where he normally sells. She explained that she was crying and trembling and felt afraid and ashamed, so she went home and locked herself in her room. She subsequently made a report at the Duhaney Park Police Station on or about 3 January 2015 and, on 19 January 2015, she attended an identification parade at the "hundred man" (an apparent reference to the Portmore Police Station) where she identified the appellant as the person who had raped her.

The case for the defence

[12] The appellant gave an unsworn statement from the dock in which the defence of consent was raised. He stated that in December 2014, he sold costume jewellery in front of the Duhaney Park Police Station. During that time, he met the complainant who introduced herself as S. He said she asked him if he knew anywhere for rent and he told her that the house in which he was living had several rooms that were not occupied and he could show her the house and she might find one of the rooms to be comfortable. He explained that they exchanged telephone numbers and he called her "couple a times arranging to see her".

[13] He met with her sometime in December on Duhaney Drive and they walked to his house. On that day, they spoke about the room that she would rent and he told her she could live there for free. He also stated that they had a mutual agreement that they would have sex. After they had sex, they both walked together to the table where he was selling and she "walked on 'bout her business".

[14] The appellant said he spoke to his brother-in-law, who owned those premises, who did not agree to renting the premises. He telephoned the complainant to advise her that

his brother-in-law had said he could not have her stay there for free and she got upset. The argument escalated, and he got upset, told her two expletives, and hung up the phone. Approximately two weeks later, he was taken into custody by the police and advised of the reason for his detention.

The grounds of appeal

[15] Miss Jacqueline Cummings, on behalf of the appellant, with the court's leave, abandoned the grounds previously filed. She was permitted to rely on the new grounds of appeal reflected in the skeleton submissions filed with the court, with instructions to file those grounds of appeal. The new grounds are as follows:

> "Ground One - The [learned judge] pointed out and reminded the jury of most of the points raised by the crown [sic] in their closing argument and in contrast rebutted most of the argument used by defence counsel in his closing argument to the detriment of the [a]ppellant.
>
> Ground Two- The [learned judge] erred and failed to explain to the jury and point out the evidence (if any) which could have shown the offence of forcible abduction was committed.
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> Ground Three- The [learned judge] failed to properly address the jury on the issue of the consent and the evidence of it.
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> Ground Four- The [learned judge] erred in summing up to the jury when on several occasions she mentioned that the appellant['s] unsworn statement was not evidence and if it had any value.
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> Ground Five- The [a]ppellant Attorney-at-Law failed to explain to him the consequence of giving an unsworn statement from the dock as opposed to sworn evidence in the witness box and chose the method for him.
>
> Ground Six-The sentence of life imprisonment with a stipulation that [the appellant] must serve 18 years before being eligible for parole for rape, is manifestly excessive having regard to all the circumstances of this case.

> Ground Seven- The sentence of 12 years for forcible abduction is manifestly excessive having regard to all the circumstances of this case."

Ground One: The [learned judge] pointed out and reminded the jury of most of the points raised by the crown [sic] in their closing argument and in contrast rebutted most of the argument used by defence counsel in his closing argument to the detriment of the Appellant.

The submissions

[16] The submissions of Miss Cummings concentrated on numerous examples that she argued constituted evidence in support of this ground. We have not set out herein each statement which Miss Cummings identified in her written and oral arguments, but we have examined the salient portions of the transcript on which reliance was placed and we have made observations that are developed hereunder.

[17] Mr Adley Duncan, on behalf of the Crown in response, submitted that the learned judge operated well within the bounds of permissible comment. Counsel noted that much of the ground covered by the judge in her direction were standard and similar to the elements of the prosecution's opening statement. Furthermore, the criticism that the judge rebutted the points raised by defence counsel in his closing argument was not borne out on an examination of the comments.

Discussion

[18] The learned judge, in giving standard general directions on matters such as the respective roles and functions of the judge and jury, noted the portions thereof which the prosecution had also introduced to the jury, either in Crown Counsel's opening or closing address. Similarly, this was done in respect of the directions that the jurors ought not to arrive at a verdict "based on sympathy for, or bias against or towards either the complainant or the accused man".

[19] The learned judge advised the jury that in their deliberations and assessment of the witnesses, they may take into account the speeches and comments made by Mr Tom Tavares-Finson QC, who appeared for the appellant at trial and counsel for the

prosecution, if they agreed with them, but were not bound to accept or adopt them. The jury was also properly directed that where the facts of the case are concerned, it was their judgment alone that matters. Furthermore, they were advised that if they did not agree with the judge's comments, those of Queen's Counsel or counsel for the prosecution, they should have no regard for such comments.

[20] The learned judge was obliged to assist the jury by summarising the case and, in reviewing the case for the prosecution, at various points, she incorporated the submissions of counsel for the Crown. In reviewing the defence asserted by the appellant, she repeated Queen's Counsel's submission as to how the evidence and the prosecution's case ought to be viewed. However, the learned judge's reference to these arguments was punctuated by reminders as to how the jury should treat the comments and submissions of counsel. In such circumstances, we find that there was no prejudice to the appellant.

[21] An example of how the learned judge referred to the comments by counsel is found at page 35 lines 2 to 15 of the transcript of the judge's summation, where she advised the jury to consider the defence's criticisms of the case for the prosecution in the following terms:

> "So, your task, Madam Foreman and members of the jury, includes the assessment of the evidence of witnesses, and especially that of the complainant, because she is the only witness as to fact as to the commission of this offence. So you will have to take heed of the criticisms that learned queen's counsel for the Defence made or pointed out. You will need to consider, with care, if there is any basis for queen's [sic] counsel's criticism. So, I will remind you, in a moment, of the more significant aspects of what the complainant said in her evidence here, and the challenges based on the cross-examination.
>
> So, counsel, on that basis, is asking you to say that the complainant is not a truthful witness, and you are to reject her evidence. As to what you make of it all, is entirely your assessment to make as judges of the facts."

[22] The learned judge also reminded the jury of the contrasting submissions of counsel in relation to the relative size of the complainant *vis a vis* the appellant, which was an issue raised for the jury's consideration on the defence's case. The issue was whether, given her admitted size advantage and employment as a security officer, the complainant was credible in her account of why she submitted to the appellant's demands for her to have sexual intercourse against her will. The learned judge's directions are found at page 26 line 14 to page 27 line 14 of the transcript of her summation and are as follows:

> "So, learned queen's counsel, Mr. Tavares Finson, of course, in advancing his client's defence, asks you to take all of these things into consideration, and to find that the complainant is not a credible witness. If you recall what the learned queen's counsel indicates, well, she is a security officer. So, as a security officer, is it likely that she would have just gone and just, in a docile way, just allow him to take advantage of her?
>
> On the other hand, Madam Foreman and members of the jury, you recall the comments, too, of learned counsel for the Prosecution that the mere fact that she might be a security guard, which is her profession, does not necessarily translate into who she is when she is not in her professional capacity, and because of the particular circumstances she might have found herself in at the time, with the door being locked, with the acts of aggression that were meted out to her, with her saying under cross-examination that she was looking for something to hit him with, but there was nothing there she was in an unfamiliar territory."

[23] The learned judge, at page 72, line 17 to page 73, line 9 of the transcript of her summation, on this issue of comparative size, made the following comments to the jury:

> "…Look at all those things and you take that into consideration whether she could really say that she was afraid, or is it like what Queen's Counsel is saying that as a security officer, as a security guard, she should have behaved in such a way that she could have overpowered the[appellant] accused man. If it is that she is saying that it is really rape, based on her size, based on his size, is it that she could have pushed him aside and I don't know what would happen after that if she didn't know we are the key was, but it is a matter for you, Madam

> Foreman and members of the jury. Which is why the learned Queen's Counsel is saying there was no rape, it was purely consensual."

[24] Miss Cummings also criticised the manner in which the learned judge treated Mr Tavares-Finson's address on the credibility of the complainant as found at page 36, line 20 to page 37, line 10 of the transcript. That portion is reproduced hereunder:

> "So, you can make a determination as to how she looks to you. And, make a determination based on her ability. You recall learned counsel for the Prosecution indicated that based on how she might have responded to the questions as asked, she came across as being a little simple. Learned queen's [(sic] counsel is saying she can't be a security officer and be simple; however, Madam Foreman and members of the jury, I am sure you must know the word 'naïve'. It doesn't mean that the mere fact that she might be a security officer, it doesn't mean she cannot be naive or simple; but, it is a matter for you, Madam Foreman and members of the jury, how you treat with that."

[25] In our opinion, the learned judge clearly left it to the jury to do their own assessment of this element of Queen's Counsel's submission, although she offered her own possible view of those submissions but with the caveat that, ultimately, it was a matter for them as to how they would treat with the issue.

[26] We also do not accept that the learned judge raised issues to the jury that were unnecessary and which could confuse them, thereby causing them to wrongly convict the appellant. Counsel for the appellant has referred to a number of portions of the transcript to support the assertion in this regard; however, none of the referenced portions support the complaint which was made, and we do not find it necessary to address them seriatim.

[27] Ultimately, we, do not find any merit in this ground of appeal.

Ground Two- The [learned judge] erred and failed to explain to the jury and point out the evidence (if any) which could have shown the offence of forcible abduction was committed.

The submissions

[28] Miss Cummings submitted that the learned judge erred in finding that force was used in the commission of forcible abduction where, on the evidence, the appellant "boxed" the complainant twice in her face and shoved her on the bed as part of the sexual assault.

[29] Counsel for the Crown submitted that the learned judge gave clear and correct directions on the offence of forcible abduction and also referred to the evidence adduced by the prosecution, which was capable of establishing the commission of that offence. This, he said included the evidence that the appellant "boxed" the complainant twice and shoved her on the bed.

Discussion

[30] In treating with this issue, the learned judge explained to the jury at page 18, lines 14 to 25 that the offence of forcible abduction is committed when a person, by force, takes away or detains another person, against her will with intent to have sexual intercourse with her or commit grievous sexual assault upon her. These directions constituted an accurate explanation of the offence pursuant to section 17 of the Act for which the appellant had been indicted.

[31] The learned judge, in addressing the issue of force, commented at page 19 of the transcript as follows:

> "Therefore, the Crown has to prove firstly that [the appellant] used force to detain [the complainant]. Secondly, that he did so against the will of the [complainant] and thirdly that at the time he intended to have sexual intercourse with her. The Crown is saying that the force used was when the [appellant] boxed her twice in her face and then shoved her on the bed. Based on the evidence that was marshalled, that is the evidence that the Crown is asking you to consider to

> determine whether you believe or are satisfied that you feel sure that this type of force that was used, if you believe her, would have been the kind of force that he used to detain her in that room. It is a matter for you to assess the circumstances of this case, examine the evidence carefully and determine whether the prosecution has satisfied you that you feel sure that this ingredient of force was used to detain [the complainant] on the 27th of December, 2014."

[32] At page 107 of the transcript, the learned judge gave additional directions to the jury on forcible abduction as follows:

> "So, for the offence of Forcible Abduction, therefore in the circumstances of this case, as I said, the Prosecution had to prove certain things to you, and you look at that, that at the time on the 27th of December 2014, you must look and determine for yourselves whether on that occasion the[appellant] used force to detain [the complainant] in the room at 1 Salkey Avenue, and that at the time he did so, it was against her will; so, she did not give consent to him keeping her in that room. When he took the key and he locked her in there with him and discarded the key to a place where she would not know, necessarily, where to find it. You look at all those factors. That at the time he intended, when he detain her, he detained her for the purpose of having sexual intercourse with her, and that was his intention at the time. And you remember who I gave you the direction with respect to intention and what you should look for."

[33] It was submitted by Miss Cummings that the learned judge "did not match" the evidence with the ingredients of the offence. Respectfully, we do not accept that there is merit in these submissions. The learned judge identified the elements of the offence and reminded the jury of the 'detention' by placing the key in a place where the complainant would not necessarily know where to find it. She also properly left for the jury's consideration the evidence of the complainant as to the physical violence used by the appellant and whether that was sufficient force, together with the locked door and hidden key, to detain her for the purpose of having sexual intercourse with her. The totality of directions of the learned judge in respect of the offence was, therefore, quite

appropriate and adequate to have assisted the jury in making a determination as to whether the offence had been committed. This ground is without merit.

Ground Three-The [learned judge] failed to properly address the jury on the issue of the consent and the evidence of it.

The submissions

[34] It was submitted that the learned judge should have explained to the jury that the appellant could have had a reasonable belief that the complainant was consenting to sexual intercourse and, in those circumstances, he ought to be acquitted. The evidence of this belief, counsel submitted, is the fact that the complainant walked voluntarily with the appellant to his house and voluntarily took off her clothes when they had sex. Furthermore, afterwards, she walked out with the appellant. It was forcefully advanced by Miss Cummings that the learned judge should have explained to the jury that the appellant could have had an honest belief that the complainant was consenting to sexual intercourse, in the absence of that direction the appellant ought to be acquitted.

[35] In his response, Mr Duncan submitted that for a specific direction on honest belief to have been required, the circumstances must be such that, on the evidence, such honest belief could have been inferred, or that such honest belief was asserted by the defence. He emphasised the fact that the appellant in his unsworn statement from the dock did not deny that he had sexual intercourse with the complainant but asserted that it was consensual. He referred to the cases of **Loveroy Henry** [2019] JMCA Crim 43 and **Denjah Blake v R** [2014] JMCA Crim 19 in an effort to illustrate the circumstances in which it was incumbent on the judge to give the honest belief direction and submitted that the instant case is distinguishable. He posited that the common thread running through both these cases is the non-communication by the complainant to the appellant of her lack of consent and that this was the basis for the court concluding that the honest belief direction was necessary.

Discussion

The origin and evolution of the honest belief direction

[36] Prior to the Act, rape in Jamaica was a common law offence defined as "the unlawful carnal knowledge of a woman without her consent". This was the usual statement of the offence in indictments. In order to prove that the offence of rape occurred, the prosecution was required to prove that:

1. there was sexual intercourse;

2. it was non-consensual; and

3. that the accused man had the requisite *mens rea.*

[37] The term *mens rea*, Latin for "guilty mind", is a fundamental feature of common law as well as statutory offences. The learned authors of Archbold Criminal Pleading, Evidence and Practice 2013, 13th edition at paragraph 17-1, cite with approval Smith and Hogan Criminal Law 13th edition, which contains the following observation:

> "*Mens rea* is a term which has no singular meaning. Every crime has its own *mens rea* which can be ascertained only by reference to its statutory definition or the case law. The most we can do is to state a general principle, or presumption, which governs its definition… The result is that the best we can do by way of a general definition of *mens rea* is as follows: 'Intention, knowledge or recklessness with respect to all the elements of the offense *together with any material intent which the definition of the crime requires*.' (at pp.134-136)."

[38] Section 3(1) of the Act provides as follows:

> "3.–(1) A man commits the offence of rape if he has sexual intercourse with a woman –
>
> (a) without the woman's consent; and
>
> (b) knowing that the woman does not consent to sexual intercourse or recklessly not caring whether the woman consents or not."

[39] Consent is not defined in the Act; however, section 3(2) provides circumstances in which consent is not to be treated as existing as follows:

> "(2) For the purposes of subsection (1), consent shall not be treated as existing where the apparent agreement to sexual intercourse is –
>
> (a) extorted by physical assault or threats or fear of physical assault or threats or fear of physical assault to the complainant or to a third person; or
>
> (b) obtained by false and fraudulent representation as to the nature of the act or the identity of the offender."

[40] It is, therefore, reasonable to conclude that consent for the purposes of the Act means free or voluntary agreement, without those specific elements described in section 3(2), and conceivably, others as well, which may arise on the facts of each case. In other words, there must be "the freedom and capacity to make that choice" borrowed from the words used in section 74 of the United Kingdom Sexual Offences Act, 2003.

[41] The landmark case of **Director of Public Prosecutions v Morgan** [1976] AC 182, shaped the modern law in relation to the *mens rea* for the common law offence of rape and arose out of unusual and sordid facts. The defendant Mr Morgan, a senior officer in the Royal Air Force, invited the three other defendants, who were younger and junior members of the force, to his house and suggested to them that they have sexual intercourse with his wife, to whom they were complete strangers. The men's case was that they were incredulous, initially, but were persuaded when Mr Morgan told them of his wife's unusual sexual desires and provided them with condoms. They asserted that they were told to expect resistance from the wife but that this would be feigned on her part.

[42] The wife's evidence was that she did not consent, and her account of the event and the extent of her resistance suggested that the accused men could not have reasonably believed that she was consenting. Her evidence was that she was awakened

and taken from the room in which she slept with one of her children to another room where her limbs were restrained while the other defendants took turns having sexual intercourse with her.

[43] On appeal to the House of Lords, Lord Hailsham of St Marylebone, in writing for the majority of the court, at page 210, made the following observation:

> "I believe that 'mens rea' means 'guilty or criminal mind,' and if it be the case, as seems to be accepted here, that mental element in rape is not knowledge but intent, to insist that a belief must be reasonable to excuse is to insist that either the accused is to be found guilty of intending to do that which in truth he did not intend to do, or that his state of mind, though innocent of evil intent, can convict him if it be honest but not rational."

[44] At pages 213-214, Lord Hailsham further acknowledged that *mens rea* means a number of different things in relation to different crimes and arrived at the following conclusion:

> "Once one has accepted, what seems to me abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a 'defence' of honest belief or mistake, or of a defence of honest and reasonable belief or mistake. Either the prosecution proves that the accused had the requisite intent, or it does not. In the former case it succeeds, and in the latter it fails. Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held, and it matters not whether, to quote Bridge J. in the passage cited above, 'the definition of a crime includes no specific element beyond the prohibited act.'"

[45] Consequently, the House of Lords held that the learned trial judge had misdirected the jury to the extent that he said that the jury could convict the accused men if they had no reasonable grounds for believing that the complainant was consenting when they had sexual intercourse with her.

[46] In addressing the issue of consent in the instant case, this is how the learned judge treated it at page 23 to 25 of the transcript:

> "Now, the second ingredient is with respect to consent, so it must be without consent, with respect to Rape. If the complainant yields through fear or duress or exhaustion, this is not consent.
>
> Thirdly, the third ingredient is recklessly not caring whether the complainant consented or not. A man is reckless in the sense required, when he carries out a deliberate act, knowing or closing his mind to the obvious fact that there is some risk of damage resulting from the act; but, nevertheless, continuing in the performance of that act.
>
> You will recall from the evidence that the complainant said she told the accused no, she didn't want to have sex with him, that she was afraid so she took off her clothes, that he shoved her on the bed after boxing her or slapping her in the face twice. She also said that she was not in for this, her words. And also, her words were, "Why are you doing this to me?" She said also, she began crying and feeling scared and afraid. She said she told the accused to stop, but he wouldn't stop. So, you have to look at all the circumstances of this case and determine whether the Prosecution has satisfied you so that you feel sure that they have proven these ingredients and thereby proving the guilt of the accused.
>
> So, you may find that based on what I have outlined to you, it reminds you of those aspects of the evidence, you may find that there was the aspect of recklessness, he didn't really care whether she was consenting or not, and the fact that when she said she was scared or feeling afraid, that too would have been one of the ingredients that would have been proven with respect to the offence of Rape. If you so accept that evidence, then you may find that accused man guilty. If you are not sure, then Madam Foreman and members of the jury, you will have to acquit."

[47] The need for the honest belief direction arises whenever there is evidence that is capable of supporting consensual sexual intercourse, together with an honest belief by the accused that the complainant was consenting. This evidence may include, but is not limited solely to, the non-communication by the complainant that she is not consenting.

In both **Denjah Blake** and **Loveroy Henry**, there was evidence that justified the honest belief direction and in the latter case the assertion of honest belief in the complainant's consent was positively raised by the accused. Both these cases were relied on by the Crown to illustrate the circumstances in which such a direction is necessary and to suggest that because the facts of the instant case are distinguishable, no such direction was required.

[48] In **Denjah Blake** the complainant, a young woman of 21 years, was walking on her way to work at approximately 6:40 am. She stated that on passing what appeared to be an abandoned building, the appellant called out to her and she initially ignored him. His calls became more aggressive and he appeared on the step of the building with his hand at his waist and told her to "come here, mi strap", which she understood to mean he was armed with a gun. In colloquial language, he then indicated that he wanted to have sex with her. She said the appellant proceeded to have sexual intercourse with her without her consent and forced her to perform oral sex. They were interrupted by a man and the appellant took her to another location inside the building where the sexual assault on her continued. The complainant testified that she was compliant because she was afraid. The appellant denied having been armed with a firearm or saying that he was, and asserted that the sexual intercourse was consensual. On the facts of the case there was, therefore, evidence that was capable of supporting consensual sexual intercourse together and an honest belief by the accused that the complainant was consenting.

[49] In **Loveroy Henry**, the complainant was at a bus stop when the appellant, a taxi driver who was known to her and who lived in the same community as her, came along and offered her a ride home. She accepted and entered the vehicle. The complainant's evidence was that the appellant deviated from the usual route and touched her inappropriately. He indicated that it was a long time that he had been asking her to have sexual intercourse with him and he introduced the possibility of doing it against her will by his use of the words "…a hold man fi hold you down and tek it". The complainant said that she did not respond to him because she was nervous and did not know how to respond.

[50] During the course of the journey the appellant told the complainant that he needed to stop at his friend's house and she said "[o]kay". He stopped and left the complainant alone in the vehicle, then returned and drove in the opposite direction from her home. The appellant drove the vehicle into bushes and repeated his request for sex. She told him "no", continued to cry and expressed her wish to go home. He stopped the vehicle and ordered her to get into the back seat, which she did. He then told her to remove her panties but she did not. He tried to remove them unsuccessfully then repeated his demand after which she complied. The complainant's explanation for doing so was that she was afraid and unsure as to what else to do. The appellant then had sexual intercourse with the complainant twice without her consent.

[51] The appellant gave an unsworn statement from the dock in which he asserted his honest belief that the complainant had consented to having sexual intercourse. He stated that they discussed sex prior to him stopping at his friend's home and that they had sexual intercourse after leaving that location. The learned judge, on those facts, gave the honest belief direction.

[52] On the facts of **Loveroy Henry**, the complainant communicated her lack of consent. She told him "no" when he asked her for sex and although she removed her panties voluntarily, she continued to cry. Her communication was, therefore, verbal and non-verbal. Accordingly, we do not accept the submission by Mr Duncan, that the common thread running through both these cases is the non-communication by the complainant to the appellants of her lack of consent and that this was the basis of the court concluding that the honest belief direction was necessary. However, more importantly, we accept his submission that for a specific direction on honest belief to have been required, the circumstances must be such that, on the evidence, such honest belief could have been inferred, or that such honest belief was asserted by the defence, and that both these elements were absent in this case.

[53] There are two cases of this court which were not commended to us for our consideration by counsel, but which we also find to be particularly instructive on the issue

of the honest belief direction. The first is **R v Aggrey Coombs** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 9/1994, judgment delivered 20 March 1995. In that case, the complainant and the applicant were known to each other. The applicant was a part-time taxi operator whose services were used periodically by the complainant and other members of her family. On the day in question, the complainant was at a taxi stand waiting and spoke to the applicant who advised her that he could take her home but had to make a stop to collect something. She entered his taxi for him to take her home but he lured her to the premises where he sexually assaulted her. The applicant admitted having sexual intercourse with the complainant but said it was consensual.

[54] It was argued on appeal that the judge misdirected the jury on the issue of whether the applicant honestly believed that the complainant had consented. Wolfe JA (as he then was) stated at page 4 as follows:

> "This clearly was not an honest belief situation, consequently no direction on honest belief was required. While it is incumbent on a trial judge to leave for the consideration of the jury every defence which properly arises on the evidence, there is no obligation on a trial judge to leave to the jury fanciful defences for which there is no evidential support and a trial judge should not indulge in this kind of patronage.
>
> The question of honest belief in a case of rape only arises where the man misreads or misunderstands the signals emanating from the woman. What the defence of honest belief amounts to is really this: I had sexual intercourse but I did so under the mistaken belief that she was consenting. That plainly was not what the applicant put forward as his defence."

[55] The second case is **R v Clement Jones** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 5/1997, judgment delivered 27 April 1998. In that case, the judge gave directions on honest belief but erred in applying the objective standard as opposed to the subjective standard that was established in the decision of **DPP v Morgan**. The court referred to the statement of Wolfe JA in **R v Aggrey Coombs**,

which is quoted above, and held that on the evidence, directions as to honest belief were totally unnecessary and could be regarded as otiose.

[56] In **R v Clement Jones**, the complainant and the appellant were members of the same church and the appellant was accustomed to taking her to church on Fridays. The complainant's version of the events was that on the day in question, the appellant visited her workplace at approximately 4:00 pm and told her he wanted to speak with her. He invited her to sit in his vehicle and she did so. He told her that he wanted to have an intimate relationship with her and she told him she did not agree to that. The appellant drove off the vehicle with the complainant and told her that he was going to Port Royal to collect something for his boss and would take her to the church on the return journey.

[57] When they arrived at Port Royal, the appellant drove into a swampy, bushy area where he made sexual advances which were rejected. He then slapped and punched the complainant several times and threatened to kill her. He forcibly removed her panties and held a knife at her throat. He demanded that she remove her dress, which she did after which he forced her feet apart and had sexual intercourse with her. Thereafter, he threatened to kill her but the complainant begged him not to so. He then dropped the knife, and proclaimed his love for her. He detained her inside the car until approximately 7:30 pm, when he drove from Port Royal and took her to church. When she arrived at church she was in a distressed condition and she told a "sister" what happen. She was taken to Up Park Camp where the appellant was stationed and she made a report. She was then taken to the Cross Roads Police Station where she made another report. The following day she was examined by a doctor, who in giving medical evidence, opined that the injuries he observed to the inner portion of both her thighs and her private parts were not consistent with consensual sexual intercourse.

[58] The appellant's version was that the complainant and himself had had an intimate relationship over the period of three months and clandestinely had sexual intercourse. On the day in question, it was the complainant who suggested that they drive to Port Royal before going to church. The sexual intercourse on that day was by arrangement

and they had previously had sexual intercourse at the same location on a previous occasion.

[59] As is the situation in many cases of rape, there were two differing accounts before the court. Bingham JA at page 4 of the judgment stated as follows:

> "Given these two diametrically opposite accounts, the matter resolved itself down to a credibility issue as to which of the two accounts, viz., that of the complainant or the appellant was to be believed. From the account of the complainant this amounted to a case of a forceful sexual assault on her at knife point which, if accepted by a reasonable jury, clearly supported the verdict arrived at.
>
> On the basis of her account, the appellant could not have understood her reaction to his advances in any other manner than that she was not consenting to having her person violated…"

[60] Bingham JA, at page 6 of the judgment, further stated that on the facts there was no room for any suggestion that based on the conduct of the complainant, the appellant may have obtained mixed signals or got his signals all wrong (and as a consequence), had engaged in sexual intercourse with the complainant in the mistaken belief that she was consenting when in fact she was not.

[61] Based on **R v Aggrey Coombs** and **R v Clement Jones**, it is clear that, in the appeal before us, there was no specific issue raised as to the honest belief aspect of the mental element in rape. It certainly was not raised on the appellant's unsworn statement from the dock, nor was it raised on the Crown's case. It is beyond debate that if on the Crown's case, there was evidence suggestive of consensual sexual intercourse, sufficient to raise a genuine issue that the appellant could have believed that the complainant was consenting, that would have entitled him to have the benefit of the honest belief direction. In other words, evidence capable of invoking the honest belief direction could have come exclusively from the Crown's case and the complainant's testimony, even if it was not engaged by the appellant's unsworn statement. Of course, had it been raised on his

unsworn statement he would, similarly, have been entitled to an appropriate honest belief direction.

[62] It was not clearly expressed as part of the appellant's case that prior to going to his home, there was an agreement with the complainant to have sexual intercourse with him. In his unsworn statement, he stated as follows:

> "… On the day we met, your Honour, the day we met to go and see the house, I bring her around to there… And we agree, mutual agreement, which we did have sex, your Honour, with her permission."

[63] The fact that the complainant walked voluntarily with the appellant to his home is, therefore, not evidence that is capable of grounding a belief on the part of the appellant that she was consenting to sexual intercourse because the sole purpose of the complainant accompanying him, which he admitted, was to view a room which he had indicated was available, and which he asserted he was able to rent to her.

[64] As it relates to the events that transpired while the complainant and the appellant were inside his room, the appellant did not speak to any facts which caused him to believe the complainant was consenting. He merely asserted that the sex was by mutual agreement. There was no evidence before the court which could have provided a basis for the appellant's belief that the complainant was consenting, which the learned judge could have left to the jury for its consideration. This was because the evidence as to the sequence of events from the complainant was, in all material particulars, evidence from which a jury could conclude that there was a lack of consent.

[65] The fact that the appellant "put argument" to the complainant featured in the evidence and this was also repeated on this appeal. The term "putting argument" when used in the context of male to female interaction simply means to proposition someone, which is an offer for sexual intercourse or to ask someone, (usually, someone with whom you are not in an intimate relationship), if they want to have sex with you.

[66] In cross-examination of the complainant, it was suggested to her that, in Jamaican parlance, the accused was "putting argument" to her, and she agreed. The fact that the appellant sought to entreat or entice her to have sexual intercourse with him is not sufficient to raise honest belief that she was consenting, in circumstances where he had to hide the key to the room, "box her" and push her unto the bed. Similarly, the complainant's evidence in cross-examination that the appellant slapped her on her bottom and said that is how he likes to have sex, was his conduct. There was no evidence that it was at her invitation. It was initiated by him and was ostensibly for his gratification. This was also incapable of supporting a belief on his part that she was consenting.

[67] The evidence of the complainant is that after she was allowed to leave the room by the appellant, he walked behind her until he veered off in the direction of his stall. This was after the act of sexual intercourse and was, therefore, factually and legally incapable of supporting an honest belief by the appellant that she was consenting to sexual intercourse at the time it was occurring.

[68] It is also to be noted that the unsworn statement of the appellant, in this case, was incapable of casting the evidence of the complainant as to the events in the room in a different light, other than the non-consensual sexual intercourse of which she gave evidence. There was, therefore, an absence of any evidence on which the appellant could have held an honest belief that the complainant was consenting, which required a specific direction on honest belief.

[69] This was a case in which the complainant asserted she was raped and detailed the circumstances showing that she did not consent, and the appellant posited that it was consensual. However, there was an absence of any assertion by him in his unsworn statement that he had an honest belief which may have been mistaken, nor did the evidence of the complainant support this possibility.

[70] We are not of the view that by a simple assertion that the sexual intercourse was consensual, an accused is entitled to the honest belief direction. To invoke that specific

direction, there must be, to adopt a term used in other situations, "something more" either on the complainant's testimony and/or on the appellant's unsworn statement from the dock. In this case, there was an absence of sufficient elements to require the learned judge to make that direction.

[71] Therefore, it is our conclusion that the learned judge's summation provided accurate directions on the elements of the offence of rape and she was not required by law to give the honest belief direction, as was urged upon this court by Miss Cummings. Accordingly, this ground is entirely without merit.

Ground Four- The [learned judge] erred in summing up to the jury when on several occasions she mentioned that the appellant[`s] unsworn statement was not evidence and if it had any value.

The submissions

[72] Miss Cummings contended that the learned judge, in several portions of the transcript, told the jury that the unsworn statement from the dock was not sworn evidence and it was not tested under cross-examination and as such the jury was to assess it and give it the weight it saw fit. Counsel further complained that the learned judge should not have told the jury that "cock mouth kill cock" in recounting the appellant's statement to the jury.

[73] Mr Duncan relied on the case of **Alvin Dennison v R** [2014] JMCA Crim 7, which he stated was an authoritative exposition on the law surrounding unsworn statements. He submitted that the learned judge gave appropriate directions to the jury, that the value to be placed on the appellant's statement was exclusively a matter for them. Furthermore, the judge was permitted in law to remind the jury that the statement was not tested by cross-examination and that as a result, it bore less weight than sworn testimony. He said that the learned judge in doing so did not usurp the function of the jury by telling them what value to ascribe to the statement.

Discussion

[74] In **Director of Public Prosecutions v Leary Walker** [1974] 12 JLR 1369 ('**DPP v Walker**'), Lord Salmon, in delivering the judgment of the court, made the following recommendation in relation to unsworn statements from the dock:

> "The jury should always be told that it is exclusively for them to make up their minds whether the unworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's unsworn statement only such weight as they may think it deserves."

[75] In **R v Hart** (1978) 27 WIR 229, Kerr JA, in considering the treatment of the unsworn statement in **R v Coghlan** (1976) 64 Crim App R 11, held that it was unnecessary and often undesirable to categorise an unsworn statement as evidence or non-evidence. However, such categorisation is not fatal. Kerr JA suggested that whereas in **R v Coghlan**, the court accepted that the jury should be told that the unsworn statement had less cogency than sworn evidence, that "Coghlan prescription" although appropriate to that case, should not be followed in the ordinary case.

[76] In **Alvin Dennison v R**, Morrison JA (as he then was) carried out a detailed analysis of the law relating to unsworn statements and reviewed numerous cases including **R v Hart** and **R v Coghlan** and at paragraph [49] offered invaluable guidance in the following terms:

> "[49] In a variety of circumstances, over a span of many years, the guidance provided by the Board in **DPP v Walker**, which also reflected, as **R v Frost & Hale** confirms, the English position up to the time of the abolition of the unsworn statement, has been a constant through all the cases. It continues to provide authoritative guidance to trial judges for the direction of the jury in cases in which the defendant, in preference to remaining silent or giving evidence from the witness box, exercises his right to make an unsworn statement. It is unhelpful and unnecessary for the jury to be

> told that the unsworn statement is not evidence. While the judge is fully entitled to remind the jury that the defendant's unsworn statement has not been tested by cross-examination, the jury must always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value and if so, what weight should be attached to it. Further, in considering whether the case for the prosecution has satisfied them of the defendant's guilt beyond reasonable doubt, and in considering their verdict, they should bear the unsworn statement in mind, again giving it such weight as they think it deserves. While the actual language used to convey the directions to the jury is a matter of choice for the judge, it will always be helpful to keep in mind that, subject to the need to tailor the directions to the facts of the individual case, there is no particular merit in gratuitous inventiveness in what is a well settled area of the law."

[77] Morrison JA acknowledged that **DPP v Walker** affords latitude to trial judges "to explain the inferior quality of an unsworn statement in explicit terms" (see paragraph [50] of **Alvin Dennison v R**).

[78] In **Vince Edwards v R** [2017] JMCA Crim 24, Brooks JA (as he then was) considered the guidance offered by the Privy Council in respect of the issue of the directions on the unsworn statement in the case of **Leslie McLeod v R** [2017] UKPC 1. Brooks JA noted that their Lordships had no reservations about the jury being told that the unsworn statement had less weight than sworn testimony, although he noted that the observations were not made in the context of a complaint that the direction on unsworn statement was wrong. At paragraph [24] he quoted paragraph 16 of the judgment in **Leslie McLeod v R** as follows:

> "...But as against this disputed evidence of [the sole prosecution eye-witness] Reid, the jury had only an unsworn statement. The judge gave the conventional direction. She made it clear that the conflict had to be resolved, and that the burden lay on the Crown, so **that if what the appellant had said in court put the jury in doubt, acquittal must follow. That was correctly to state the test, and to give some value to the unsworn statement for assessment**

against the evidence of Reid. She correctly directed the jury to take good character into account in the appellant's favour in resolving the conflict. **But she also told the jury, equally correctly, that the unsworn statement was of less weight than sworn evidence would have been**. She said this:

> 'Now, Mr Foreman and members of the jury, the prosecution closed its case and at the close of its case the defendant, accused man … had three choices. He could stay there and say nothing at all, he could say, well, the prosecution has brought me here, let them prove me guilty; or, he could go up in the witness box and give evidence on oath and be cross-examined like any other witness or he could stay where he is and give a statement from the dock which is what he did. That is his right in law. So, he gave you a statement from the dock. **But you remember you are going to give it what weight you see fit. It is not evidence that has been tested under cross-examination. So, you can't weigh it in the same scale as the evidence of the witnesses for the prosecution because they all gave evidence on oath**.'

Unless one is to assume that the jury would disregard **this (accurate) judicial direction that the unsworn statement was of less value than a sworn one would have been**, it is simply not possible to conclude that the absence of sworn evidence must inevitably have made no difference. It is no more than speculation, and moreover speculation which ignores the direction." (Emphasis supplied)

[79] The narrow ambit within which the direction, if correctly framed, may be permitted, is illustrated in the case of **Trevor Whyte et al v R** [2017] JMCA 13 where at paragraph [98] the learned trial judge is noted to have said the following in the opening portion of his summation to the jury:

> "And when I speak of evidence, you will remember that each accused when called upon made an unsworn statement. **Now an unsworn statement is not evidence but let me hasten to tell you that none of them had any duty to give evidence or to say anything.** They exercised a right that is afforded them in our jurisprudence and they made an

> unsworn statement. My only comment will be that you Madam Foreman and members of the jury, will think of what they say, and attach to it what weight, what importance you think it has in the case.
>
> Now, it is the prosecution who has brought these four men here, so it is the prosecution that has the burden or the duty to convince you on the evidence that each is guilty as charged." (Emphasis supplied)

[80] The learned trial judge in **Trevor Whyte et al v R**, at paragraph [110], is noted to have given the following direction after reviewing the Crown's case and before reviewing the appellants' defence:

> "I have already said that none of the accused need give any evidence. They could have stood there and say nothing. Each chose to give what is called an unsworn statement. **An unsworn statement is not evidence but you are required to assess it and give it what weight you think it deserve.**" (Emphasis supplied)

[81] In that case, it was argued before this court, on the appellants' behalf, that the learned trial judge erred in law when he began his summation by directing the jury in the manner in which he did, and subsequently, when he directed them in terms that each appellant had made an unsworn statement and that it was not evidence. It was also argued that the placement of those directions in the judge's summation, amounted to a direction to the jury that the appellants' unsworn statements ought not to be given any significant weight in their consideration.

[82] The court in determining this issue referred to the observations of Morrison JA at paragraph [49] of **Alvin Dennison v R**, to which reference has previously been made, and at paragraph [103] arrived at the following conclusion:

> "[103] The extracts from the summing up demonstrate that the learned trial judge made it sufficiently clear that it was a matter for the jury to determine what weight to give to the unsworn statements. He also went further to invite the jury to acquit the appellants if they were convinced by them that they were not on the premises of Mr Linval Thompson that

> morning. He also kept reminding them that it was for the prosecution to satisfy them so they felt sure as to the guilt of each accused. In the totality of the directions given, it is not fair to say that the learned trial judge substituted his own view of the weight to be given to the appellants' unsworn statements. Further, he did not usurp their role as being the arbiters of facts and their need to be satisfied on the evidence from the prosecution before they could return a verdict adverse to the appellants. In the result, the learned trial judge's treatment of the unsworn statement of each applicant was adequate and has not resulted in any miscarriage of justice."

[83] It is clear from a reading of the case that what is important in determining the impact of a trial judge's direction on the effect of the unsworn statement is whether, on the totality of the summation, the learned trial judge usurped the function of the jury or was unfair to the defendant. In **Vince Edwards v R** Brooks JA, in an attempt to reconcile the cases, put it this way at paragraphs [25] – [27] as follows:

> "[25] In attempting to reconcile their Lordships view against the views expressed in the various decisions of this court, it would seem appropriate to say that the correctness of a trial judge's direction on the value of an unsworn statement will be a matter of degree. It would be wrong to say to a jury that the unsworn statement was just 'some words', implying that it had no value, but that there is no error in directing, without any further detraction, that it was not sworn evidence, that it had less weight than sworn testimony, but that the jury should give it such weight as it thought fit.
>
> [26] Nonetheless, compliance with the guidance in **Alvin Dennison v R** would not contradict their Lordships' direction. The direction in **Alvin Dennison v R**, including the recommendation that the jury should not be told that the unsworn statement is not evidence, is, once again, strongly urged.
>
> [27] The issue to be decided at this stage, is whether the learned trial judge's directions in the instant case, on the issue of the unsworn statement, taken as a whole, had the effect of withdrawing 'from the jury a full and fair consideration of

> the issues raised in the defence' (as said by Kerr JA in **R v Alfred Hart** (1978) 16 JLR 165 at page 169H)."

[84] In the instant case, at page 95, line 20 and page 96, line 8 of the transcript of her summation, the learned judge directed the jury in the following terms:

> "… So, it is exclusively for you, Madam Foreman, members of the jury, to make up your minds whether the unsworn statement has any value. And if so, what weight should be attached to it. It is for you to decide whether the evidence for the prosecution has satisfied you of the accused man's guilt beyond all reasonable doubt. And so, in considering your verdict, you should give the accused man's unsworn statement only such weight as you think it is [sic] deserves. You should note that a statement not sworn to and not tested by cross-examination has less cogency and weight than sworn evidence."

[85] A statement in similar terms was also made by the learned judge at page 103 line 24 to 104 line 9 as follows:

> "… I indicated to you that he had three options and he is free to choose whichever option and having chosen the option to stay where he is, you must assess his statement and give it whatever weight you think it deserves. And bear in mind, as I said before, that it was not tested under cross-examination and it therefore has less cogency and weight than sworn evidence. You bear all of that in mind."

[86] The learned judge clearly told the jury that the unsworn statement had less cogency and weight than sworn testimony. However, there is nothing objectionable about a judge directing a jury on the inferior quality of an unsworn statement, and accordingly, there is nothing objectionable about this specific direction of the learned judge (see **Vince Edwards v R**). The learned judge properly directed the jury that they were to assess the unsworn statement and decide what weight should be attached to it. Accordingly, we are of the view that on the totality of the learned judge's summation, the directions on this issue were fair and did not usurp the function of the jury. We conclude that there is no merit in this ground of appeal.

The Judge's use of the Jamaican proverb "cock mouth kill cock"

[87] The proverb, "cock mouth kill cock", is generally understood to mean that the speaker has uttered words that may not be in his favour or which may tend to incriminate him. In this case, the context is important and is derived from the entirety of what the learned judge said, which was:

> "You remember the comment made by learned counsel for the Prosecution that he indicated to her that he had several rooms unoccupied, this came from his mouth. And yet, when he took her to the premises, first of all, everywhere was locked. When he took her around to the back, and he produced the key and opened the door, there was no room that was not occupied. So you must look at that. Is this a situation where cock mouth kill cock? Because it came straight out of his mouth. It is a matter for you, Madam Foreman, and members of the jury, how you wish to access that bit of evidence in the context of all that has been said."

[88] The evidence of the complainant during cross-examination was that when she went to the appellant's home everywhere was closed except for the portion occupied by the appellant. Thus, the evidence that there was no unoccupied room originated with the complainant. It was also her evidence that the appellant stated that he would remove his items from the room. In his statement from the dock, the appellant admitted that he had told the complainant when he met her that the house in which he was living had several rooms that were not occupied, so he could show her the house and she might find one of the rooms to be comfortable. Accordingly, it was appropriate to remind the jury of what he said and juxtapose that against the complainant's evidence that he took her to a room occupied by him.

[89] The use of the proverb may not have been perfectly apt to illustrate the possible inconsistency between the appellant's words and his conduct. However, we are of the view that the appellant would not have suffered any prejudice as a result of this statement. This is so because it was posed as a rhetorical question and importantly, the

jury was reminded immediately thereafter that it was a matter for their consideration. There was also no merit to this ground.

Ground Five- The [a]ppellant Attorney-at-Law failed to explain to him the consequence of giving an unsworn statement from the dock as opposed to sworn evidence in the witness box and chose the method for him.

The submissions

[90] The essence of the appellant's complaint is that the failure of his attorney-at-law to properly advise him of the distinction between an unsworn statement from the dock and evidence from the witness box deprived him of the opportunity to have chosen to give sworn evidence, and that would have been his choice. He was of the opinion that that would have evened the scales in weighing the complainant's evidence and his in circumstances where it would have been her evidence against his.

[91] Mr Duncan posited that at the time of the parties making their respective submissions it was unknown whether learned Queen's Counsel who represented the appellant accepted or contradicted the account given by the appellant, and that this would have been relevant in determining this ground of appeal. However, he submitted that, in any event, the offering of strategic advice about giving an unsworn statement did not entail, *prima facie* at least, dereliction of professional duty.

Discussion

[92] The transcript of the notes of evidence discloses on page 126 that, on 14 June 2019, there was the following exchange between Mr Tavares-Finson and the learned judge:

> "MR. T. TAVARES- FINSON, QC: My Lady, just to indicate on 26 of April, when this matter was before you, Mr. McDonald had indicated that he was not aware of the fact that he could have given sworn evidence. I just wish to place on record Mr. McDonald misspoke because he was advised and prepared, signed the relevant authority and handed it to my chambers. M'Lady, I wish to put that I don't think your Ladyship has seen the document.

> HER LADYSHIP: I don't need to see the document, counsel.
>
> MR. T. TAVARES- FINSON, QC: Very well.
>
> HER LADYSHIP: When it was said to me I dealt with it accordingly and placing it on record. It is to your benefit than to my (sic).
>
> MR. T. TAVARES- FINSON, QC: Thank you."

[93] Unfortunately, the transcript of proceedings provided to the court does not indicate what transpired on 26 April 2019, the date on which it is said that the appellant first informed the court below in his trial that he was not advised that he could have given sworn evidence at his trial.

[94] Miss Cummings accepted that the appellant did not challenge the assertion that he was advised of his right to give an unsworn statement but instead his position was that he was not advised of the distinction between the effect of giving sworn evidence and giving an unsworn statement, and as such he was deprived of the opportunity to make an informed decision, which operated to his prejudice.

[95] In **Gerald Muirhead v The Queen** [2008] UKPC 40 ('**Muirhead**'), the Board referred to the position adopted in **Bethel v The State** (1998) 55 WIR 394 and relied on the following quote, which is reflected at paragraph 30:

> "They are very conscious of the ease with which it is possible for condemned prisoners, as a last resort, to invent allegations of refusal to accept instructions or incompetence on the part of counsel who defended them or conducted their appeals. It is also, for practical reasons, not possible for their Lordships to investigate such allegations and the only course open to them is either to dismiss the petition or to refer the matter back to the Court of Appeal for investigation. Their Lordships wish to make it clear that the fact that such allegations are made and persisted in, despite denial by the counsel involved, does not amount to a reason for referring the matter to the Court of Appeal. Ordinarily, their Lordships would not be inclined even to entertain such allegations when they are raised for the first time before the Board and, in those cases

> in which they think it appropriate that counsel should be asked to respond to the allegations, they will accept his explanation."

[96] In **Muirhead** the Board emphasised the value of counsel's response to the allegations and made the following observations:

> "[37] One has to approach with a degree of caution statements of this kind made some time after a trial. The maker may suffer from some infirmity of recollection, as the appellant himself acknowledged in paragraph 15 of his affidavit. Such statements, which are obviously self-serving, are easy to make and not always easy to rebut, and we are very conscious from recent experience of a number of appeals in which similar points have been raised of the validity of the remarks made by the Board in *Bethel v The State (1998) 55 WIR 394,* 398 quoted in para 30 of the main judgment. We fully share the misgivings expressed in that paragraph. It is undeniable, however, that the appellant's counsel did not follow the practice prescribed by the Board in ***Bethel*** of obtaining and recording the client's instructions on the decision made about his giving evidence. In the absence of any such record or of any assistance by way of information from those who represented him at trial and on appeal, it is difficult for the Board to assume now that the decision was given sufficient consideration and that the appellant accepted the advice given to him with proper understanding of the reasons behind it. There may well have been good and sufficient reasons for Mr Frater to give that advice, and one does not lightly suppose that experienced counsel gave it without adequate foundation. But in the light of the uncontradicted evidence from the appellant the Board is not in a position to do more than speculate about that. It is also averred by the appellant, again without contradiction, that he received no advice from his counsel about what he should say in his statement from the dock."

[97] Counsel for the appellant advised the court that she had, as a matter of courtesy, advised Mr Tavares-Finson of the allegations being made by the appellant and had alerted him to the possibility of the Crown contacting him to obtain his response. Mr Duncan explained that to the best of his knowledge, it was not the practice of the Crown to obtain such a response and, accordingly, he had made no effort to do so.

[98] Having due regard to the guidance of the Privy Council in **Muirhead**, we formed the view that it would be helpful if we had the benefit of the document to which learned Queen's Counsel referred, in his exchange with the learned judge, in responding to the allegations of the appellant. Consequently, we suggested that Miss Cummings explore the possibility of obtaining a sworn affidavit from Mr Tavares-Finson to explain his position.

[99] Mr Tavares-Finson, by way of an affidavit sworn 18 February 2022 and filed in this court, confirmed that prior to the commencement of the trial, he explained to the appellant his options with regard to him giving evidence on oath or not. He deposed that the appellant was given a document entitled "Instructions to defence attorney" and asked to read the document, which he did. He was also asked if he understood it line by line. He then selected his choice from the available options and signed the document, with his signature being witnessed by Mr Tavares-Finson's secretary, who is a Justice of the Peace.

[100] The instructions were exhibited to the affidavit. It sets out, in plain and simple language, the options available to the appellant and it expressly stated that if the appellant chose option (b) to give an unsworn statement from the dock, he would not be guided in examination= in- chief by questions and would not be cross-examined, but the judge may tell the jury that what is said is not as strong as if evidence had been given by him. Above the signature, paragraph 8 of the document clearly states "[m]y Attorney has fully explained to me the above-mentioned and I fully understand".

[101] Having regard to the information provided by Mr Tavares-Finson, the veracity of which we accept, we conclude that the appellant's complaint in respect of the advice he was given is unfounded. It is clear, therefore, that Miss Cummings' submissions on this ground of appeal is without merit.

[102] By way of commentary, we are impelled to highlight the practice adopted by Mr Tavares-Finson in this case, of obtaining signed instructions from the appellant, particularly as it relates to the options available to the appellant at the close of the case

for the prosecution and the appellant's right to choose. Mr Tavares-Finson has averred that this is his usual practice, born of his wealth of experience, and serves to avoid or refute such baseless allegations as were made in this case. As a matter of prudence, we commend it to all practitioners at the criminal bar.

Ground Six-The sentence of life imprisonment with a stipulation that [the appellant] must serve 18 years before being eligible for parole for rape is manifestly excessive having regard to all the circumstances of this case.

Ground Seven- The sentence of 12 years for forcible abduction is manifestly excessive having regard to all the circumstances of this case.

The submissions

[103] Grounds 6 and 7 are self-explanatory and can conveniently be addressed together, since the crux of the appellant's submission is that the sentences are manifestly excessive. There is, of course, the need to determine each sentence separately, although they were committed during the same incident.

[104] Crown Counsel graciously conceded that whereas the learned judge demonstrated, in her sentencing remarks, an appreciation of the relevant sentencing principles, she did not demonstrate the proper application of such principles. As a consequence, it fell to this court to review the sentences.

Discussion

[105] As it relates to the offence of forcible abduction, based on the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), the learned judge identified the normal range of sentences as three years to 15 years' imprisonment with five years being the usual starting point.

[106] As it relates to the offence of rape, the learned judge identified the normal range as being between 15 to 25 years' imprisonment at hard labour, with the usual starting point being at 15 years' imprisonment.

[107] The learned judge took into consideration the following factors:

> (1) the fact that in the social enquiry report, the appellant was still contesting the complainant's evidence, and she concluded that this was an indication that he had shown no remorse for his actions;
>
> (2) the appellant was very aggressive and abusive to the complainant; and
>
> (3) the appellant's previous convictions and the fact that they were suspended sentences that expired shortly before the commission of these offences.

[108] The learned judge stated that, in her view, all of these factors "would further increase the lowest penalty to a higher one". The learned judge also stated that she had taken into consideration the evidence of the character witnesses on the appellant's behalf as well as the social enquiry report, and would balance it with his record in the antecedent report and the previously indicated aggravating factors.

[109] Having conducted this exercise, the learned judge concluded as follows:

> "Therefore, the most suitable sentence in the circumstances for count 1 for forcible abduction would be 12 years [sic] imprisonment at hard labour and for count 2, life imprisonment to serve 18 years before parole. The sentences are to run concurrently."

[110] In **Meisha Clement v R** [2016] JMCA Crim 26, at paragraph [43], Morrison P, in delivering the judgment of the court, detailed the task to be undertaken by the court in imposing a sentence in the following manner:

> "[43] On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like

> offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[111] These principles have been affirmed and adopted in a number of cases by this court, and in **Daniel Roulston v R** [2018] JMCA Crim 20, McDonald-Bishop JA, at paragraph [17], indicated that the following approach and methodology is to be employed:

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

[112] The learned judge, in this case, identified the sentencing range for the offences of both forcible abduction and rape, then she went on to determine the usual starting point in accordance with the Sentencing Guidelines. However, it was not sufficiently and transparently demonstrated how she arrived at the final figures of 12 years' imprisonment for forcible abduction and life imprisonment with the possibility of parole after 18 years for the offence of rape.

[113] It was submitted by Miss Cummings and conceded by the Crown that, whereas all rapes are egregious violations of a woman's body, for purposes of sentencing, the court is required to consider each rape on its particular facts. Further, she contended that the rape, which is the subject of this appeal, could not be reasonably considered "the worst of the worst", for which the maximum sentence of life imprisonment should be imposed.

[114] In the case of **Lincoln McKoy v R** [2019] JMCA Crim 35, the learned trial judge did not employ the sentencing methodology suggested in cases such as **Meisha Clement v R** and **Daniel Roulston v R** and, accordingly, it was not sufficiently demonstrated how he had arrived at the sentence imposed. On that basis, this court held the learned trial judge erred in principle in sentencing the appellant and concluded that it fell on the court to determine the appropriate sentence that ought to have been imposed, after applying the relevant principles.

[115] We have decided that the sentence passed by the learned judge warrants the intervention of the court, pursuant to section 14(3) of the Judicature (Appellate Jurisdiction) Act, which provides that:

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

[116] In analysing this issue, due consideration was given to the authority of **R v Ball** (1951) 35 Cr App Rep 164, at page 165 and the principles espoused therein, which have been repeatedly referred to by this court, that:

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

[117] Regarding the offence of forcible abduction, we will utilise the sentencing range of three to 15 years' imprisonment, with five years being the usual starting point as suggested by the Sentencing Guidelines. We find that the starting point of five years

would be appropriate having regard to the absence of any unusual features and the level of force used in the commission of the offence. The major aggravating feature is that of the appellant's previous convictions, two of which were for offences involving violence and one for a sexual offence, namely indecent assault. In passing, we have noted that even though the appellant has maintained his innocence after his conviction, this is not to be considered an aggravating factor as the learned judge had erroneously stated. Contrition and remorse on the other hand, if shown, can be considered as a mitigating factor.

[118] We are of the view that the mitigating factors, being the positive social enquiry report and the appellant's character witnesses, would be outweighed by the aggravating factors, particularly the previous convictions. Balancing the aggravating and mitigating factors, we have concluded that a sentence of eight years' imprisonment at hard labour is an appropriate sentence for the offence of forcible abduction in this case.

[119] The appellant has spent four days short of three months on remand awaiting his trial (rounded up to three months for ease of calculation), and this period will be deducted resulting in a sentence of seven years and nine months.

[120] As it relates to the offence of rape, we consider the sentencing range of 15 to 25 years' imprisonment and utilise the usual starting point of 15 years suggested in the Sentencing Guidelines, they being appropriate on the facts of this case.

[121] There are two aggravating features of the offence of rape. The first is the deception utilised by the appellant in luring the complainant to his home. It is clear on his unsworn statement that on the day he led the complainant to his home he did not have any authority to rent a room at the premises. Neither had he obtained confirmation from the person in control of the premises, his brother-in-law, that there was a room available for rent and/or that his brother-in-law was desirous of having a room rented.

[122] The second aggravating factor for the offence of rape is the appellant's previous convictions, and as already noted, two of which were for offences involving violence. Of

particular significance is the fact that one of the previous convictions was for a sexual offence, namely indecent assault.

[123] Having balanced the aggravating and the mitigating factors, we conclude that the appropriate sentence is a term of 20 years' imprisonment at hard labour, from which the three months spent in custody on pre-trial remand will be deducted.

[124] Whereas we have used the methodology proposed in **Meisha Clement v R** as modified by **Daniel Roulston v R** in arriving at the sentence for rape, the court is required by section 6(2) of the Act to specify a period of not less than 10 years, which that person shall serve before becoming eligible for parole. Section 6(2) of the Sexual Offences Act is declared to be in substitution for the provisions of section 6(1) to (4) of the Parole Act.

[125] The court has already conducted the balancing of the mitigating and aggravating factors in determining the sentence. In determining the pre-parole period as it is commonly called, the emphasis of the court is on attempting to arrive at consistency with other similar cases while taking into account the circumstances of the particular offender.

[126] In the very recent case of **Levi Levy v R** [2022] JMCA Crim 13, the appellant and the complainant met virtually on social media and after several conversations, agreed to meet in person. The appellant took the complainant to Bachelors Guest House in Cross Roads, Saint Andrew, which he said was a "chill place where you can drink like a bar". The complainant did not see a bar there and the appellant took her to a room near the lobby where, despite her protest, he raped then slapped her several times in her face and forced her to perform oral sex. This court affirmed a sentence of 18 years' imprisonment at hard labour for the offence of rape with the specification that the appellant serves a period of 12 years before being eligible for parole.

[127] In the instant case, it is our view that a stipulation that the appellant serves 15 years before being eligible for parole is justified.

[128] Accordingly, the orders are:

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

2. The appeal against sentence is allowed.

3. The sentence on count 1 of 12 years' imprisonment at hard labour for forcible abduction, is set aside, and substituted therefor is a sentence of seven years and nine months' imprisonment at hard labour (with three months on pre-trial remand having been credited).

4. The sentence on count 2 of life imprisonment for rape, with the stipulation that the appellant serves a period of 18 years before becoming eligible for parole is set aside and substituted therefor, is a sentence of 19 years and nine months (three months on pre-trial remand having been credited), with the stipulation that he serves 15 years' imprisonment at hard labour before becoming eligible for parole.

5. The sentences are to be reckoned as having commenced on 21 June 2019 and are to run concurrently.