CAYMAN ISLANDS
CRIMINAL FORM 18
RULE 50(1) & 51(1)

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 3 of 2008
(Indictment No. 23/07)
(Summary Court No: 1605/07)

Between:

HER MAJESTY THE QUEEN

Respondent

- and –

CRAIG DILBERT

Appellant

LEGAL DEPARTMENT
JAN 26 2010
CAYMAN ISLANDS GOVERNMENT

NOTIFICATION TO AUTHORITIES OF RESULT OF APPEAL

To: The Attorney General

This is to give you notice that **CRAIG DILBERT** having sought leave to appeal against *his* SENTENCE passed upon *him* by the Grand Court on the 23rd day of January, 2008 as set out below:

Indictment # 23/07

RAPE – Count 1
15 years imprisonment.

BURGLARY – Count 2
8 years imprisonment, concurrent on Count 1.

THREATENING VIOLENCE – Count 3
6 months imprisonment, concurrent to Count 1.

The Court of Appeal has finally determined the said appeals, and has this **8th day of December, 2009** given judgment therein to the effect following:

1. **Leave to appeal sentence refused.**
2. **Sentence affirmed.**
3. **Written judgment released.**

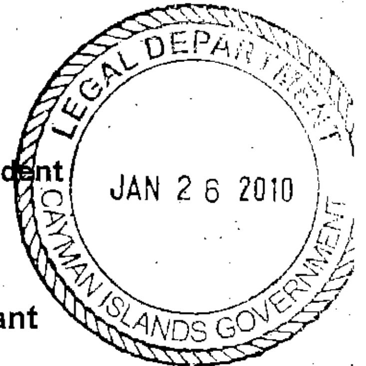
Dated this 29th day of December, 2009.

Registrar

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 3 of 2008
(Indictment No. 23/07)
(Summary Court No: 1605/07)

Between:



HER MAJESTY THE QUEEN — **Respondent**

- and -

CRAIG DILBERT — **Appellant**

Criminal Appeal No. 17 of 2009
(Indictment No. 17/09)
(Summary Court No: 00650/09)

Between:

HER MAJESTY THE QUEEN — **Respondent**

- and -

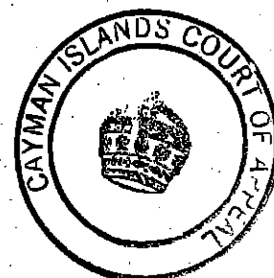
CHRISTOPHER OMAR SAMUELS — **Appellant**

BEFORE: THE RT. HON. SIR JOHN CHADWICK, P.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE MOTTLEY, J.A.

Appearances: Mr. Lee Freeman of Priestleys for the appellant, Craig Dilbert, Mr. Nicholas Dixey of Mourant for the appellant, Christopher Omar Samuels and Mrs. Kirsty-Ann Gunn.

Heard: 23rd November, 2009 Judgment given: 8th December, 2009

JUDGMENT



Sir John Chadwick, President:

1. This is a judgment to which each member of the Court has contributed.

2. The appellant Craig Damian Dilbert was convicted on 22 January 2008, after a trial before Justice Levers and a jury, on a charge of rape. On the following day he was sentenced to a term of 15 years imprisonment in respect of that offence: the term to run concurrently with sentences of eight years imprisonment for burglary and six months imprisonment for threatening violence in respect of offences committed on the same occasion.

3. The appellant Christopher Omar Samuels pleaded guilty to a charge of rape on 8 May 2009. On 26 June 2009 he was sentenced by Justice Henderson to a term of imprisonment for twelve years. In the course of his sentencing remarks the judge indicated that, but for the plea of guilty, he would have concluded that the appropriate sentence would have been 15 years imprisonment.

4. Each of these appellants appeals to this Court against the sentence passed upon him. The appeals raise a common question of some importance: when sentencing in accordance with the tariff in respect of rape which is set out in the Statement of Tariffs and Guidelines issued by the Chief Justice on 16 January 2002, what effect (if any) should be given by a court in the Cayman Islands to observations in the Court of Appeal of England and Wales in *R v Millberry* [2002] EWCA Crim 2891, [2003] 1 WLR 546. The appeals have been heard together.

The Statement of Tariffs and Guidelines

5. The 2002 Statement of Tariffs and Guidelines was issued following expressions of concern arising from the perception that earlier guidelines, issued by former Chief Justice Harre in May 1998, were not being strictly followed or applied. In the introductory paragraphs of the 2002 Statement it is explained that "the judges of the Court of Appeal, the Grand Court and the Magistrates have recently met to consider and to once again agree together what the tariffs and guidelines for sentencing for those categories of

offences should be". The principles which they reaffirmed in the 2002 Statement related to "offences in respect of which an immediate term of imprisonment will be the norm and where the accused has unsuccessfully pleaded not guilty". A guilty plea, especially an early one, would usually result in a discount. The following passage is of particular importance in the present context:

> "By way of introduction we note that the tariffs and guidelines now to be announced will largely be in affirmation of those announced in 1998 and it should always be remembered that a tariff means a sentence to be applied in a typical case. Mitigating factors will reduce it and aggravating factors will increase it."

6. The tariff for rape was announced in these terms:

> "As regards **SEXUAL OFFENCES**
>
> *For RAPE, which has become alarmingly prevalent, an offender can expect a tariff of between 10 and 12 years imprisonment."

A tariff of between ten and twelve years imprisonment represented a modest increase over the tariff of ten years imprisonment which had been announced in 1998. That increase may be seen as a response to the view that, between 1998 and 2002, rape had become increasingly (and alarmingly) prevalent in the Cayman Islands.

7. In a later passage, in a section of the 2002 Statement headed "PRINCIPLES OF SENTENCING", it is explained that "The object of setting and announcing tariffs for sentencing is not to set measures which are cast in stone but to advise everyone on what the guidelines and likely consequences will be".

The principles to be deduced from R v Millberry

8. In *R v Millberry* (which was heard with two other appeals, *R v Morgan* and *R v Lackenby*) the Court of Appeal of England and Wales took the opportunity to review guidelines set out in its earlier decisions in *R v Roberts (Hugh)* [1982] 1 WLR 133, 134-135 and *R v Billam* [1986] 1 WLR 349, 351 in the light of advice received from the Sentencing Advisory Panel following legislative changes since 1986. Those legislative changes are summarised at paragraph [6] of the judgment ([2003] 1 WLR, 546, 548): they are not material in the present context.

9. At the beginning of its judgment in *R v Millberry* the Court set out and endorsed the observations of Lord Lane CJ in R v Roberts 9[1982] 1 WLR 133, 134-135):

> "Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence. . . . A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasis public disapproval. Thirdly to serve as a warning to others. Fourthly to punish the offender, and last but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but those in cases of rape vary widely from case to case."

It is pertinent to keep in mind that, in England and Wales as in this jurisdiction, the maximum sentence for rape is imprisonment for life.

10. The Court then referred to the "more extensive guidelines" set out by Lord Lane CJ in *R v Billam*; which, as it said, had "since consistently been applied by the courts up to the present time". As the Court pointed out, those guidelines were based on four separate starting points for sentencing of rape "which reflect their different levels of seriousness". Lord Lane CJ had said this ([1986] 1 WLR 349, 351D-F):

> "For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years.
>
> At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime upon a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may be appropriate. Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate."

11. The Sentencing Advisory Panel had proposed, first, that a custodial sentence of five years (after a contested trial) should continue to be appropriate for a single offence of rape on an adult victim by a single offender manifesting none of the features (which it went on to identify) which should attract a higher starting point. The Panel recommended a starting point of eight years where any of the following features were present:

"(i) the rape is committed by two or more offenders acting together; (ii) the offender is in a position of responsibility towards the victim (e.g. in the relationship of medical practitioner and patient, teacher and pupil); or the offender is a person in whom the victim has placed his or her trust by virtue of his office or employment (e.g. a clergyman, an emergency services patrolman, a taxi driver, or a police officer); (iii) the offender abducts the victim and holds him or her captive; (iv) rape of a child, or a victim who is especially vulnerable because of physical frailty, mental impairment or disorder, or learning disability; (v) racially aggravated rape, and other cases where the victim has been targeted because of his or her membership of a vulnerable minority (e.g. homophobic rape); (vi) repeated rape in the course of one attack (including cases where the same victim has been both vaginally and anally raped); (vii) rape by a man who is knowingly suffering from a life-threatening sexually transmissible disease, whether or not he has told the victim of his condition and whether or not the disease was actually transmitted."

As the Court observed, in *R v Millberry* (*ibid*, 552*H*, [20]), the first three of those features had been identified in *R v Billam* as attracting the eight-year starting point. The Court did not comment on the absence from the Panel's list of features of the other factor identified in *R v Billam* – rape committed by a man who has broken into or otherwise gained access to a place where the victim is living. It pointed out (*ibid*, 553*C-D*, [21]) that the Panel had emphasised that the presence of any of the features which it had identified (described by the Court as "aggravating factors") would attract the eight year starting point. The eight-year starting point had been recommended "either because of the *impact of the offence upon the victim* or *the level of the offender's culpability*".

12. The Sentencing Advisory Panel confirmed that a sentence of fifteen years imprisonment and upwards should continue to be the appropriate starting point for a campaign of rape. That recommendation covered not only cases in which the offender had raped a number of different victims (as envisaged in *R v Billam*) but also in cases of repeated rape of the same victim over a course of time. A life sentence might be "not inappropriate" where the offender had "manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, at large, to remain a danger to women for an indefinite time".

13. The Court in *R v Millberry* accepted the advice of the Sentencing Advisory Panel as to starting points (*ibid*, 554*B*, [26]). The Court expressed the view that that involved "no substantial departure from the general approach laid down in *R v Billam*". It may be said that that leaves open the question whether, in England and Wales, the appropriate starting point is eight years (as had been indicated in *R v Billam*) in a case in which the rape is committed by a man who has broken into or otherwise gained access to a place where the victim is living but where none of the features identified by the Panel is present. That is not a question which we need to decide.

14. In *R v Billam*, Lord Lane CJ had identified eight aggravating factors, the presence of any one or more of which would (as he said, *ibid*, 351G-H) lead to the result that the sentence should be substantially higher than the figure which, earlier in his judgment, he had suggested as the appropriate starting point. Those factors were:

> "(1) violence is used over and above the force necessary to commit the rape; (2) a weapon is used to frighten or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned; (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind; (6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect upon the victim, whether physical or mental, is of special seriousness."

15. The Sentencing Advisory Panel had identified nine aggravating factors, in addition to those features which would attract the eight year starting point:.

> "(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; (vi) the offender has broken into or otherwise gained access to the place where the victim is living; (vii) the presence of children when the offence is committed; (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"

The Court pointed out, in *R v Millberry*, that the factor numbered (v) in that list had appeared in the *R v Billam* list as "further sexual indignities or perversions", that the factor numbered (vi) had been treated in *R v Billam* as, of itself, attracting the 8 year

starting point, and that the age of the victim (factor (7) in the *R v Billam* list) had been treated by the Panel as a feature to be taken into account in determining that there should be a higher starting point of eight years. With those matters in mind, the Court agreed that the nine factors identified by the Panel in the list just set out were, indeed, aggravating factors.

16. At paragraphs [27] to [29] of its judgment in *R v Millberry* the Court addressed mitigating factors and guilty pleas. It said this:

> "27 The court is required . . . in determining what sentence to pass on an offender to have regard to whether the offender has pleaded guilty and if so at what stage in the proceedings this happened. Although many participants in the Panel's research project found the idea of substantial mitigation for a guilty plea unacceptable, this may be because as the Panel point out, it was seen 'as being primarily about saving court time and costs and allowing the defendant to manipulate the system in his favour'. This is not, however, the reason why the courts are prepared to and should reduce sentences in a case in which the offender pleads guilty. The first reason why courts adopt this approach is because it is well known that victims of rape can find it an extremely distressing experience to give evidence in open court about what has happened to them, even where their identity is protected.
>
> 28. Having to give evidence and especially being cross-examined can make a victim relive the offence. We have seen many victim impact statements that make this clear. Obviously the distress which is avoided is greater the earlier the victim is informed so the discount should be reduced if there is not an early plea. There is also the fact that the plea demonstrates that the offender appreciates how wrong his conduct was and regrets it. While it is desirable to avoid taking up the time of the court and incurring expense unnecessarily, this is a less important in mitigation than the other two factors we have just mentioned. . . . With the Panel, we stress that the maximum credit should only be given for a timely guilty plea. (see paragraphs 41 and 42)
>
> <u>The Defendant's Good Character</u>
>
> 29. While the fact that an offender has previous convictions for sexual or violent offences can be a significant aggravating factor, the defendant's good character, although it should not be ignored, does not justify a substantial reduction of what would otherwise be the appropriate sentence. Here again we are endorsing the approach of the Panel."

17. In our view the principles to be deduced from the observations of the Court of Appeal of England and Wales in *R v Millberry* (so far as material in the present context) may be stated as follows:

(1) The appropriate starting point, in England and Wales, for a single offence of rape on an adult victim by a single offender in a case where none of the seven factors identified by the Sentencing Advisory Panel, referred to at paragraph [20] of the judgment in *R v Millberry* and set out at paragraph 11 of this judgment are present, is five years.

(2) The appropriate starting point, in England and Wales, for an offence of rape (not being committed in the course of a campaign involving repeated rape of the same victim or rape of multiple victims) in a case where any one of those seven factors is present is eight years.

(3) It is, perhaps, an open question whether, in a case where none of those seven factors are present but the offender has broken into or otherwise gained access to the place where the victim is living, the appropriate starting point is five years or eight years. But, if (in such a case) the appropriate starting point is five years, that feature is an aggravating factor which may lead to the conclusion that the sentence should be as much as eight years.

(4) The appropriate starting point, in England and Wales, where the rape has been committed in the course of a campaign of rape, is fifteen years.

(5) In each of those cases the appropriate sentence to pass may be increased above the relevant starting point by the presence of any one or more of the nine further factors identified by the Panel, referred to at paragraph [32] of the judgment in *R v Millberry*, and set out at paragraph 15 of this judgment. Where the offender has broken into or otherwise gained access to the place where the victim is living, care must be taken to avoid double counting (see sub-paragraph (3) above).

(6) In each of those cases the appropriate sentence to pass may be reduced below the relevant starting point by the presence of mitigating factors. An early plea of guilty, which avoids the need for the victim to give evidence in open court, is a significant mitigating factor.

(7) There will be cases in which a life sentence is appropriate.

18. We were taken extracts of the further advice given by the Sentencing Guidelines Council following the enactment of the Sexual Offences Act 2003. We find no reference in Part 2 of that document to cases where the offender has broken into or otherwise gained access to the place where the victim is living, and we note that that factor does not appear in the Tables in Part 2A. We were not invited to draw any conclusions from that apparent omission; and we do not do so.

The application of the Millberry principles to cases in this jurisdiction

19. We have no doubt that the appropriate starting points of five and eight years - identified in *R v Billam*, recommended by the Sentencing Advisory Panel in 2002 and endorsed in *R v Millberry* – have no direct application in the Cayman Islands. We think it important to keep in mind that the 1998 Guidelines post-dated *R v Billam* and that the 2002 Statement post-dated *R v Millberry*. We find it impossible to avoid the conclusion that the tariff for rape, both in the 1998 Guidelines and the 2002 Statement, was set, deliberately, at a higher level than that which, at the time, was thought appropriate in England and Wales. We find that a matter of no surprise: those responsible for the 1998 Guidelines and the 2002 Statement may be taken to have had proper regard for what circumstances local to these Islands required.

20. Nor have we any doubt that the tariff for rape, set by the 2002 Statement is intended to indicate an appropriate sentence in a case where there no special features. That is the meaning to be given to the direction, in the introductory paragraphs of the 2002 Statement, that:

> ". . . a tariff means a sentence to be applied in a typical case. Mitigating factors will reduce it and aggravating factors will increase it."

The spread indicated by the tariff (between ten and twelve years) recognises that, within the category of "typical case" with no special features, cases will differ: some offences will call for a higher sentence than others. We reject, as obviously untenable, the proposition that the spread of ten to twelve years is intended to confine sentences for rape (whatever the mitigating or aggravating factors) to a term of between ten and twelve

years. In fairness to counsel for the appellants, we should add that we did not understand that proposition to be advanced.

21. The presence of aggravating factors can be expected to take the appropriate sentence not merely to the upper end of the ten to twelve year bracket, but above that bracket. So, also, the presence of mitigating factors may take the appropriate sentence below the lower end of that bracket. This is likely to be the result in a "typical case" where there has been an early guilty plea: as the 2002 Statement itself recognises.

22. Notwithstanding that the starting points of five and eight years adopted in *R v Millberry* have no direct application in the Cayman Islands, there is, nevertheless, assistance to be gained from the principles which we derive from that case. First, we think that the two lists of aggravating factors - in paragraphs [20] and [32] of the judgment in that case and set out, respectively, in paragraphs 11 and 15 of this judgment – provide a useful (but not exclusive) reference for the identification of aggravating factors in cases which come before these courts. Second, we find it significant that the presence of any one of the factors in the first list is treated, in England and Wales, as sufficient to warrant an uplift of the appropriate starting point from five to eight years: that is to say, an uplift of some sixty per cent. Applied to the tariff in these Islands, the presence of any one of those factors could properly be seen as sufficient to warrant a sentence of imprisonment of fifteen years or more; with a further uplift from that level if there were other aggravating factors. Third, we find assistance in the observations of the Court in *R v Millberry* in relation to mitigation and guilty pleas.

23. We have drawn attention, in the preceding section of this judgment, to what we see as some lack of clarity in the treatment, in *R v Millberry*, of cases in which the offender has broken into or otherwise gained access to the place where the victim is living. In summary: (i) that was an aggravating factor which, under the guidelines in *R v Billam*, had the effect of raising the appropriate starting point from five years to eight years; (ii) it was not given that effect by the Sentencing Advisory Panel in the recommendations made in May 2002; but it was treated as an aggravating factor to taken into account once

the appropriate starting point had been determined; (iii) the Court, in *R v Millberry*, (*ibid*, [26]) expressly adopted the advice of the panel as to starting points, but observed that there was "no substantial departure from the general approach laid down in *R v Billam*"; it also included this factor in the approved list of nine post-determination aggravating factors (*ibid*, [32]); and (iv) this factor seems to have been ignored by the Sentencing Guidance Council in its 2003 publication. In those circumstances, we think it important to make it clear that, whatever the position in England and Wales, the fact that an offender has broken into or otherwise gained access to the victim's dwelling is a significant aggravating factor; and that in our view, as indicated in *R v Billam,* it is no less significant a factor than the other factors which would lead (or would have led), in England and Wales to the substantial uplift in the appropriate starting point. It is a feature which is alarmingly prevalent in rape cases in these Islands. It is particularly serious in a case where the offender has broken into the victim's dwelling at night. It should be treated, in these Islands, as an aggravating factor warranting a sentence which is substantially in excess of the ten to twelve year tariff.

Previous cases in this jurisdiction

24. We were referred to a number of cases in which defendants have been sentenced for rape in this jurisdiction:

(1) The first in time is *R v David Cassidy Ebanks* (indictment 9/1998), in which sentence was passed shortly after the announcement of the 1998 Guidelines. Save that the victim was a visitor to these Islands, the facts are not dissimilar to those in the case of Craig Dilbert, now before us. The offence was committed in victim's hotel room after she had retired for the night. The defendant had obtained access to the room by breaking in. The victim was struck several times in the mouth and on the head; but no weapon was used. The ordeal lasted 15 to 20 minutes. The defendant was sentenced to life imprisonment after a trial. The sentence was reduced to one of 15 years imprisonment on appeal.

(2) Next in time is *R v Ronnie Rodney Ebanks*. The offence was committed in the early hours of the morning, after the defendant had broken in to the victim's dwelling.

It is not clear from the only report available (a report in the press) whether excessive violence was used; but, in sentencing, the judge is reported as saying that the defendant "had imprisoned the victim in her own home, dominated her, raped her and petrified her". He was sentenced to 14 years after a trial.

(3) We know very little of the facts in *R v Julio Simon Newball* (indictment 1/1999). It appears from a brief summary that the defendant entered the victim's residence as a trespasser with intent to commit an offence. While inside the victim's residence he forced her to have sexual intercourse against her will. He was sentenced to twelve years after a trial. That sentence was reduced to ten years on appeal. At first sight, the sentence of ten years seems low; but, as we have said, we know little of the facts; and we have no record of the reasons which led this Court to reduce the sentence.

(4) The most recent of the cases to which we were referred is *R v Kenny Roger Whittaker* (indictment 25/2003). It does not appear from the judge's reasons for sentence whether or not this offence was in a dwelling after a break-in; but the victim was of young age and a knife was used to force her to submit to rape. She was forced, also, to perform oral sex. The judge sentenced the defendant to twelve years imprisonment after a trial. That sentence was reduced to ten years on appeal. It appears from a newspaper report [there is no transcript of the proceedings in this Court] that the Court expressed the view that twelve years was not an excessive sentence; but that, in the circumstances that the judge may have been influenced by an irrelevant consideration – the possibility that the victim may have been traumatised by fear that the defendant had AIDS, when there was no evidence either that he did have AIDS or that the victim was concerned about that possibility – the defendant should have the benefit of the doubt and a reduction in sentence.

25. We have taken account of these cases. The sentences in *R v David Cassidy Ebanks* and *Ronnie Rodney Ebanks* are not outside the range which we would have expected on the facts as we know them. We do not think we can obtain any real assistance from *R v Julio Simon Newball,* given the very limited account of the facts which is available to us. The reduction of the sentence in *R v Kenny Roger Whittaker* by this Court is explained by the

possibility (accepted in this Court) that the judge may have been influenced by an irrelevant matter.

26. We now turn to the particular facts in the two appeals which are before us.

R v Craig Dilbert

27. The prosecution's case against the appellant Craig Dilbert was that the complainant awoke during the night to find an intruder astride of her while she was lying in her bed. This intruder pinned her arms behind her back. She screamed and was told by the intruder that he just wanted money. She was turned onto her stomach by the intruder who tied her hands behind her back with what felt like cord. The complainant struggled, and, as a result, the intruder fell from the bed. The intruder then punched her twice in her face causing her to bleed. He then grabbed her by the throat making it difficult for her to breathe and held her faced down on to the carpet. The intruder penetrated her vagina with his penis for about 4 to 5 minutes. He then turned her over and again penetrated her. Subsequently, he penetrated her digitically. As he was about to leave he told her that if she complained to the police he would come back and kill her. After he left, she discovered that her handbag was missing. When seen by the police, it was observed that she had a swollen nose which was bleeding, a swollen lip, a bruised left jaw and red marks on her neck. A bruise was on her right breast and abrasions to her knee and ankle were also seen. A DNA profile foreign to the complainant was found on a vaginal swab taken from her. The DNA expert said that the profile matched the DNA profile of the appellant with a match probability of at least 1 in 120 trillion. This evidence linked the appellant with the offence.

28. Craig Dilbert is seeking leave to appeal against the sentence imposed on the ground that it is manifestly excessive and/or wrong in principle. It was submitted on his behalf that the judge failed to take into account the relevant sentencing guidelines and this caused her to use too high a starting point and consequently resulted in her imposing too high a sentence even when the aggravating circumstances are taken into consideration. On the

other hand, Crown counsel submitted that the sentence imposed was not manifestly excessive having regard to all the circumstances.

29. Counsel for Dilbert submitted that the appropriate starting point for the offence of rape following a trial should be 8 years imprisonment inasmuch as the rape followed a night time breaking into the residence of the complainant. For the reason stated earlier, we do not accept that the starting point is 8 years and, consequently, we reject the submission made by his counsel that the judge took too high a starting point. We consider that the fact that Dilbert broke into the complainant's house at night to be a significant aggravating factor which in itself warrants a substantial increase in sentence over that recommended in the 2002 Statement.

30. In addition, a number of further or additional aggravating factors are also present in this case. The evidence showed that the complainant awoke to find the appellant astride of her while she was lying in bed. The complainant sustained injuries of varying degrees. As evident from the photographs produced at the trial the complainant was struck violently across her face causing her mouth and nose to swell. During the course of the struggle, he grabbed by her throat in such a manner which made it difficult for her to breathe. Her hands were tied behind her back while she was violated on two occasions by the appellant. Apparently not satisfied with what he done, he then subjected her to further degradation by violating her digitally. On completion of this assault, the appellant threatened to return and kill her if she reported the rape to the police.

31. In a victim impact statement submitted to the court, it is clear that the complainant suffered mental injury in addition to the physical injuries sustained at the time of the assault. She had been under psychiatric care for a while. She spent seven months on long term disability during which period she had to reside with her parents. Three years after the assault, she was still unable to work. She was afraid to spend nights alone and was still suffering from frequent nightmares. She is still suffering from anxiety and is particularly fearful of his last statement to her that if she reported the incident to the police he would come back and kill her.

32. Women in the Cayman Islands must be protected from such vicious assaults at night in their homes. They are entitled to go to sleep knowing that they are safe in their homes. Having regard to the observations made by Lord Lane CJ in *R v Roberts* (*supra*), and endorsed by Lord Woolf CJ in *R v Millberry* (*supra*), the Court does not consider that the sentence of 15 years' imprisonment is manifestly excessive having regard to the circumstances of this particular case. Leave to appeal against the sentence is therefore refused.

R v Christopher Samuels

33. The complainant in this case, a 48 year old U.S. national, arrived in Grand Cayman on 26 April 2002 on vacation. On 3 May 2002, having spent the day out, at a time between 7 and 8 p.m., she was travelling back towards her accommodation on West Bay Road. She had been to Foster's at the Strand where she purchased groceries, and consequently when travelling home, she had two grocery bags with her. She also had a shoulder bag and a towel.

34. As she was walking on West Bay Road she noticed a gold coloured van drive up next to her in the vicinity of the Ritz Carlton Hotel. The driver of the vehicle asked her whether she needed a ride. She told the man "No" and continued walking along the road. The driver of the car drove in a slow manner and pulled up again next to her and again asked her whether she wished to have a ride. She again refused, and he drove off.

35. She described feeling uneasy about the encounter, and feeling vulnerable, she decided to 'cut' through the Westin Hotel in case the man came back.

36. Whilst walking through the Westin she went into the ladies' restrooms, located at the Spa, which is a separate building to the hotel and which has outdoor access to the

restrooms. She went into the ladies' room, placing her two grocery bags inside the restroom and went into one of the cubicles.

37. While in there, she heard the door to the outside of the restrooms opening. She initially thought it was a security guard who walked in, as she was able to see the person through the louvres in the stall door. She said, "Excuse me; this is the ladies' room, Sir." The man responded, "Okay, sorry" and left. Thirty seconds later she heard the door opening again, and again somebody walked in. She assumed it was the same man, and fearing for her safety she said to the man, "I have a cell phone and I'm going to call the police".

38. As she said so, the lights of the restroom were switched off. She unsuccessfully tried to dial 911. The man, who was still outside the cubicle at this stage told her that if she screamed she was going to be killed. She then heard a 'noise' at the bathroom stall. She described it as someone trying to chop the door down. She saw the wood from the door chopping away and coming away from the door, flying at her.

39. She held on to the door knob to try to stop the man outside from coming inside, but once the wood had been chipped away, the man was able to grab her hand and pull it away from the door knob. The man then came into the stall and grabbed her physically. He grabbed one hand to her shoulder and he had a knife in his other hand which he placed to her neck.

40. Being in fear, she told the man that he could have her bag and take her money, to which he replied, "I don't want your money, I need some pussy." He grabbed her across her body, with one hand on her breasts. He then instructed her to turn around and bend over and also instructed her that if she didn't scream he would not cut her.

41. She begged him not to hurt her, and it then became apparent to her that he was going to have intercourse with her. In fear, she asked him whether he had AIDS because that would kill her. He said that he didn't have AIDS, he just wanted some sex.

42. In an attempt, again, to stop the rape occurring, she again begged for her life and begged him not to penetrate her, and in order to calm him offered to perform oral sex on him. He responded, "We'll start with that," and then pushed her head down on to his penis, which had already been exposed, his pants having been down at this time. This act lasted approximately a minute, at which point he then said he still wanted to have sex with her. He instructed her to turn around and bend over and place her hands on the wall. He then placed the knife to her neck and told her he didn't want to hurt her pretty face.

43. He instructed her to bend over and place her foot on the toilet. She complied and the assailant then placed his fingers into her vagina. He did this on two occasions. He removed her underwear. She believed he did this with the use of the knife.

44. He then penetrated her vagina with his penis and then proceeded to have intercourse with her for approximately 20 minutes. He repeatedly told her to relax because he didn't want to have to cut her, and he was complaining that she was tight. She again tried to get him to stop by telling him a lie that she was tight because she had herpes. He nevertheless continued. He withdrew after about 20 minutes. She believes that he ejaculated before withdrawing. He then began wiping the floor and the doorknob with her underwear. She became even more afraid, as she thought he was going to kill her because the act was over.

45. She tried to calm him, to befriend him almost, in an attempt to get her freedom, and he stated that he was sorry and that he couldn't believe that he had done this. He said he didn't want to hurt her but he was 'stoned'. He was going to go, and she must count to 100 before she left the restrooms.

46. Upon leaving the restrooms she sought assistance from the staff of the Westin Hotel who phoned the police. The police came shortly after.

47. As a result of the incident the complainant underwent an intimate examination, during which swabs were taken, both from her person and her clothing. DNA foreign to her was recovered at that time (2002). A search of the database, at that stage, of known felons, did not produce a match, and so the investigation continued.

48. In December 2008, continued checks on what is commonly called "cold cases" were done for DNA matches. The appellant's DNA, which had been placed there on a completely unrelated matter, came back as a match. As a result of that information, the appellant was arrested on the 5th January 2009. A further swab was taken for confirmation analysis which was duly completed and concurred with the initial screen sample.

Effect on Victim

49. As we have said, the complainant was 48 years old at the time of the incident. The injuries she sustained as a result of the assault included bruises to the vaginal area, as well as bleeding from a 1.5 centimetre laceration to the vaginal floor, as well as abrasions to her arm, her neck and her legs. Dr. Chapin, the complainant's physician/gynaecologist explained that the injury observed initially, i.e. the laceration to the vaginal floor, has caused a "continuing injury" to the date of the hearing. It causes embarrassment and discomfort to her and she will have to have surgery in due to course to rectify the physical injury.

50. The complainant provided a statement at the time of the hearing (approximately 7 years after the incident) in which she states that immediately after the incident she went

to the George Town Hospital where she was given a combination of medication to deal with victims of "stranger rape." These are commonly known as morning after pills as well as a number of HIV/AIDS related drugs which she had to take for some three months after the incident. She was diagnosed with pelvic tissue damage to her vaginal area.

51. She advised that she is due to undergo surgery but she is putting it off in the hope that it might resolve itself. It is scheduled for "fall of this year."

52. Since the incident she has returned to the United States, but due to the stress of the assault, she lost her employment within the month of returning home. At the time of the incident she had been an architect, as well as an avid photographer, both of which she can no longer do. She describes being unable to do the things she used to love, as she no longer enjoys them, and that she has lost her enthusiasm.

53. She became fearful and depressed and, in fact, feared to leave her apartment. To "this day" some seven years later, she said she rarely goes out except to go to the grocery store or to the doctor and that she still continues to be fearful, although not as often as before.

54. She was diagnosed by a therapist, as well as a psychiatrist, with Post-Traumatic Stress Disorder, depression and a Dissociative Disorder as a result of, or following, this incident.

55. These conditions were still present at the time of the hearing, and up to that time, she was still undergoing regular treatment with medication which she will most likely be on for the rest of her life, as well as psychotherapy.

56. Because of the stress the complainant lost hair and weight.

57. Since being advised that the perpetrator had been arrested and brought before the Court, she is 'now' (at the time of the hearing) starting to feel better, the nightmares have stopped and she is now (at the time of the hearing) feeling slightly more positive about the future of her life. She however concedes that she will never feel confident in her mind (confirmed by the therapist) engaging with men and in particular, an intima relationship.

58. On that background, i.e. the circumstances relating to the commission of the offence, including the aggravated features which will be dealt with later; the learned trial judge sentenced the appellant to twelve years imprisonment, in doing so, he gave, *inter alia*, the following reasons:

> "Mr. Samuels has no criminal record. He has pleaded guilty to this offence. That entitles him to a discount from what the sentence would otherwise be. The magnitude of that discount varies between 25 and 50 percent, depending upon the individual judge's assessment of the reasons for the discount, the reasons for the guilty plea, and the circumstances in which it has been entered.
>
> Here Mr. Samuels was facing a relatively strong case. Two separate DNA samples of his matched DNA taken from the victim shortly after the offence. That does not disentitle him to a discount, but it suggests that the discount would not be as large as it might have been in some other situations. I consider the use of the knife and the threats to kill the victim to be serious aggravating features.
>
> In this jurisdiction there are sentencing guidelines (promulgated 16th January 2002) which repeat guidelines published on earlier occasions. The guidelines read in part:
>
> > 'As regards Sexual Offences: "for rape, which has become alarmingly prevalent, an offender can expect a tariff of between 10 and 12 years imprisonment."
>
> The alarm at the prevalence of rape, which was expressed by the Chief Justice in 2002 has not diminished. The offence is very prevalent in the Cayman Islands. Tourists appear to be particularly vulnerable to this offence because of their lack of experience with our local culture.
>
> In my view, the aggravating features, that is to say, the use of the knife and the threats – elevate this above the tariff level. I consider that the appropriate sentence in this case, but for the guilty plea, would be imprisonment for 15 years. Because

of the guilty plea, I will reduce that to 12 years. I sentence you to imprisonment for 12 years."

59. We have set out in detail the reasons given by the judge for concluding that a sentence of twelve years of imprisonment is appropriate in this case, because it demonstrates clearly his appreciation of the principles applicable in delivering the proper sentence in the circumstances of this particular case.

60. He correctly applied the guidelines and felt justified in coming out of the "range" of sentence – that is set out in the guidelines as the tariff in Rape cases, because of the aggravated features that accompanied the commission of this particular offence. Certainly these were features which justified consideration.

61. Although he confined himself to the use of a knife and the threats (to kill), there were also other features that called for an increase over and above the range set by the guidelines – that is to say:

a. The use of violence over and above the force necessary
b. The particular serious physical and mental effect on the victim, and
c The degradation of the victim, i.e. the victim having to indulge in oral sex on the appellant.

62. In those circumstances we cannot conclude that the sentence imposed was manifestly excessive. We also agree that the guilty plea tendered, as it was in circumstances where the prosecution's case was strong as a result of the DNA evidence, was sufficiently discounted by a 20 percent reduction on the sentence he would have been given were it not for the plea of guilty.

63. In the event, the appeal against the sentence is dismissed.

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Chadwick P

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Forte JA

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Mottley JA