8/12/09

IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeal No. 14 of 2006
(Indictment No. 3/05)
(Summary Court No: 4078/04)

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

DAVE KENNEDY WHITTAKER

Appellant

Before: The Rt. Hon. Sir John Chadwick, President
The Hon. Mr. Justice Mottley, Justice of Appeal
The Hon. Sir Geoffrey, Vos, Justice of Appeal

Appearances: The Appellant in person
Ms. Cheryll Richards, QC, Solicitor General for Respondent
Mr. Philip McGhee, amicus curiae

Heard: 28 August 2009. Judgment delivered: 8th December 2009.

MOTTLEY, J A

Judgment

1. Following a trial in the Grand Court before Ramsay-Hale J sitting alone, the appellant was convicted on all six counts of the indictment and sentenced to three terms of imprisonment of 25 years and three terms of 8 years. The terms of imprisonment on counts 2 to 6 were to run concurrent to the sentence of 25 years on the first count. The appellant has filed 3 grounds of appeal against conviction and a ground against sentence.

2. The appellant had been represented at the trial; but was unrepresented on the appeal. Given the serious nature of the offences and the length of the sentences passed that was regrettable and must be seen as less than satisfactory. But it was unavoidable in the circumstances. The appeal was first listed for hearing in March 2009. The appellant had the benefit of legal aid for the appeal and had been represented until shortly before that hearing. At a late stage, he discharged his counsel; not for the first time. At his request, the Court adjourned the hearing over until the August session to enable him to instruct other counsel; and requested the Registrar to use her good offices to ensure that other counsel could be found. But it was made clear to the appellant that the appeal would be heard in the August session: no further adjournment would be granted. counsel, Mr Philip McGhee, was willing to accept the appellant's instructions and the legal aid certificate was transferred to him. He settled amended grounds of appeal on the appellant's behalf. At the appellant's request he applied to the Chief Justice for a direction that legal aid should be extended to enable leading counsel from overseas to be instructed. Thar application was refused. The appellant was not satisfied with the amended grounds of appeal. He instructed Mr McGhee to advance the original grounds which he, the appellant, had himself settled. Mr McGhee did not feel able to do so; and took the view that he had no alternative but to withdraw. He so informed the Court when the appeal was first called on. The Court granted a short further adjournment to enable the appellant to prepare his case; or to find further representation. No other counsel being willing and able to take the appellant's case the Court invited Mr McGhee to attend the hearing as *amicus curiae* in order to ensure that every point that could properly be taken on behalf of the appellant was argued. Mr McGhee accepted that

invitation; and the Court is most grateful for the assistance which he was able to provide. The appellant presented his own appeal. He did so skillfully and articulately. He was, plainly, a man of considerable intelligence and had a detailed knowledge of the evidence as it appeared from the transcripts. The Court was satisfied that the points which he wished to make were presented fully and competently; and that it was able to identify and understand all the issues, notwithstanding the absence of legal representation.

Appeal against conviction

3. In count 1 of the indictment, the appellant was charged with aggravated burglary contrary to the provision of section 232 (1) of the Penal Code. The particulars alleged that the appellant, between 25 and 26 October 2004, entered the premises situated at 280 Bodden Road, Bodden Town as a trespasser and with the intent to commit the offence of rape therein. It was also alleged that, at the time when he entered the premises, the appellant had a knife with him. The second count alleged that, while at the premises, the appellant indecently assaulted Laura Trucy who was then residing at those premises. In count three, it was alleged that on the same occasion the appellant forcibly compelled Ms. Trucy to go to Bodden Town public beach where he then again indecently assaulted her. This indecent assault was the subject of the offence charged in count 4. Count 5 also alleged indecent assault of Laura Trucy on an occasion other than those already mentioned in counts 2 and 4. The final count alleged that, while at the premises at 280 Bodden Road, the appellant robbed Laura Trucy of a cell phone, $120 in cash, jewelry and a watch.

Prosecution's Case

4. The prosecution's case was that shortly after Hurricane Ivan, Ms. Trucy was asleep at No. 280 Bodden Road when she woke to find a man in her bedroom sitting on her bed. She described this intruder as having dreadlocks, a beard and brown eyes. She was able to observe him for about 2 to 3 seconds as he was facing the window through which the moonlight from a full moon was shining. The man told her not to shout out or he would kill her. He spoke in what she described as Jamaican patois. He was very aggressive in his attitude. To ensure that she did not scream, the intruder put a sock in her mouth which affected her breathing. He was armed with a thin curved knife which he held against one of her eyes. He placed a pillow over her face. He used the knife to cut a sheet into several pieces, and used them to tie her hands behind her back. He turned her over so that she was lying on her stomach. He spread her legs apart and touched her on her bottom. She was wearing underwear at the time and was using a tampon as she was having her menstrual period. The man then ransacked the drawer in the bedside cabinet. He also searched her jewelry box from which he took jewelry and placed it along with a cell phone either into a bag or cloth which was on the floor.

5. He turned her onto her back and again placed a pillow over her face but quickly replaced it with a towel. He ordered her to spread open her legs and again threatened to kill her when he considered that she had not complied. Although she was having her period and was using a tampon the intruder nonetheless inserted his finger in her vagina through her underwear. He then threatened to rape her. She was made to sit on the

bed whereupon he put his penis into her mouth and forced her to perform oral sex on him for about three minutes. He did not however ejaculate in her mouth. The man took her to another room where he again assaulted her by touching her vagina. She was then taken to the down stairs of the house and was again forced to perform oral sex on him. On this occasion it lasted between 5 to 6 minutes. He did not ejaculate on this occasion. After this assault, he obtained her car keys from her. He placed her in the car and drove away from the house. While driving he again ordered her to perform oral sex on him.

6. He took her to a beach and, on arrival, took her out of the car and untied He took her to a beach and, on arrival, he took her out of the car and untied her hands. She was taken to a house which appeared to be damaged. In the house he again ordered her to perform oral sex on him. This lasted for 2 to 3 minutes. On that occasion, he told her that if she did not do "a good job" he would call his two friends. He left the damaged house and took her to the beach where he made her lie beside him on the sand. He again ordered her to have oral sex with him. She made it clear she had no choice but to do as he had ordered as she did not know what would have happened to her had she refused. Because of the presence of mosquitoes on the beach she was taken back to the house where she was ordered by him to remove her clothes and was again made to indulge in oral sex on him. Ms. Trucy pointed out that, while lying across her assailant on the beach and engaged in oral sex on him, she was able to see the man's face.

7. She was then taken back to 280 Bodden Road and was again ordered to indulge in oral sex on him. On this occasion it lasted about 10 minutes

during which he actually ejaculated in her mouth. He ordered her to swallow it and told her if she didn't he would kill her. However, she was able to spit it on to her T-shirt. Having ejaculated in her mouth, he told her that she was a "good girl" and that she deserved to live. He then gave her a bottle of rum and insisted that she had a drink. This she did. After this the intruder left the house.

8. On 8 November 2004, Ms. Trucy attended the George Town Police Station where she identified the appellant as the man who had assaulted her in the early morning of 26 October 2004.

9. Twyla Mae Vargas, the librarian for Bodden Town, said that on the night of 25 October 2004 she went to bed about 10pm. Around 3 to 3:30am she got up and went to her kitchen where she had a drink of water. She sat in the kitchen and started reading a book. Whilst there, she heard someone outside calling her name. She spotted a flashlight through her window and saw the appellant who is known to her by the nick-name of Bouncer. She has known him for 15 years. She asked him what he was doing outside her window at that time of the morning. The appellant responded that he was drunk. He told her that he had money as he had robbed some place. He asked if she would hold the money for him. She spotted the flashlight on his hand and saw that he was holding what she described as a lot of money. She refused and told him that he must be crazy. He asked her to open the door and let him into the house. She again told him that he must be crazy. He left and returned 20 minutes later and again requested that she let him into the house. She again refused. The appellant then left after which she made a call to the West Bay Police Station. A bottle of liquor which was later found in her yard

was handed over to the police. Finger prints found on that bottle were subsequently identified as belonging to the appellant.

10. Police went to Bodden Town in search of the appellant. Not finding him in Bodden Town, the officer went to the residence of the appellant in North Side area. On arrival at his residence, an officer knocked at the door several times, while shouting several times for the appellant by his nick-name "Bouncer". One officer said he was able to look into the residence into the living area through a glass at the top of a door. Another officer shined her flashlight through a window into another room but no one was seen in that room.

11. The prosecution's case against the appellant depended predominantly on DNA evidence. The expert called by the prosecution said that he examined a number of articles including oral swap tips from Ms. Trucy and a cutting made from the T-shirt she was wearing at the time of the attack and onto which she spat after he had ejaculated in her mouth. These were tested against known samples from Ms. Trucy and the appellant. In respect of these two items, the expert concluded that the appellant was not excluded as the source of the sperm that was identified on the oral swab, as well as on the cutting from the T-shirt. In respect to the swab from the rum bottle he found that an insufficient amount of DNA was detected. In respect of this item he was unable to develop a genetic profile.

12. The expert stated that he did a calculation to show how many times it was likely to find another person with the same DNA profile as the appellant. He did his calculations in respect of four ethnic groups –

Caucasian, African American, South Eastern Hispanic and South Western Hispanic. In respect of the Caucasian population the profile would be once in 813 followed by 14 zeros. In respect of an African American population, the genetic profile is expected to be found once in 461 million. In respect of South Eastern Hispanic it would be once in every 42.6 quadrillion; in respect of South Western Hispanic it would be once in 302 quadrillion.

Defence

13. The appellant did not give evidence. He relied on his interviews by the police. In his first interview which took place on 29 October 2004, the appellant stated that at 4am on 26 October he was at his residence at North Side. He said that he knew Twyla Mae Vargas all his life and was by her 'yard' drinking earlier on 25 October 2004. This was between 8.30pm and 10pm. After that, he hitched a ride to his residence in North Side with a Jamaican "Yardie" whose name he did not know. He specifically denied that he was at Vargas' residence between 3.45am and 4am on the 26 October 2004. In his second interview which took place on 1 November 2004, the appellant stated on Monday 25 October 2004 he was in Bodden Town but he arrived home about 10.50 pm and did not leave home until early the following morning around 5:30am. He explained that when he left home at that time he got a ride on a truck to area of the Bodden Town Police Station and then from that junction to Manse Road. He was walking and as he stopped a police car drove up behind him. Shortly after, he was arrested.

14. In respect of the DNA evidence, it was the contention of the defence that the evidence of DNA had been planted by the Police who had his

DNA in their possession from the previous case in which he was charged with rape. In addition, it was contended that the identification by the complainant was made under difficult circumstances and was therefore unreliable.

The Appeal

15. On 16 August the appellant filed Grounds of Appeal. The first ground alleged that the appellant had been denied the assistance of a Queen's Counsel under the Legal Aid scheme on a category A charge which carried a maximum sentence of life imprisonment.

Section 3 of the Legal Aid Law (1999 Revision) provides as follows:-

> "3. Where it appears to any court before whom there appears any person-
>
> (a) charged with a scheduled offence; or
>
> (b) who desires to take or defend legal proceeding in the Grand Court,
>
> that such person has not the means to instruct a legal practitioner to advise or to represent him in any relevant proceedings, it shall grant to such person a certificate entitling him to free legal aid or, as the case may be, subsidized legal aid, for the preparations of his case and generally throughout such proceedings and in any appeal."

16. Section 5 of the Act provides:

> "5. The effect of a grant of a certificate shall be that the person to whom the certificate is granted shall have assigned to him the services of one or, subject to the approval of the Court, more legal practitioners who shall be entitled to such fees as may be prescribed and such travelling and other expenses incurred in the investigation and conduct of the proceeding shall be certified by the Clerk of the Court to have been reasonably so incurred."

17. At the commencement of the trial, crown counsel informed the court that the appellant was unrepresented. On that occasion, Mr. Ben Tonner appeared as amicus curiae. The judge pointed out that the court had already refused to assign a Queen's Counsel to represent the appellant. However, she indicated that she would reassign the legal aid certificate to Mr. Collins. The judge made it clear that she would not entertain any further application for a Queen's Counsel.

18. Under the provision of section 3 of the Legal Aid Law, a person who is charged with an offence specified in the Schedule to the Law and, who does not have the means to instruct a legal practitioner, is to be granted a certificate by the court which entitles him free or subsidised legal aid . The law does not provide for the assignment of a Queen's Counsel as of right. What is required is the assignment of counsel if the litigant does not have the means to instruct counsel. Whether a Queen's Counsel should be assigned is a question for the court before which he is appearing and would, in the opinion of this Court, depend on the nature and seriousness of the offence or offences and the difficulty and complexity of the case. In any event, it is not being alleged before us that the failure to assign Queen's Counsel resulted in any prejudice to the appellant or that he did not have a fair trial as a result of the failure.

19. In the second of the original grounds of appeal, the appellant alleged that Magistrate Ramsay-Hale was not publicly sworn in as a judge. The judge whose substantive position at the time of the trial was a Magistrate had been appointed an Acting Judge of the Grand Court. Section 49 K(2) of the Cayman Islands (Constitution) (Amendment) Order 1993 provides:

"49 K(2) If the office of a Judge of the Grand Court other than the Chief Justice is vacant, or if any such Judge is acting as Chief Justice or is for any reason unable to perform the functions of this office, the Governor, acting in his discretion, may appoint a person qualified for appointment as a Judge of the Grand Court to act as such a Judge."

20. In section 6 of the Grand Court Law it is stated:

"6.(1) The Governor, acting in his discretion, shall appoint persons who are qualified for appointment under sub section (2) to be the Chief Justice and the Judges. The person appointed Chief Justice shall take precedence of and have seniority over the other Judges.

(2) Any person qualified to practice as a barrister or solicitor in England or in an equivalent capacity in a Commonwealth country approved by the Governor as having comparable standards for call or admission to practice and who has so practice for not less than ten years shall be qualified to be appointed a Judge."

21. The Instrument of Appointment of the Judge was submitted to the Court. The Instrument showed that on 9 June 2006 the Governor appointed Magistrate Ramsay-Hale to act as a Judge of the Grand Court of the Cayman Islands with effect from 13 June 2006 until 23 June 2006. A second Instrument, dated 22 June 2006 , showed that the Governor had appointed Magistrate Ramsay-Hale to act as a Judge of the Grand Court "with effect from 26 June 2006 to complete the matter of IND#3/05 Regina v Dave Whittaker".

22. The Solicitor General pointed out that it would appear that the appellant was not concerned with whether the judge had been properly sworn in but rather with whether she possessed the requisite qualification to be appointed as a Judge. The Court was shown the call certificate of the Judge which indicated that the Judge was indeed qualified to be

appointed as a Judge having been called to the Bar and having practiced for over 10 years. The Court raised the issue whether the phrase 'practiced as a barrister or solicitor' in sub section (2) of the Grand Court Law related exclusively to private practice or whether it includes the period when the barrister or solicitor served as a magistrate.

23. Section 6 of the Summary Jurisdiction Law (2006 Revision) provides as follows:

> (1) The Governor may appoint persons qualified under subsection (2) to be magistrates, to have and exercise the powers and jurisdiction of the court as provided by this Law. Every person so appointed shall be ex officio, a Justice of the Peace.
> (2) Any person qualified to practice as a barrister or solicitor in England or in an equivalent capacity in a Commonwealth Country approved by the Chief Justice as having comparable standards for call or admission to practice and has so practiced for not less than five years, shall be qualified to be appointed a magistrate."

24. During the course of the argument the President of the Court observed that it would be odd if a person had qualified for appointment as a magistrate and had been appointed a magistrate and had served in that capacity for five years or more did not fall within the ambit of Section 6(2) of the Grand Court Law.

25. To be appointed a judge of the Grand Court, a person must be qualified to practice as a barrister or solicitor in England or in a Commonwealth Country approved by the Governor as having comparable standards for call or admission to practice. In addition, that person must have practiced as a barrister or solicitor for at least ten years. The Act does not stipulate that the person must have been in private practice. In our

view, section 6(2) must be construed as including in the ten year period of qualification, any period which a person served as a Magistrate. Any contrary interpretation would, in our view, exclude from appointment to the Grand Court persons who had worked in the Magistracy for an extended period after being duly appointed. This clearly could not be what was intended by the Legislature when enacting the Grand Court Law. Indeed, similar provisions in legislation in the Caribbean have always been interpreted as including service in the Magistracy and in the Attorney-General's Chambers.

26. In the original Ground 3 the appellant complained about the denial by the judge of his application to have an independent DNA expert testify regarding "extremely controversial DNA evidence". It is necessary to deal with this ground along with the first ground which the appellant argued.

27. The appellant stated that he gave a "full rape kit to Dr. Madden". Within 3 to 4 days after the police took a second buccal swab from him. He complained that this swab was sent away in the same bag as the rape kit which were left overnight at Bodden Town Police Station before being handed over to the appropriate personnel. In any event, the DNA kits were not sent off for testing until 13 days after they had been taken. He submitted that the law in Cayman Islands requires that such samples should be sent for testing within 72 hours. We were not referred to the any legislation to this effect. We do not consider that there is any merit in this submission.

28. The appellant also complained that no dead skin cells were found on the T-shirt which Ms. Trucy said that she was wearing on the night, a hot night, when she was attacked. In addition, he stated that Ms. Trucy said that after he had ejaculated in her mouth she spat it on the T-shirt yet her DNA cannot be found on that T-shirt. He submitted that in the circumstances this raised the issue 'whose shirt was it' that was submitted to the DNA expert for examination.

29. Erin Paul Reat was accepted by the court as an expert witness competent to conduct DNA examinations on the items which were submitted to him. He explained that spermatozoa are the male reproductive cells. Semen is the liquid in which the spermatozoa can reside. He described semen as the "liquid matrix in which sperm can be found." He examined introitus swabs and smears from Ms Trucy. In respect of the introitus smears which were examined under a microscope for the presence of sperm, no sperm was found. The swabs were examined for a particular protein which is found in semen but it was not found to be present. He also examined oral swabs and smear slides taken from Ms Trucy. On the oral smear slide, he observed the presence of sperm heads. The oral swab tested positive for protein found in semen. Microscopic examination disclosed evidence of sperm on the oral swabs. Mr. Reat also examined a black T-shirt, which had been submitted to him, for the presence of semen. This examination disclosed the presence of a protein commonly found in semen. Subsequent microscopic examination showed the presence of sperm.

30. In relation to the dead skin cells Mr. Reat explained that the "epithelial cell is basically a scientific term for skin cell." The witness pointed out

that the exterior of the skin is actually dead cells. If these cells are examined under a microscope, no nucleus in which DNA would be found would be observed because the cells have died. It is only in an area of the body where there is living tissue and the cells are being constantly replaced that DNA would be found.

31. The appellant submitted that there was no way that Ms. Trucy can spit on to her T-shirt, wear it and it doesn't have her DNA on it especially when she was in a hot place as she said.

32. Mr. Reat explained that there would be multiple reasons why Ms. Trucy's DNA was not found on the T-shirt. It would depend on how long the person was wearing the shirt. In addition "the outside skin cells don't have nuclei in the cells, so most of the skin cells that are transferred to our shirts don't have DNA, nuclear DNA". In these circumstances, a DNA profile may not be developed.

33. In cross examination Mr. Reat was asked by the appellant's counsel if he would expect to find DNA on Ms. Trucy's T-shirt if it was hot and she was sweating. The witness told the Court that sweat in itself doesn't contain much nuclear DNA. He pointed out that in cases where someone has been running, sweating and shedding clothes, in many cases it was not possible to develop a genetic profile even though a great amount of sweat was present.

34. The stain found on the T-shirt was tested and proved positive for the presence of sperm and semen. A cutting was taken from the shirt and retained for the purposes of DNA analysis. Stains from the oral swab

were also subjected to DNA analysis. The expert said he had in his possession oral swab tips with the known saliva sample from Ms. Trucy and the known saliva sample from the appellant. He explained that it was necessary to isolate the DNA and extract it and then analyze it. In testing the oral swab tip and the cutting from the T-shirt, a technique was used whereby the sperm was separated from the other material in the stain. This is necessary so as to test the other types of cells in the material. The sperm cells are tested. Additional tests are done to ascertain what other skin cells are present. Similar tests were done on the known samples from Laura Trucy and the appellant. A genetic profile was then developed and compared to the known samples. The purpose of this genetic profile was to ascertain the source of the spermatozoa that was found on the oral swab tips and the cutting from the T-shirt. He stated that as spermatozoa only came from males, there would have been no need to analyze female DNA to find out the source of the sperm. The results of the test did not exclude the appellant as the source of the sperm which was found on the oral swabs and on the cutting from the T-shirt.

35. Mr. Reat was asked to comment on various statements which were contained in a report of Ms. Nancy Peterson, the appellant's DNA expert. It was pointed out to him that she stated that he had:

> "used a DNA procedure that tests the nuclear DNA found in all cells. This test is not specific for DNA found in spermatozoa. Why does he conclude that the DNA profile that he says matches [Dave] Whittaker came form the spermatozoa."

He acknowledged that while Ms. Peterson was correct in the first part of her statement that the DNA procedure test for nuclear DNA is non-

specific for sperm, he nonetheless was able to conclude that the DNA profile came from the sperm. The reason he gave for so concluding was that he was able to separate out the sperm cells from the other cells known as epithelial cells, and test them independently. Having developed a genetic profile from the separated sperm cells, he was able to conclude and report that the profile came from the sperm and not from any other source.

36. In her report Ms. Peterson stated:

> "There is no mention of any other DNA profiles being developed from the evidence samples that could be matched to Laura Trucy or Olwena Griffith. I would expect that the samples from the oral swabs and the T-shirt would have DNA from Laura Trucy, if the samples were taken from items that came from her. The lack of a mixed profile containing DNA from Mr. Trucy and a second profile which could be matched to another source could indicate the samples tested did not come from Ms. Trucy."

In view of this comment, Mr. Reat was asked why there was no mention of a mixed DNA profile or either of the items in his report. He explained that, in so far as the T-shirt was concerned, there was one genetic marker which fell below the threshold. When developed the marker did not appear to be that of a mixture. In respect of the oral swab, he does not report on a mixture when a sample is taken directly from a known individual.

37. In relation to the bottle of rum In relation to the bottle of rum from which Ms. Trucy stated that the intruder made her take a drink, Mr. Reat said that the result of the DNA profile was inconclusive. No weight was given to this evidence by the Judge.

38. The Solicitor General submitted the issues relating to the independence of Ms. Peterson, the DNA expert eventually engaged on behalf the appellant, were resolved at the beginning of the trial. It was pointed out that Ms. Peterson never gave evidence for the prosecution in any of the appellant's earlier cases.

39. In her oral reasons, the judge said:

> "Finally the defence challenged the DNA evidence on two primary grounds. The first that the prevalence of incest in these islands or in breeding, meant that the probabilities relied on by the Crown witness would be much smaller; this is to say, the probabilities of DNA being someone else's was higher in the Cayman Islands than in other population groups. Further, that the police has made a sinister use of the buccal swab collected by Zoan Maring planting the DNA evidence upon which the Crown relied."

40. In dealing with these contentions the judge found:

> "...no merit in the suggestion that the defendant's DNA was planted either on the oral swab taken from the complainant or on the complainant's T-shirt. The DNA sample that the police took after the doctor had completed his taking of samples from the defendant.....the sample that the defendant complains were improperly handled and in the possession of the police for several hours otherwise not accounted for...that was a buccal sample. On the evidence, such a sample would have epithelial cells. The evidence was to the effect that its mucous membranes and cells that you retrieve from those are nuclear epithetical cells. The evidence of the witness Reat, was abundantly clear that the material used to extract the suspect's DNA was sperm. It was DNA extracted from sperm that was matched to the defendant's DNA, not DNA from epithelia's as would be found on an oral swab."

41. In relation to the question of incest and its effect on the findings that the DNA came from the appellant, the judge said:

> "As to the issue of incest and a Cayman disease that counsel wish to rely on to call the identifying quality of DNA evidence into question, I accept the evidence of the expert that there have been studies done on inbreeding and the learning is that the impact of inbreeding on the statistical frequency of DNA in any given population would not be significant."

42. The defence also relied on the absence, in the report from the DNA expert, of any evidence of co-mingling of Ms. Trucy's DNA in the samples taken from her. The judge, in indicating that she accepted the evidence of the DNA expert, observed that:

> "....it was part of the defence case that had these DNA samples come from the mouth of the victim, Laura Trucy, as she claimed, that there would have been some evidence in sample of her DNA, some co-mingling, but I accept the evidence of the expert that if she had dry mouth, even if she shook her head "no" first before spitting it on her shirt, which was her evidence, it is quite likely that there would be no DNA present from her. What he said, in fact, was there had to be at least one to twenty, and that meant that the quantity of the material from the person spitting could not be more than twenty times less or the experts would not be able to see any markers."

43. In respect of the T-shirt from which the cutting was made, the judge accepted that there was no forensic evidence to support the prosecution evidence that the T-shirt was worn by Ms Trucy. The judge however accepted the evidence of Mr. Reat that the surface cells of the body are dead cells which do not contain the nucleus that is essential to the finding of DNA markers. The evidence from Ms. Trucy, who was recalled, identified the T-shirt which was produced as the one she was wearing when she was assaulted by the intruder. The judge said:

> "So while there was no forensic evidence to support that it was her T-shirt, and while there was no forensic evidence to show any inter mingling of her saliva with his sperm, I say I accepted the evidence of the Crown's expert Reat."

44. Finally in respect to the samples used for the genetic profiling the judge said:

> "I am satisfied on all the evidence, so that I feel sure, (emphasis of the court) that the obtaining of the samples from Ms. Trucy were done in an appropriate fashion, and that I am satisfied of the integrity of the samples, which I accept were properly sealed. I also find that the chain of custody was not broken, that surface skin cells are dead cells where no epithelial from which to extract DNA was not controverted. The evidence accords with common sense and I accept it as the reason for her shirt not bearing any DNA peculiar to her."

45. The prosecution relied on the DNA evidence to prove the identity of the person who entered the house situate at #280 Bodden Road and who assaulted Laura Trucy. The examination of the stains on the oral swab tips taken from Ms. Trucy together with the cutting from the T-shirt which she said she was wearing at the time when she was attacked and on which she spat after her assailant had ejaculated in her mouth both revealed the presence of spermatozoa. Spermatozoa are the male reproductive cells. In conducting the examination the examiner used a technique which permitted him to separate out the cells of spermatozoa from other cells known as epithelial cells. Having separated out the spermatozoa, the expert said it was possible to examine it to determine its source. The result of that test showed that the appellant was not excluded as being the person from whom the spermatozoa came. In cross- examination Mr. Reat said that it was "highly remote but there is a possibility that there could be another individual in the population that

could have that same profile". He went on to reiterate that while it is possible it was highly unlikely. Suggestions that "inbreeding" in the Cayman Islands would affect the results of the test were rejected.

46. The conclusion reached by the judge that the appellant was the source of the spermatozoa and as such was the person who entered the house at #280 Bodden Road and assaulted Laura Trucy was, in our view, correct based on the evidence. The judge, on the evidence, was entitled to conclude that she found no merit in the appellant's suggestion that his DNA had been planted on the oral swab taken from Ms. Trucy and the cutting from her T-shirt. Further, on the evidence, the judge was also entitled to accept the reasons given by Mr. Reat for the absence of the DNA of Laura Trucy on the oral swab and the cutting from the T-shirt.

47. The appellant also complained that jewelry, a ring, belonging to Ms. Trucy was found in possession of a person who was never charged.

48. Detective Chief Inspector Kurt Watkins said that, as a result of a search warrant executed at the house of a convicted drug dealer, a ring, later identified as belonging to Ms. Trucy was found. He said that although the file relating to the convicted drug dealer was submitted to the Legal Department the evidence was apparently considered to be insufficient to justify charging that person. The house which was searched was about 100 feet from the area where the police had been taken by Ms. Trucy. The Chief Inspector was unable to say whether finger prints were taken from that individual.

49. The appellant submitted that the failure of the police to take the finger prints of that person reflected on the level of investigation conducted by the police. He said that the police made up their minds that he had committed the offence because of his record and reputation. He contended that that person ought to have been questioned or, at any rate, ought to have been asked whether the appellant gave him the jewelry. The appellant was therefore contending that, as the ring belonging to Laura Trucy was found with someone else, this was evidence from which it could be said that that person was the one linked to the burglary and assault on Ms. Trucy.

50. The Solicitor General countered this submission by saying that it could be inferred that investigations had been completed and the Legal Department had concluded that there was insufficient evidence on which to institute charges against that person. The Solicitor General conceded that at the trial the Crown did not make any submission on the jewelry.

51. In her oral judgment, the judge did not refer to the issue of the jewelry. As was pointed out during the course of argument, the judge in directing a jury would have had to remind the jury that a ring belonging to Ms. Trucy had been found in possession of someone other than the appellant. She would have to tell the jury that they may think that this called for an explanation as to how that person came to have had it in his possession if the appellant had taken it. In addition, the judge would have told the jury that it was for them to make up their minds whether the appellant would have had an opportunity to off load the ring. The judge would have reminded the jury that the ring was found at a house

which was 100 feet from where Laura Trucy had been taken. The judge would have reminded the jury that Twyla Mae Vargas said that she had seen the appellant who was known to her for over 15 years, and that he had said to her that he had a lot of money because he robbed some place and he wanted her to hold it for him.

52. This issue is tied to the fact that the police found finger prints at the house at 280 Bodden Place but were unable to identify those finger prints as belonging to the appellant. The Crown submitted that the failure of the police to identify the source of the finger prints meant that they did not belong to the convicted drug dealer. The inference being that if that person was the source of the prints, as a convicted drug dealer, the police would have had his finger prints in their possession and would have been in a position to say whether the finger prints came from him.

53. In her oral reasons the judge said:

> "It was said that absolutely no finger prints belonging to the accused were found in the premises where Ms. Trucy was attacked, nor in the motor vehicles. But, you know, none of her finger prints were found in a bedroom which she occupied. So I say this, absence of finger prints, cannot prove that somebody was not there. Only the presence of finger prints can be used to prove."

54. The appellant said that it was alleged that he drank from a bottle. He submitted that if he did then his DNA would have been found on the bottle. The evidence from the DNA expert was that there was not sufficient to develop a profile.

55. In respect of the complaint that Ms. Trucy's finger prints were not found on the bottle, there was no evidence that she held the bottle. The evidence was that the intruder put the bottle to her mouth. In regard to the absence of her DNA on the bottle, there was no evidence that the bottle touched her lips.

56. The appellant alleged that his alibi was never checked by the police. He said that D.I. Walton and PC Andrea Bernard said that they tried to check out his alibi. He said he gave them an address and the description of the vehicle that took him from North Side and dropped him off by the police station. He said this is why he was found by Bodden Town Primary School. The judge found that there was no direct evidence to show that the alibi put forward by the appellant in his interview with the police was checked by them. No evidence was led that the police made any attempt to find the driver of the vehicle who the appellant said had given him a lift that morning. While it may be said that the police ought to have stated what steps they made to find the driver of the vehicle the failure to do so does not in any way impact upon the prosecution's case which, as stated earlier, was largely dependant on identifying the appellant by means of DNA evidence

57. Criticism was also made of the identification by Ms. Trucy of her assailant. The judge recognized that the identification by Ms Trucy of her assailant who was previously unknown to her was made at night under difficult circumstances. The judge reminded herself of the need for special caution. The judge found that Ms Trucy had several opportunities to see her assailant albeit being at night and by moonlight.

These opportunities included

> "....When he first came over to her while she was in bed, when he lifted up the towel and kissed her in the room down stairs, and when he lay on the beach and she lay crosswise over him giving him oral sex with her face turned towards him."

The judge went on to point out that Ms. Trucy had taken the opportunity to observe her assailant while she performed oral sex on him. The judge accepted that, although the identification was made under difficult circumstances, this in itself, did not prevent her from identifying her assailant. The judge concluded that, even though the identification was made by moonlight she was satisfied so that she could be sure that there was both "sufficient light and sufficient time" for her to observe her assailant.

58. The judge clearly had in mind the guidelines set out in **Regina v Turnbull [1977] QB 244** which are to be observed by judges when directing a jury on the issue of identification. She warned herself of the need for special caution where the identification was made under difficult circumstances. She specifically referred to each opportunity Ms Trucy had to identify the appellant and the circumstances under which the identification was made and reminded herself that, at all times it was by moonlight. The judge did not warn herself as to the reason why there was a need for caution nor did she remind herself that a mistaken witness can be a convincing witness. But, as indicated below, nothing turns on that failure which should viewed in the light of what was said by Lord Lowry in R v Thompson, supra.

59. An identification parade was held to see whether Ms Trucy could identify the person who entered her residence and assaulted her. Ms. Trucy identified the appellant as that person. Criticism is made that the parade was unfair because the police did not use persons who were similar to the appellant in build, height, age and general appearance. While the judge accepted that the parade was effectively narrowed to a choice between three persons she nonetheless stated that she was unable to conclude that the parade was unfair. In the view of this Court, the circumstances surrounding the parade were not ideal. Persons selected for the identification parade ought to have been chosen from persons who were of similar build, height, age and general appearance to the suspected person. Whenever possible this procedure should be observed so as to ensure that identification parades are fair.

60. The Court agrees with the view expressed by the judge that:

> "Whatever the shortcomings of the parade, the correctness of the complainant's identification does not rest on her visual identification alone it is supported by the forensic evidence found on the T-shirt she wore and on the buccal or oral swab taken from her ."

The prosecution's case against the appellant did not rely solely on the identification of the appellant by Ms Trucy during the attack on her or of her pointing him out in the identification parade; the case was mainly based on the DNA evidence which showed that the appellant "was not excluded as the source of sperm that was identified on oral swabs, as well as on the cutting from the T-shirt."

61. Complaint was also made that the judge failed properly to direct herself when she rejected the defence of alibi and also failed to direct herself in accordance with the case of **Regina v Lucas [1981] QB 720**.

62. In his interview with the police, the appellant stated that he arrived home at North Side around 10.50 pm and remained there until he left early the following morning when he was given a lift to Bodden Town. Police who went to his residence stated that they knocked at the front door and called out but received no answer. On looking through a window at the back of the house, the police said they did not see anyone in the room or lying on the bed. Another officer said that while standing at the back of the house, she could see other officers shining their lights through the front door. The appellant's wife gave evidence and produced photographs of the house at North Side. The judge accepted that the photographs show that from the front door there is not a complete view of the bedroom. However, she found that you can see into the bedroom from the front door. The judge reviewed the evidence relating to whether the blinds at the appellant's house were drawn and expressed the view that the blinds would have been drawn if the appellant was at home and concluded that she

> "accepted the evidence of the officers and say that I am satisfied that he was not."

63. This turned essentially on issues of fact. Having had the opportunity to hear the witnesses and to observe their demeanour, the judge accepted, as on the evidence she was entitled to do, the officers as witnesses of truth. The judge however correctly went on to state that the burden was on the Crown to prove the guilt of the appellant and that the appellant

did not have anything to prove. Nothing in the record indicated that the judge used the rejection of the appellant's alibi to draw any inference of guilt against the appellant.

64. In respect of the need for a Lucas direction, there was nothing in the judgment to suggest that the judge came to the conclusion that the appellant was lying and therefore she could draw any inference of guilt. Indeed, at no stage did the prosecution rely on lies told by the appellant to prove his guilt. Consequently, in our view, there was no need for a Lucas direction.

65. The first of the original grounds of appeal relates to the elements of aggravated burglary. Count 1 charged the appellant with aggravated burglary. Section 232 (1) of the Penal Code (1995 Revision) provides as follows:

> "232 (1) Whoever commits any burglary and at the same time has with him any firearm or imitation firearm, any offensive weapon or any explosive is guilty of the offence of aggravated burglary and liable to imprisonment for life."

66. Ms. Trucy said that she was asleep but awoke to find a man sitting on her bed. The man had a thin curved knife with a black handle in his right hand. He placed the knife against her eyes.

67. In her oral reasons, the judge said:

> "with respect to the aggravated burglary, it was her evidence that she was tied and intimately touched while her assailant use words such as "f___" and "rape". That evidence, taken together with the evidence of the indecent assault that followed, give rise, in my view, to the irresistible inference that her assailant entered the premises with intent to rape, an intention which he resiled from

when he discovered that she was menstruating. I say that on those facts the offence of aggravated burglary is made out."

On appeal, no issue is taken as to whether there was sufficient evidence from which the judge could find that the intent of the appellant was to rape. Issue is however taken with whether there was sufficient evidence from which the judge could find that the appellant had the knife with him when he committed the burglary so as to bring it within the ambit of aggravated burglary.

68. The Solicitor General conceded that there was no direct evidence that the appellant brought the knife with him or that he had the knife with him at the time he committed the burglary. She submitted that the reasonable inference was that the intruder entered the house with the weapon and that it was a planned and well executed assault. In these circumstances it would have been highly unlikely that the assailant would have left it to chance and expected to find a weapon in the house. The fact that he used the knife throughout his assault is also indicative that he would not have left it to chance. This proposition may very well be true but descends into the realms of speculation rather than inference.

69. In her alternative submission, the Solicitor General submitted that in the context of the evidence, where an assault was committed on the complainant after entry and items of jewelry and cash stolen a charge of aggravated burglary would have been made out on the alternative basis. In support of this submission, the Solicitor General relied on **R v Michael O'Leary [1986] 82 Cr. App. R. 341** and **R v Ronnie Peter Kelly [1993] 97 Cr. App. R. 245**.

70. In the written submission on behalf of the appellant it was submitted that the judge considered that evidence as to the intent to rape when the premises were entered as determinative of whether the offence of aggravated burglary was made out. It was further submitted that the judge misdirected herself as to the elements of the offence of aggravated burglary. An essential element was that at the same time the person has with him an offensive weapon. Reference was made to **R. v Francis & Another [1982] Crim L. R. 363).**

71. Section 231 (1) and (2) of the Penal Code (1995 Revision) provides for the offence of burglary simpliciter:

> "231 (1) Whoever-
>
> (a) enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2); or
>
> (b) having entered any building or part of a building as a trespasser steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm,
>
> is guilty of the offence of burglary and liable to imprisonment for fourteen years.
>
> (2) The offences referred to in subsection (1)(a) are offences of stealing anything in the building or part of the building in question, of inflicting on any person therein any grievous bodily harm or raping any woman therein, and of doing unlawful damage to the building or anything therein."

72. The offence of burglary may therefore be committed by a person who enters any building or part of a building as a trespasser with the intention of committing the offences specified in subsection (2) of section 231.

The offence may also be committed where a person having entered a building or a part of a building as a trespasser, steals or attempts to steal anything in the building or inflicts or attempts to inflict any grievous bodily harm on any person in the building.

73. Under section 231 (1) (a) the offence is committed at time of entering the building as a trespasser with the intent to commit any of the crimes specified in subsection (2): in this case with the intent to rape. Under section 231 (1) (b) the offence is committed where the person having entered the building as a trespasser steals or attempts to steal or inflicts grievous bodily harm.

74. Aggravated burglary is committed when a person commits any burglary either under section 231 (1) (a) or (b) and "at the same time" as the burglary has with him a firearm or offensive weapon or explosive. Count 1 of the indictment alleged that the appellant between 25 and 26 October 2004 entered the premises at #280 Bodden Road as a trespasser with the intent to rape therein and at the time of the said entry had with him a knife (emphasis the Court's).

75. In our opinion, the relevant period at which to prove that the appellant had the knife was when the burglary was committed i.e. the time of entry. The burglary would have been committed when he entered the premises as a trespasser and he had the intent to rape. For aggravated burglary, it would therefore be necessary to prove that on committing the burglary he had the knife with him The Court is fortified in reaching this decision by the decision of the Court of Appeal (Criminal Division) of England and Wales. In **R v Francis and Another [1982] Crim. L.**

R. 363. The observation of Lord Lane Chief Justice in **R v Michael O'Leary (1986) 82 Cr. App. R. 341** is apposite. Referring to aggravated burglary where the burglary itself fell under section 9(1)(a) of the Theft Act 1968, the Chief Justice said at p. 344:

> "If he had been charged under subsection (1)(a), the offence of burglary would be completed and committed when he entered and it would be at that point that one would have to consider whether or not he was armed."

76. The evidence of Ms Trucy was that she awoke and found him sitting in her bed. She saw that he was holding in his right hand a thin curved knife with a black handle. No attempt was made by the prosecution to ascertain whether Ms. Trucy could say whether that the knife was not one which belonged to the house. This may be due to the fact that Ms Trucy living temporarily at that house which belonged to her friends. Nor did the prosecution seek to lead any evidence from Ms Trucy if she could say what happened to the knife after her ordeal had been completed. In the absence of such evidence, there was nothing from which the judge could infer that the knife was brought to the house.

77. It is unfortunate that it was not alleged on a separate count that he had committed a burglary under section 231 1(a) i.e. that having entered the premises as a trespasser he stole there and at that time he had the knife with him. In those circumstances it would not be necessary to prove that he had the knife when he entered. Aggravated burglary would have been committed when he stole and he had the knife with him.

78. In the view of this Court, there was no evidence that the appellant had the knife at the time he entered #280 Bodden Road. Nor was there any

evidence from which the court could infer that he brought the knife with him when, as a trespasser, he entered the building. Had this issue been raised before the judge, the prosecution may well have sought and would have obtained an amendment to the indictment to allege aggravated burglary based on the commission of burglary under section 231(1)(b). In the absence of such an amendment, it does not appear that this Court has any authority to substitute a conviction of aggravated burglary based on a burglary under section 231(1)(b) for a conviction on an indictment which alleged aggravated burglary based on burglary under section 231(1)(a). Nor was the Court referred to any authority statutory or otherwise. For the reasons stated, the appeal against conviction for aggravated burglary must be allowed . The conviction on count one is therefore quashed and the sentence set aside. A conviction for burglary under section 231(1)(a) is substituted. The sentence in respect of this substituted conviction will be dealt with when dealing with the appeal against sentence.

79. In **R v Thompson [1977] NI 74** Lord Lowry, Chief Justice, giving the judgment of the Court of Appeal in Northern Ireland from a decision of a judge sitting alone had this to say at page 83:

> "While on the subject I might say a word on the duty of the judge when giving judgment in a trial under the 1973 Act. He has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal, it may be seen how his view of the law informed his approach to the facts."

80. The judge, as she was required to do, set out the conclusions she reached and her reasons for so concluding. She clearly appreciated that the main issue was the identity of the person who entered #280 Bodden Road and assaulted abducted and robbed Ms Trucy. The judge indicated that she was satisfied so that she felt sure that, on the evidence, the appellant was the person who entered #280 Bodden Road and assaulted abducted and robbed Ms Trucy. The judge accepted that the evidence of Mr Reat, the DNA expert,

> "...was abundantly clear that the material he used to extract the suspect's DNA was sperm. It was DNA extracted from sperm that was matched to the defendant's DNA...."

The judge was entitled to come to this conclusion. As stated earlier, the prosecution's case against the appellant and the evidence to support it was that as a result of the sperm found on the oral swabs and the cutting from the T-shirt the appellant was not excluded as the source of the sperm.

81. The appeal against conviction on the other counts are, therefore, dismissed and the convictions are affirmed.

Appeal against Sentence

82. The appellant has appealed against the sentence of 25 years' imprisonment imposed in respect of the counts relating to abduction and robbery. He has also appealed against the sentence of 25 years' imprisonment imposed on count 1. Because of the decision in respect of the conviction for aggravated burglary, that sentence has been set aside.

In written submissions on behalf of the appellant, it was stated that the judge took too high a starting point and consequently imposed a sentence that was manifestly excessive in all the circumstances.

83. The maximum sentence for abduction and for kidnapping is life imprisonment. The Court was referred to the guidelines for kidnapping as set out in the case of **Regina v Spencer & Thomas 5 Cr. App. R. (S) 413**. Based on that case, it was submitted that the sentence should be around 8 years imprisonment after trial. It was also submitted that, even in the presence of aggravating features in the appellant's case, a sentence of 25 years' imprisonment, which is more than three times the tariff recommended in Spencer's case, is not justified.

84. In respect of burglary simpliciter, it was submitted where the intent is to commit rape the Current Sentencing Practice B6-43E has a range of sentences on convictions of between 4 years and 8 years' imprisonment. However for the reasons stated below we are of the view that a term of imprisonment of 12 years should be imposed having regard to the circumstances of this case.

85. In respect of the robbery conviction, the Court was referred to cases of robbery by burglary using violence toward an occupant. These cases in the Current Sentencing Practice (B6-2.35) show that there is a wide range of sentences up to 15 years' imprisonment. Reference was made to **Attorney General's Reference No. 89 of 1999 [2000] 2 Cr. App. R. (S) 382**. It was said that having regard to these cases, the sentence of 25 years' imprisonment is far in excess of what is appropriate having regard to all the circumstances.

86. The Solicitor General submitted that, as the appellant had been previously convicted for rape and robbery in 1966, he ought to be sentenced to life imprisonment pursuant to the provisions of section 23 of the Penal Code (2005 Revision). It was further submitted that Ms. Trucy was subjected to a serious and sustained assault which the judge described as exceptionally unpleasant. Given the antecedent history of the appellant the nature and circumstances of the offences, the Solicitor General submitted that the sentence passed was not excessive. The Solicitor General submitted that, even if the judge was not disposed to passing the maximum sentence of life imprisonment a sentence at the higher end of the scale should be imposed. The Court was referred to **R v James O Driscoll [1986] 8 Cr. App. R. (S) 121, R v Anthony Gabbidion and Keith Bramble [1997] 2 Cr. App. R. (S) R v Millbery et al [2003] 1 WLR 546 R v Billam]1986] 1 WLR 349**.

87. In imposing sentence, the judge said:

> "....this was an exceptionally unpleasant and serious sexual assault against a young woman who was not only alone, but was peculiarly vulnerable because of the condition that prevailed in these islands after Hurricane Ivan.
> You broke into her home, armed with a knife, and committed no fewer than five sexual assaults on her, forcing her to perform oral sex on you until finally ejaculated into her mouth."

The judge rejected the Crown's submission that the appellant should be sentenced to a term of life imprisonment. She said this:

> The Crown has shown me your record. The Crown asks me to note that you have a record of sexual offending. This they do to draw the Court's attention to its power to sentence you to imprisonment for life.

> I am reminded by your attorney that you only have one previous offence, and that your record as it is does not support an inference that you are, as he put it, a serial rapist or serial sexual offender.
>
> I will say this on the subject of life imprisonment. The authorities that I read seem to suggest that they should reserve to offenders who have, one of the phrases was, a 'gross personality disorder', seemed to be a defendant whose psychiatric condition was such that he could not respond to a deterrent sentence by ceasing and desisting from anti-social behavior."

The judge did not call for a psychiatric report. Plainly, she accepted the submission that the appellant's record did not support the interference that he was a serial sexual offender: she must have taken the view that the appellant was not likely to be incapable, by reason of psychiatric disorder to respond to a deterrent sentence. She did not sentence the appellant on the basis that he was such a danger to female members of the public that he needed to be kept in prison for as long as possible. She sentenced on the basis that what was required was a long term of imprisonment by way of deterrent. That approach has not been challenged by the Crown. In passing a sentence of 25 years, she stated that she was of the view that the appellant's

> "....offending calls for what would be a longer than normal sentence, but does not reach a threshold for life imprisonment. Having regard to the totality of the offending , that is, the forced entry into the premises at night, armed with a knife , forcible binding and gagging of the victim , and the repeated offensives (sic) sexual assaults, the forcible oral sex tending to degrade the victim, taking it all together I say the appropriate sentence is 25 years."

88. In respect of abduction **Regina v Spence & Thomas** is of some assistance. The appellants were convicted of kidnapping and attempted

kidnapping. Spence was sentenced to 8 years' imprisonment in each count while Thomas was sentences to 6 years. The young girls who were the subject of the kidnapping were known to the appellant. Lord Lane, Chief Justice said at page 416:

> "It seems to this Court that, as with many crimes so with kidnapping, there is a wide possible variation in seriousness between one instance of the crime and another. At the top of the scale of course, come the carefully planned abductions where the victim is used as a hostage or where ransom money is demanded. Such offence will seldom be met with less than eight years' imprisonment or thereabouts. Where violence or firearms are used, or there are other exacerbating features such as detention of the victim over a long period of time, then the proper sentence will be very much longer than that."

89. In **R v O'Driscoll (1986) 8 Cr. App. R. (s) 121** the appellant was convicted of attempted burglary, robbery and causing grievous bodily harm with intent. A man of 80 was the occupier of a home to which the appellant had gained access. He was struck on his head with a hammer over his head, shoulders and leg. A lighted gas poker was held to his face. The man was tied with wire and gagged. The appellant was sentenced to 15 years' imprisonment.

90. Lord Lane, Chief Justice in dismissing the appeal stated:

> "Consequently it seems to us that in cases such as this nowadays, where thugs, because that is all they are, select as their victims old folk and attack them in their own homes and then torture them – that is what happened here – in order to try to make them hand over their valuables in this savage fashion, then this sort of sentence, whatever might have happened in the past, will be the sort of sentence that they can expect. One hopes that that, in so far as it lies in the power of this Court, may have some effect in protecting these old folk from these sort of savage, sadistic, cruel and greedy attacks."

The Chief Justice concluded that:

> ".....whatever may be the circumstances surrounding this man, what every may be his record, whatever may be his antecedents, it must be made clear that this sort of attack on these circumstances will recover this sort of sentence."

In **R v Gabbidon and Bramble [1997] 2 Cr. App. R (S) 19** Lord Justice Henry, giving the judgment of the Court of Appeal , observed that Lord Lane's statement does not only apply to the elderly but to anyone who is subjected to the commission of crimes in his own home.

91. In **R v Anthony Bernard Gabbidon and Keith [1997] 2 Cr. App. R (S) 19**, Gabbidon pleaded guilty to robbery and was convicted of wounding with intent to resist apprehension. Bramble committed three robberies in which people were attacked in their homes by a masked man carrying a weapon. Gabbidon was sentenced to 16 years' imprisonment for robbery and 12 months' consecutive for wounding with then intent to resist apprehension. Bramble was sentenced 21 years', 22 years' and 27 years' imprisonment respectively on the counts charging robbery with six months for assault all concurrent.

92. In giving the judgment of the Court Henry LJ observed at p.22:

> "We are dealing here with domestic robberies which in the present context means burglaries of domestic properties where burglars wish the house to be occupied in order to increase their haul by causing, by fear or by force, the occupant to open their safe and/or produce their jewelry and valuable from wherever they may be hidden. The potential effect on victims of such an invasion of their home, the place where they should be able to feel safe, does not end with the actual terror of the moment. It is well known, and realistically accepted by counsel for these

appellants, that the trauma can cause lasting psychological damages. The trial judge said that no judge should play down or disregard the risk of such trauma. With that we agree:
Next, as the judge again made clear, people surprised and terrified by the sudden appearance of an armed masked intruder, or worse, intruders, are very vulnerable in their homes, where they will probably be no one who can come to their assistance and as the occupants are at home the alarms are unlikely to be activated and entry will be that much easier."

93. Henry LJ went on to point out that:

> "…..this type of crime is very serious indeed. When we said earlier that these offences, in our view, are not the very worst encountered, the very worst are those involving firearms which these did not, and those involving gratuitous violence to the extent of torturing the occupant which again these did not. But having said that, with these two exceptions the crimes were at the 'top of' the domestic robbery category."

94. The Court of Appeal in passing an enhanced sentence of 20 years' imprisonment on Bramble under the provisions of Section 2 (2) of the Criminal Justice Act 1991 accepted that it was necessary to protect the public from serious harm from him. The Court considered that he was a dangerous man and must be sentenced to a long term of imprisonment to ensure so far as humanly possible so that he did not commit similar offences.

95. The appellant had been previously convicted of rape, robbery and assault occasioning actual bodily harm. He was sentenced to 11 years, 6 years and 3 years' imprisonment. These offences all occurred in 1996. On that occasion a visitor rose early, about 4.30am and went to watch the sunrise. The appellant raped her, using a considerable amount of violence. He forcibly caused her to perform oral sex on him. She was

robbed of her property. At the time, the appellant threatened to kill his victim in order to prevent her from identifying him. Even though she was maimed she was able to escape from him.

96. A number of aggravating features are present in the commission of these offences. Ms. Trucy was gagged with a sock which was pushed deep into her throat. He put his finger over her face. He then tied her hands behind her back. More than once he threatened to kill Ms. Trucy. He took the jewelry that she was wearing along with jewelry which was in a jewelry box. After the pillow was removed, a towel was placed over her face. He inserted his finger in her vagina through her underwear. On this occasion he told her to open her legs wider if not he would kill her. He also threatened to rape her. The appellant threatened her on a number of occasions. Shortly after his entry she was told not to scream or she will be killed. Later he told her that it was up to her if she wanted to live. At another stage she said she was aware that he had a knife and had threatened her on many occasions. Later he told Ms. Trucy that he would call his two friends from prison for her. Having again forced her to perform oral sex, he ejaculated in her mouth and told her that if she did not swallow it he would kill her. The appellant forced her to perform oral sex on him on seven different occasions, the majority of them taking place after he had abducted her and then brought her back to the residence.

97. This case is distinguishable from Regina v Spence and Thomas. In that case the young girls who were kidnapped were known to the appellant. While no firearm was used or actual violence was used by the appellant the aggravating features referred to above accompanied the abduction of

Ms. Trucy. Ms. Trucy was indeed fortunate that she was not raped. It is clear that the only thing which prevented this offence from taking place was the fact that she was having her menstrual period. While she was not held for a long time during the short period Ms. Trucy must have feared for her life having been the subject to a series of threats from the appellant to kill or rape her.

98. We are fully cognizant of what was said by Henry L J in **R v Gabbidon & Bramble supra,**. Ms Trucy awoke to find the appellant sitting on her bed. She was particularly vulnerable being in the house alone. The appellant clearly exploited the unfortunate conditions which existed in the aftermath of Hurricane Ivan and the devastation it caused. Having regard to the circumstances of these serious offences and the aggravating factors together with the antecedent history of the appellant it is, in our view, appropriate to impose sentences at the upper end of the scale. However, given the judge's view that this was not a case in which the appellant was such a dangerous man that he needed to be imprisoned for as long as possible, we consider that (as deterrent sentences) the sentences of 25 years' imprisonment were manifestly excessive and ought to be reduced to 20 years' imprisonment.

Chadwick, P.

Mottley, JA

Vos, JA