[2014] JMCA Crim 5

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 5/2013

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

CHRISTOPHER BROWN v R

Robert Fletcher for the appellant

Mrs Sahai Whittingham-Maxwell for the Crown

16 January and 7 February 2014

BROOKS JA

[1] On 16 January 2014, after considering the record of appeal and hearing submissions on behalf of Mr Christopher Brown, we made the following orders:

> "1. The appeal is allowed.
>
> 2. The sentence of three months imprisonment imposed by the Resident Magistrate on each count is set aside.
>
> 3. In lieu of those sentences the following fines are imposed:
>
> a. Count 1 - $100,000.00 or 3 months imprisonment at hard labour,
> b. Count 2 - $100,000.00 or 3 months imprisonment at hard labour,

c. Count 3 - $100,000.00 or 3 months imprisonment at hard labour,
d. Count 4 - $50,000.00 or 3 months imprisonment at hard labour,
e. Count 5 - $50,000.00 or 3 months imprisonment at hard labour,
f. Count 6 - $50,000.00 or 3 months imprisonment at hard labour,
g. Count 7 - $50,000.00 or 3 months imprisonment at hard labour,
h. Count 8 - admonished and discharged.

4. The appellant is granted three months with one surety within which to pay the fines."

[2] The orders arose from Mr Brown's appeal against sentences passed on him on 14 March 2013 by Her Honour Ms Judith Pusey, Resident Magistrate for the Corporate Area. The learned Resident Magistrate sentenced him to three months imprisonment on each of the eight counts of the indictment on which he had been charged. The sentences were ordered to run concurrently. Mr Brown had previously pleaded guilty to all of those counts and the learned Resident Magistrate imposed the sentences after having had the benefit of a social enquiry report, in which Mr Brown was the subject, and having heard a plea in mitigation by Mr Brown's counsel.

[3] The learned Resident Magistrate, in passing sentence, did not accede to Mr Brown's requests that he be given a non-custodial sentence and that his conviction not be recorded. Mr Brown contends that the sentences are manifestly excessive and has appealed against them. He was granted bail in the sum of $500,000.00 pending appeal.

[4] An examination of his appeal requires a listing of the counts for which Mr Brown was convicted and a statement of the facts leading to his convictions. The counts were:

a. three counts of forgery;

b. three counts of uttering a forged document;

c. one count of obtaining money by a false document; and

d. one count of conspiracy to defraud.

[5] The learned Resident Magistrate succinctly recorded the circumstances of the commission of those offences. They appear in the record of appeal as follows:

> "In 2012 the National Commercial Bank instituted a 'loan sale' initiative in which it relaxed it [sic] conditions for accessing a loan requiring among other things proof of income and a recommendation to qualify.
>
> This accused man desired to access a loan of $4,230,000.00 in the loan sale but did not earn sufficient funds from his job to qualify. He therefore created recommendations from his friends as to his creditworthiness, pay slips elevating his income to in excess of three hundred thousand dollars per month and a job title in a position that he did not fill. All these documents were fictitious.
>
> He submitted the documents to the bank and successfully obtained the loan and was servicing the loan. The fraudulent activity was discovered and he was questioned by the police. In the presence of his Attorney-at-Law he gave a caution statement to the police."

There is no gainsaying that these facts reveal serious offences.

[6] The learned Resident Magistrate, in setting out her reasons for the sentences imposed, noted that Mr Brown had shown no remorse and "no reflection that any

meaningful punishment should attend his criminal action". She found support in a portion of the social enquiry report that indicated that Mr Brown had sought to justify his actions to the probation officer who was conducting the interview. The portion of the report states as follows:

> "Ironically the Subject [Mr Brown] has sought to justify his actions, and has not indicated any regret for his actions..."

It is in that context that the learned Resident Magistrate imposed the sentences mentioned above.

[7] The question for the court is whether the sentences are manifestly excessive in the circumstances, given the fact that:

a. The social enquiry report indicated that Mr Brown was a businessman with, no previous convictions, a good reputation in his community and an unblemished character.
b. He had pleaded guilty to the offences.
c. He had assisted the police in their investigations.
d. He had been dutifully servicing the loan and upon the deception having been revealed, had repaid the sums involved.
e. The victim had suffered no financial loss.

[8] In his written submissions on behalf of Mr Brown, Mr Fletcher argued that the case was not one in which "the classical principles of sentencing – deterrence, prevention, rehabilitation and punishment cannot be reasonably achieved by any other

means". He argued that the learned Resident Magistrate had placed too great an emphasis on the lack of remorse by Mr Brown. Mr Fletcher submitted:

> "the purpose of sentencing might not be to reward or punish apparent contrition. The degree of demonstrated contrition is a personal thing that may even be affected by a simple human characteristic such as pride and bravado and is not a reliable basis upon which to ground a sentence, especially in light of a plea of guilty."

[9] In oral submissions, Mr Fletcher reinforced that point. He argued that the learned Resident Magistrate had not placed sufficient emphasis on the implications and effect of the guilty plea offered by Mr Brown. Learned counsel submitted that the import of the guilty plea had been "underrated". He concluded that, given all the circumstances, a custodial sentence was inappropriate.

[10] A fundamental principle applied by this court in appeals against sentence is that it does not alter a sentence imposed at first instance merely because it would have imposed a different sentence. This court adheres to the principle set out in **R v Ball** [1951] 35 Cr App R 164. Hilbery J, in delivering the judgment of that court said, in part, at page 165:

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

[11] The principles by which the sentencing court is to be guided were reiterated in **Regina v Beckford and Lewis** (1980) 17 JLR 202. In that case, this court recounted the aims of sentencing for criminal offences. The headnote accurately summarises the court's view as expressed in the judgment. It states:

> "There is no scientific scale by which to measure punishment however a trial judge must impose [a] sentence to fit the offender as well as the crime. There are 4 classical principles which must be considered by a trial judge when imposing sentence, these are retribution, deterrence, [prevention] and rehabilitation. In the instant case the offenders are two very young and inexperienced young men. There was no evidence to indicate that they were beyond redemption but at the same time imprisonment should be for an extensive period to demonstrate the courts' abhorrence for [the particular offence]."

[12] There is no doubt that the sentencer must take into consideration the character and antecedents of the individual offender. This was fairly recently emphasised by Morrison JA in **Andrae Bradford v R** [2013] JMCA Crim 17 at paragraph [11] of his judgment in that case. Nonetheless, "the punishment should at all times fit the crime" (**Benjamin v R** (1964) 7 WIR 459, 461). The Court of Appeal of Trinidad and Tobago, in **Benjamin**, interpreted that phrase to mean "that all five objects of sentencing policy should, if possible, be kept in view although they will not all be necessarily applied. Each case must depend on its own facts".

[13] The aim of imprisonment in the concept of prevention involves ensuring that the offender does not re-offend. In considering the element of prevention, the court must take into account the fact that the offender has pleaded guilty. That plea, by itself may

be indicative of remorse. Sir Denys Williams CJ, in delivering the judgment of the Court of Appeal of Barbados, commented on this aspect in **Keith Smith v R** (1992) 42 WIR 33. He said at pages 35-36:

> "It is accepted that a plea of 'Guilty' may properly be treated as a mitigating factor in sentencing as an indication that the offender feels remorse for what he has done. It is also clear that an offender with a good or relatively good record may have his sentence reduced to reflect that record."

[14] In considering sentence, the sentencing court must also consider, if it is available, information on the character of the offender. In **Everol Malcolm v R** [2012] JMCA Crim 63, Harris JA said at paragraph [17]:

> "...It is acknowledged that ordinarily, it is a requirement that prior to the passing of sentence, a sentencer must take into consideration not only the facts of the case but the conditions prevailing in the community at the relevant time and the character of the offender – see **Errol Campbell v R** (1970) 12 JLR 1317."

The reputation that the offender has in his community would be an indicator of character.

[15] In the instant case, the learned Resident Magistrate accepted that Mr Brown's plea of guilt was an admission of wrongdoing, but was of the view that he had shown no remorse for his actions. She relied on two main factors for that view. Firstly, she interpreted the plea in mitigation by Mr Brown's counsel (who was not Mr Fletcher) as meaning that Mr Brown "simply wanted to pay off the bank and end the matter there". Secondly, the learned Resident Magistrate found support in a statement in the social

enquiry report that Mr Brown "has not indicated any regret for his actions". Her view that there was lack of remorse was very influential in the sentence that she imposed.

[16] In outlining her reasons for judgment, the learned Resident Magistrate said, "despite the mitigating steps taken by [Mr Brown], his manifest contention that he should walk away from this unscarred, could not be entertained". The term "unscarred" is perhaps unfortunate, as there is no element of sentencing aimed at "scarring" an offender. Perhaps the learned Resident Magistrate meant "unscathed". Notwithstanding the use of that unfortunate term, we are of the view that the learned Resident Magistrate did make an error in her assessment of the appropriate sentence.

[17] We agree with Mr Fletcher that the learned Resident Magistrate, although she mentioned all the mitigating factors in Mr Brown's favour, did not give sufficient weight to the effect of the plea of guilt. Her stress on his lack of remorse overshadowed the impact of the guilty plea.

[18] We also find that she did not demonstrate that she gave sufficient weight to the favourable reputation that Mr Brown had in his community. The report stated that persons in his community viewed him "as a productive member of their community who is often seen on his way to and from work". The learned Resident Magistrate, in her reasons for the sentence, did not mention this aspect.

[19] Finding as we do, that the learned Resident Magistrate did err in these ways, we are at liberty to consider the sentence afresh. Section 268(2) of the Judicature

(Resident Magistrates) Act guides the court as to the maximum penalties that a Resident Magistrate may impose in respect of forgery-related offences. The offences to which Mr Brown pleaded guilty made him liable to a maximum sentence of five years imprisonment in respect of each count concerning the forgery and the uttering of a forged document. In respect of each of the counts of obtaining money by way of a false document and for conspiracy, he was liable to a maximum sentence of three years. The learned Resident Magistrate was also entitled to impose, instead of a sentence of imprisonment, a maximum fine of $1,000,000.00 for each of the offences on the indictment.

[20] The sentence of three months imprisonment that the learned Resident Magistrate imposed could not be considered as manifestly excessive in the context of those maximum penalties alone. However, in considering this particular offender, his antecedents and all the mitigating factors mentioned above, we find that a fine is more appropriate in the circumstances. Given the large number of counts, and the seriousness of each count we considered a global fine of $500,000.00 and divided it over the majority of the counts. It is for those reasons that we made the orders that are set out in paragraph [1] above.