[2016] JMCA Crim 25

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 13/2015

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

ROGER FORRESTER v R

Mrs Valerie Neita-Robertson QC instructed by Robertson & Co for the appellant

Mrs Natalie Ebanks-Miller for the Crown

22, 24 June and 22 July 2016

P WILLIAMS JA (AG)

[1] On 28 December 2012, Mr Roger Forrester, the appellant, was convicted in the Resident Magistrate's Court for the parish of St James for a breach of section 14(1)(a) of the Corruption Prevention Act. Mr Forrester was at the time a member of the Jamaica Constabulary Force (JCF). The information on which he was convicted reads, in part, as follows:

> "You being a public servant to wit: a member of the Jamaica Constabulary Force on Tuesday the 1st of July 2008 corruptly

> accepts [sic] directly from Raymond Campbell, the sum of Thirty Thousand Dollars ($30,000.00) being a gift for yourself or some other person to do an act in the performance of your public function."

[2] On 26 March 2013 a sentencing hearing was held at which time the learned Resident Magistrate received a social enquiry report, which had been requested by the defence. She also heard from a teacher who had known the appellant for over 25 years. This teacher was married to the appellant's aunt. The attorney-at-law, who had conducted the defence of the appellant at the trial, made a plea in mitigation for which he was commended by the learned Resident Magistrate. At the conclusion of the hearing the appellant was sentenced to 18 months imprisonment at hard labour.

[3] The appellant gave verbal notice of his intention to appeal his conviction and was admitted to bail pending his appeal.

[4] On 8 April 2013, the appellant filed two grounds of appeal, namely:

> "1. The conviction is unreasonable and cannot be supported by the weight of the evidence
>
> 2. The sentence is manifestly excessive."

[5] On 22 June 2016, when the matter came on for hearing, learned Queen's Counsel Mrs Neita-Robertson announced that she only wished to argue ground 2 - the matter of sentence. On 24 June 2016, after hearing submissions from Mrs Neita-Robertson and inviting comments from Mrs Ebanks-Miller on behalf of the Crown, we made the following orders:

1. Appeal against conviction is dismissed.
2. Appeal against sentence is allowed and the sentence of 18 months imprisonment is set aside
3. The sentence of 12 months imprisonment is ordered in its stead
4. Sentence to commence immediately.

The Facts

[6] The learned Resident Magistrate set out her findings of facts on which the verdict of guilty was founded in a manner which rendered the conviction unassailable. It is largely from these findings of facts that a record of the events that led to the arrest and eventual conviction of the appellant will be gleaned for the purposes of this decision. The matter had its genesis in an incident that occurred on the night of 23 April 2008 that culminated in the appellant arresting and charging Mr Greg Cameron, a friend of the complainant in this matter, Mr Raymond Campbell.

[7] This arrest was made following a report from Mr David Watson that Mr Cameron was involved in an incident where two men, one armed with a gun, had attempted to intercept the taxi that Mr Watson was operating along the Hopewell road in the parish of Hanover. Mr Cameron had been the passenger in the taxi and was the first to attend at the Sandy Bay Police Station to make a report to the appellant, who was the detective on duty at that time. However, based on the manner in which Mr Watson eventually described the unfolding of the incident, Mr Cameron was considered to be

implicated as an accomplice in the hold-up hence his arrest. He was charged for the offences of illegal possession of firearm and assault with intent to rob.

[8] Mr Cameron was eventually placed before the Western Regional Gun Court and admitted to bail. Upon his release on bail, Mr Cameron saw and was spoken to by Special Constable Metro McFarlane, who he regarded as a friend. Upon being told the name of the arresting officer in the case, Special Constable McFarlane commented that Roger Forrester was a "food man". Special Constable McFarlane then went on to advise Mr Cameron to "line up a thing" so that he, the appellant and the taxi driver could get 'a thing'. Mr Cameron upon asking what amount he should line up, was told "about $50,000.00".

[9] Raymond Campbell, the complainant, was also a police officer. He was contacted by Special Constable McFarlane and told that the appellant would do a thing for his friend, Mr Cameron. There were several conversations over the following days between the complainant and Special Constable McFarlane culminating in the complainant calling the appellant on 30 June 2008, which was the day before the trial was set to commence. Special Constable McFarlane, who was also arrested and charged for his role in this matter, met his demise before the trial commenced.

[10] After ascertaining whether Special Constable McFarlane had contacted him, the appellant told Mr Campbell that the amount to start would be $50,000.00 but the complainant in the matter against Mr Cameron, Mr Watson, would have to be contacted

to find out how much money he, Mr Watson would need. Mr Campbell told the appellant he only had $30,000.00 but would get the rest by the following morning.

[11] Mr Campbell, thereafter, made contact with the Anti-Corruption Branch (ACB) of the JCF. Superintendent Leon Clunis, then an inspector of police, led a team from the ACB to Montego Bay. On the morning of 1 July 2008, Mr Cameron and Mr Campbell met with the team of police officers from the ACB. Mr Campbell was handed $30,000.00 by Superintendent Clunis. The money was made up of $1,000.00 and $500.00 notes, each of which, had the marking 'ACB' on them.

[12] Corporal Nigel Pencil, one of the officers with the ACB team, fitted and activated a recording device on Mr Campbell who then proceeded to the Montego Bay Resident Magistrate's Court building where the Western Regional Gun Court is located. Another constable with the team went to the parking lot at the front of the courthouse to make observations.

[13] Mr Campbell saw and spoke with both Special Constable McFarlane and the appellant. Their conversations were recorded and edited transcripts of these conversations were admitted into evidence at the trial of the appellant.

[14] Among the conversations that were recorded the appellant was heard saying the following to Mr Campbell, at separate times:

> "mek we see wha a gwaan. Metro hole on me a talk to you mi talk to di crown council [sic] aready and base pan wha mi say to him yu understand, him a say him a go try run it dah way deh"

"...mi talk to di crown council [sic] mi tell him a little vibes still"

Further this exchange was also recorded:

"[Appellant]: If de man did say roo from early out

[Mr Campbell]: Lock up, lock up, you know sey honestly

[Appellant]: Yeah man

[Mr Campbell]: A touty dollar suh duh weh yuh a duh worst like how dat deh man deh nuh come

[Appellant]: Yeah man everything criss"

[15] In the course of that morning, the case against Mr Cameron was disposed of. The indictment on which Mr Cameron was pleaded was exhibited at the trial, and indicated that no evidence was offered and Mr Cameron was acquitted.

[16] After the appellant exited the court, he was observed by Constable Hinds walking with Mr Campbell into the car park and the two men went and sat in a motor vehicle parked 3 feet away from Constable Hinds. The appellant sat in the driver's seat and Mr Campbell in the front passenger seat. Mr Campbell took out the money he had been given and gave it to the appellant who was told it was only $30,000.00. The appellant looked at it and placed it in the inside pocket of the jacket he was wearing. He then exited the vehicle. Constable Hinds testified that he witnessed this transaction.

[17] The officers from the ACB approached the vehicle and accosted the appellant. The money was taken from the pocket of the appellant and the appellant was shown

the marks on the note by Superintendent Clunis. This part of the incident was recorded on a video recorder by Constable Hinds. A DVD of this recording was admitted into evidence.

[18] Detective Sergeant Clifford Cameron, another member of the ACB team, informed the appellant of the allegations made against him. The appellant was then arrested on reasonable suspicion of breaching the Corruption Prevention act. The appellant replied "Me no know why I collected the money. A Metro McFarlane made arrangements to collect the money".

[19] The learned Resident Magistrate found that these words proved that the appellant actually collected money from the complainant and knew for what purpose the cash was given to him. She went on to find that this aspect of the evidence "conclusively proves the [appellant's] participation and acquiescence in the corrupt scheme and cements his mens rea". Further she found as a total fabrication that portion of the appellant's evidence that the complainant had placed the money in his pocket for him to "buy himself a drink".

[20] Another significant finding of the learned Resident Magistrate concerned the role the appellant had played in the eventual dismissal of the charges against Mr Cameron. She considered the transcript of the conversations between the appellant, the complainant and Special Constable McFarlane and found that the appellant "was actively involved in having Mr Greg Cameron's case disposed of without a trial". After noting the words ascribed to the appellant she commented:

> "...Given our cultural reality and the context in which these words were said, I have interpreted them to mean that the defendant spoke with Crown Counsel, based on what he said to him the case against Greg Cameron was dismissed, Mr Campbell was glad that his friend was freed of the charges, things had gone as they planned and everything was just fine."

[21] The learned Resident Magistrate, in setting out her reasons for the sentence imposed, commenced by noting that it was the appellant's first conviction. The learned Resident Magistrate however gave much consideration to the fact that the appellant was a member of the JCF and a public servant. She stated:

> "38. ...The citizens of this country reposed a significant amount of trust and confidence in him. He was entrusted not only to serve and protect them, but also to uphold and enforce the Rule of Law. He has violated this trust. His conduct had led to the further catastrophic erosion of the confidence of the Jamaican people in the administration of justice. The entire justice system has been brought into disrepute. The reputation of the JCF and by extension those of his colleagues and other public servants, has taken another mighty blow.
>
> 39. It is my belief that public servants who are convicted for corruption are to expect long periods of incarceration. I am supported in my view by many decisions of the Court of Appeal including the judgment of Carey JA, as he then was, in **Blendon [sic] Blair v Regina** RMCA 129/88 delivered on July 18, 1987 [sic].
>
> 40. I wish to commend learned counsel for the defendant Mr Albert Morgan for the manner in which the defence and mitigation were conducted. However, the circumstances of this case coupled with the scourge of corruption which is crippling the growth and development of our nation, it is my hope that this sentence will also serve as a deterrent to likeminded individuals. The country and its citizens are seriously

> desecrated when acts of corruption are committed by public servants or officials."

The Submissions

[22] Learned Queen's Counsel quite properly and commendably acknowledged that there were no grounds on which the conviction could be challenged. She however sought to urge this court to reduce the sentence passed and requested that a suspended sentence instead of immediate incarceration be imposed.

[23] Mrs Neita-Robertson engaged this court in comprehensive and useful submissions on the law pertaining to sentencing. She submitted that there are jurisprudential principles which impact upon the determination of the appropriate sentence in a particular case. Thus, she reminded that "the court must have regard to the five purposes of sentencing:

> The punishment of offenders;
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> The reduction of crime (including its reduction by deterrence);
>
> The reform and rehabilitation of offenders;
>
> The protection of the public; and
>
> The making of reparation by offenders to persons affected by their offences."

[24] She noted observations of the High Court of Australia in two cases namely: **Veen v The Queen (No 2)** [1988] 62 ACJR 224 and **Channon v R** (1978) 20 ALR 1. These observations supported her contention that a simple sentence may satisfy a single goal

or multiple goals and sentencing is never an easy task and is generally accepted as being a complex exercise within itself.

[25] Mrs Neita-Robertson contended that the court must strive for uniformity in sentencing but also recognised that the sentencing function is a subjective one - subjective as to the convicted person as well as a judge. She noted that the Parish judges, formerly known as Resident Magistrates, are creatures of statutes and are thus bound by the statute which creates them and their sentencing discretion is bound by the various legislation from which they get their jurisdiction.

[26] She noted further that the sentence for the offence under consideration is set out at section 15(1) of the Corruption Prevention Act, which states:

> "Any person who commits an act of corruption commits an offence and is liable:-
>
> (a) on summary conviction in a Resident Magistrate's Court-
>
> (i) in the case of a first offence to a fine not exceeding one million dollars or to imprisonment for a term not exceeding two years, or to both such fine an imprisonment; and
>
> (ii) in the case of a second or subsequent offence to a fine not exceeding three million dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment."

[27] She then went on to note the appropriate factors that a court should consider when determining the appropriate sentence for an offence as being:

> "(a) the nature of the offence;

(b) any mitigating circumstances in respect of the actual commission of the offence, including possibly restitution;

(c) the interests of the victim (if there is one);

(d) the welfare of the community;

(e) the societal effect of the offence;

(f) the character, age, gender and conduct of the offender including the likelihood of a repetition of the offence".

[28] Mrs Neita-Robinson considered the case cited by the learned Resident Magistrate in her reasons for giving the sentence namely: **R v Brendon Blair** RMCA No 129/88 delivered on 18 January 1989 and urged that the instant case was distinguishable on the facts and the sentence of 18 months at hard labour in the instant case should be reduced.

[29] She submitted that ultimately the sentence passed on the appellant was not condign and ought to be reduced, taking into account certain facts and mitigating factors which arise in relation to him, as set out below:

"- That since the Appellant has been convicted [sic] eight (8) years ago and has been on bail pending appeal, he has been dismissed from the Jamaica Constabulary Force and has not been engaged in any questionable/lawbreaking activity;

- That the Appellant has suffered great hardship, mentally, physically and financially as a result of the conviction;

- That the Appellant is indeed remorseful for his actions;

- That the Appellant is a first time offender;

- That the Appellant has been deterred reformed and rehabilitated and has also sought solace in religion to atone for his misdeeds."

[30] Mrs Neita-Robinson has brought to our attention cases of a similar nature which have been disposed of in the Resident Magistrate's Courts and highlighted the types of sentence imposed in them. The range of the sentences seen in those cases went from the imposition of a fine to a term of imprisonment ranging from four months to 18 months imprisonment at hard labor, with 12 months being the most frequently imposed.

[31] Learned Queen's Counsel, however, ultimately requested a suspended sentence. She reminded this court of the provisions which allow for the imposition of such a sentence, namely, section 6 of the Criminal Justice (Reform) Act. She submitted that mandating a custodial sentence at this point will not achieve the primary objectives of sentencing, as the appellant "has been deterred reformed and rehabilitated and is not a threat to the public or wider society".

[32] Mrs Ebanks-Miller, conscious of the fact that the Crown is not usually required to participate significantly when the matter of sentencing is being reviewed by this court, was very helpful in assisting by commenting on the comparable sentences imposed in casess of this nature. She also highlighted the approach encouraged by this court in **R v Brendon Blair**.

Discussion and Analysis

[33] This court has consistently been guided by a fundamental principle in appeals against sentence which is that it does not alter a sentence imposed at first instance merely because it would have imposed a different sentence.

[34] The principle was set out by Hilbery J in delivering the judgment of the court in **R v Ball** [1951] 35 Cr App R 164 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."

[35] The accepted and well known purpose of punishing an offender is to satisfy the goals of:

(a) retribution;

(b) deterrence;

(c) rehabilitation; and

(d) the protection of the society.

[36] It cannot be gainsaid that there are certain offences where the need for punishment of the offender to be such that it serves as a deterrent to others, is of primary significance. The offence for which the appellant was quite properly convicted

is one such. While it is true that the appellant did not initiate the corrupt act, his willingness to participate in a plan to interfere with the course of justice in the way he did is no less reprehensible.

[37] The attitude of the courts in dealing with offenders who have committed acts of corruption was expressed in strong terms by Carey JA in **R v Brendon Blair**, where he stated:

> "...We could have thought that the incidence of corruption with the Force has been sufficiently publicized. This court has on occasions, prior to this, intimated that the sort of sentences which should be imposed for corruption by members of the Force will in fact be serious and condign. It is a matter of regret that police officers choose to continue to ignore what they know to be correct procedure and correct action on their part. They have taken an oath to uphold the law and are well aware that they cannot sell their services in this way. We wish to repeat, that if officers in the police force are caught and convicted of acts of corruption, they must expect sentences of the sort which were imposed in this case..."

[38] These words of Carey JA are as relevant today as they were when he used them in 1989, over 20 years ago. Regrettably, this might lead one to conclude that the type of sentences encouraged by him has not been serving as a deterrence. However, it remains necessary for the message to be sent that the level of propriety and professionalism expected from officers sworn to uphold the law requires appropriate periods of incarceration once they have swerved in any way from the expected high standard.

[39] In **R v Brendon Blair** a sentence of two years imprisonment on each of the three counts for the offences of bribery under the Corruption Prevention Act, to run consecutively was ordered by this court to run concurrently instead. The appellant there had approached relatives of an accused with a view to stifling his prosecution for the offence of possession of cocaine. He collected three separate sums of money from the relatives. This court found that "this was as brazen an example of corruption as one could find in the police force" and went on to say:

> "The appellant, over a period, continually pestered these persons in an endeavour to collect large amounts of money and succeeded in his aim. So that no mitigating factors could really be urged in his favour."

[40] It has been recognised that the appellant in the instant case did not initiate the corrupt act and this may be considered a mitigating factor in his favour.

[41] The maximum term of imprisonment to be imposed for matters such as this in the case of a first offence, is two years. It is clear that in imposing a term of 18 months the learned Resident Magistrate imposed a sentence which is on the high end of the scale.

[42] This court also noted the comparable sentences imposed for similar offences. While recognising, as has often been said, that these decisions are of no binding effect, they are certainly useful as an aid to arriving at an appropriate sentence.

[43] This court continues to maintain, as it did in **R v Brendon**, that police officers convicted of acts of corruption should ordinarily be sentenced to terms of

imprisonment, in the hope that such sentences will serve as a deterrent to ones who might be tempted to dishonour their position in this way. The appellant's willingness to participate in this act to pervert the course of justice and the steps he was prepared take to achieve the acquittal of the accused he had placed before the courts, for a reward, are such that a suspended sentence would not be appropriate in these circumstances. However, we have recognised that there is a mitigating factor on his behalf which ought to have been factored into the consideration of the appropriate sentence; which would mean that to be sentenced to the higher end of the scale was not warranted.

[44] There is one other factor which impacted on our decision to reduce the sentence imposed. This court could not help but be concerned about the time that had elapsed between the time of arrest and the time of the hearing of this appeal. The appellant was arrested in 2008, his trial commenced some two years later and continued on diverse days over the two years ending with his conviction in December 2012 and then his sentencing in March 2013. However, it is with even more concern that we note that it had taken over two years from the time the appellant gave notice of his intention to appeal for the papers to be made ready and transmitted to the registry of this court. The appellant had the shadow of this matter hanging over his life for a total of some eight years.

[45] Taking all factors into account we came to the view that a different sentence ought to have been passed. Hence we made the orders as set out in paragraph [5].