[2016] JMCA App 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 76/2007

APPLICATION NO 124/2016

STEVEN GRANT v R

Lijyasu Kandekore for the applicant

Mrs Andrea Martin-Swaby for the Crown

25 October and 10 November 2016

IN CHAMBERS

MORRISON P

[1] This is an application for an order "to Amend and Correct Errors in Sentencing". The application, which was filed on 28 June 2016, is purportedly made pursuant to section 61 of the Criminal Justice (Administration) Act ('the CJAA'). On 25 October 2016, having heard submissions from counsel on the matter, I reserved my decision to 10 November 2016 and on that date, I refused the application, for the reasons which now follow.

[2] The applicant is currently serving a sentence of life imprisonment for the offence of murder, contrary to section 2(2) of the Offences Against the Person Act ('the OAPA').

Section 3(1) of the OAPA provides that "[e]very person who is convicted of murder falling within ... section 2(2), shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years".

[3] The offence for which the applicant was convicted took place on 18 April 1999 and the applicant was in fact tried three times in respect of it. The first trial resulted in his conviction, but this was subsequently overturned on appeal to the Privy Council and the matter was remitted to the Court of Appeal to determine whether there should be a new trial[1]. The Court of Appeal ordered a second trial, but this trial ended in a mistrial, thereby necessitating a third trial, which took place before N McIntosh J ('the judge') and a jury in the Home Circuit Court. On 7 June 2007, following on from his conviction for murder at this trial, the applicant was sentenced to life imprisonment, with the judge stipulating that he should serve a period of 17 years in prison before becoming eligible for parole. The applicant was in custody continuously from the date of his first conviction on 26 February 2003 up to the date of his sentencing after the third trial on 7 June 2007.

[4] During the sentencing hearing at the third trial, extensive submissions were made to the court as regards the appropriate sentence to be imposed on the applicant. Among other things, it was submitted to the court that "an extended term of imprisonment ... would not serve the public's interest". The court was also urged "not

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[1] **Grant v The Queen** [2006] UKPC 2

to set a period before which parole should be considered" and "to bear in mind the five years that [the applicant] was behind bars".

[5] In considering the sentence to be imposed on the applicant, the judge observed as follows:

> "Your attorney has certainly made a very impassionate and excellent plea in mitigation on your behalf and has certainly given me much food for thought recognising that this act of sentencing remains one of the most difficult parts of the judge's duty, but I have to weigh the various factors and try to be fair not only to you ... as you stand before me, but I have to bear in mind the offence that you have been convicted of. A seventeen year old man is dead, eleven gun shot injury was to his back. You admitted to firing those shots ... You maintained that you acted to defend yourself. I wonder if you forgot what you did that night and how hard it was for the jury to understand how you can be under attack and your attacker ends up with eleven shots in his back ... I am also a little grateful to learn ...that after the incident you expressed some regret for the taking of a fellow human's life but you expressed none while addressing the jury and the question of whether or not you feel remorse after reviewing the evidence, I really do not think so. You really need to take consideration of the offence and the impact on the life of the [deceased's parents] who have lost their child someone they will never see again ...
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> **It is recognised that I have no choice but to sentence you for the duration of your life. Your attorney asked me in the first instance to let you serve seven years. The justice of this case, to my mind, does not allow me to do that, so in the circumstance the sentence of this court is that you been [sic] imprisoned and kept at hard labour for the duration of your life and you will be eligible for parole after serving seventeen years**." (Emphasis supplied)

[6] The applicant's application for leave to appeal from this conviction was refused by the Court of Appeal on 30 July 2010, when the court ordered that his sentence should begin on 7 September 2007[2]. No submission was made to the court on that occasion as to either the appropriateness of the sentence, the period fixed before eligibility for parole, or the date from which the sentence should be calculated.

[7] The applicant now seeks an order "to amend and correct errors of the sentencing court". Section 61 of the CJAA, under which the application is said to be made, provides as follows:

> "The Court of Appeal may, if it shall think fit, amend all defects and errors in any indictment or proceeding brought before it under this Act, whether such amendment could or could not have been made at the trial, and all such amendments as may be necessary for the purpose of determining the real question in controversy shall be so made."

[8] The errors of which the applicant complains relate to the sentencing judge's (i) imposition of a mandatory life sentence on the applicant; (ii) stipulation that a period of 17 years should elapse before the applicant would become eligible for parole; and (iii) failure to give credit to the applicant for the time spent in custody before trial and sentencing.

[9] The grounds on which the applicant seeks the order correcting these errors are as follows:

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[2] **Steven Grant v R** [2010] JMCA Crim 77

(a) The sentencing court erred when it thought that it had no choice but to sentence the applicant to amandatory life sentence;

(b) The sentencing court erred when it failed to consider the appropriate principle to be applied when determining the period of time that must elapse before the applicant becomes eligible for parole;

(c) The sentencing court erred when it failed to give the applicant credit for the time he had been incarcerated before the imposition of the current sentence.

[10] For the applicant, Mr Kandekore's principal submission was that, by considering that she had "no choice" but to impose a life sentence on the applicant, the judge misapprehended her sentencing powers under section 3(1) of the OAPA, by virtue of which she had a clear discretion as to whether or not to impose a life sentence or some lesser term of imprisonment, subject only to the minimum sentence of 15 years' imprisonment. But further, it was submitted, because the court was not alerted or reminded by counsel for the applicant of the principles and policies which should guide it in determining the period of time which the applicant should serve before becoming eligible for parole, it had ended up stipulating a period which was manifestly excessive. And lastly, it was submitted, the judge failed to give credit to the applicant for the period of four years and four months which he had spent in custody from the date of his sentence after the first trial up to the time of his being sentenced at the end of the

third. Mr Kandekore very helpfully referred me to a number of authorities on the relevant principles of sentencing and submitted that the judge's failure to be guided by them amounted to errors or defects in sentencing which section 61 of the CJAA empowered this court to rectify.

[11] Responding for the prosecution, Mrs Martin-Swaby submitted, firstly, that in saying that she had "no choice" but to sentence the applicant to life imprisonment, the judge was doing no more than to reflect her sense of the justice of the case. Secondly, that the applicant had now exhausted the machinery of appeals and that there was now no route available to him to challenge his sentence in the way in which he now sought to do it. And thirdly, that section 61 of the CJAA is applicable to errors in procedure and the like and that, given the specific avenue of appeals provided for by section 13 of the Judicature (Appellate Jurisdiction) Act ('the Act'), it cannot be utilised to give the applicant access to this court for the purpose of challenging his sentence. In this regard, Mrs Martin-Swaby reminded me, *generalia specialibus non derogant*[3].

[12] Mrs Martin-Swaby's third point raises a jurisdictional issue, which it may therefore be convenient to deal with first. As will have been seen, section 61 of the CJAA speaks to the power of the Court of Appeal to "amend all defects and errors in any indictment or proceeding brought before it under this Act". The first point to note is that, assuming for the moment that it is applicable to this case, section 61 gives a

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[3] Literally "the general does not detract from the specific". This maxim suggests that courts prefer specific provisions over provisions of general application where the provisions are in conflict.

power to the Court of Appeal, rather than to a single judge of the court. Therefore, in the absence of a rule similar to rule 2.11 of the Court of Appeal Rules 2002, which applies to civil appeals and gives power to a single judge of the court to make orders in certain specified cases, it appears to me to be clearly open to question whether, as a judge sitting in chambers, I have any jurisdiction to entertain this application at all.

[13] But I think that it is nevertheless right that, particularly in deference to Mr Kandekore's thoughtful submissions on the applicant's behalf, I should state briefly my views on them. Accordingly, I will next consider whether, by its terms, section 61 has been triggered by the circumstances of this case. It seems clear that, firstly, there is nothing to suggest that there has been an error or defect in the indictment on which the applicant was charged in this case. So the only question is whether the "errors" in the sentencing process complained of by Mr Kandekore can be said to be errors in a "proceeding", within the meaning of the section.

[14] The word is not defined in either the CJAA or the Interpretation Act, but the learned editor of Words and Phrases Legally Defined[4] refers to an old Australian case in which it was described as "a term of very wide appreciation[5]. In some contexts, it has

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[4] 2nd edn, vol 4, page 183

[5] **Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association** (1906) 4 CLR 488, 494 per Griffith CJ

been taken to mean "the invocation of the jurisdiction of a court by process other than writ"[6]; while in others it has been taken to connote "a step in an action"[7].

[15] In this case, I am rather inclined to think that, juxtaposed as it is with the word "indictment", the word "proceeding" was intended by framers of the CJAA to connote an analogous originating process, such as an information. But, be that as it may, I am quite satisfied that, even if the errors complained of by Mr Kandekore could be said to be errors in "a proceeding", the applicant's recourse must be by way of section 13(1)(c) of the Act, which provides for an appeal "with the leave of the Court of Appeal against the sentence passed on ... conviction unless the sentence is one fixed by law". It seems to me that it would be curious indeed for the legislature to have provided for two alternate routes of challenge to one's sentence after conviction in the Supreme Court, the one in a statute concerned with criminal justice administration generally, and the other in the statute which establishes and confers appellate jurisdiction on the Court of Appeal.

[16] Finally, on this point, I should mention, if only to exclude it, section 42L of the CJAA. This section was inserted into the CJAA in 2015 by virtue of the Criminal Justice Administration (Amendment) Act 2015 ('the amending Act'). It now provides a mechanism for persons who were sentenced to a prescribed minimum penalty before the appointed day of 30 November 2015 to apply to a judge of the Court of Appeal for

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[6] Per Lord Simon in **Berry (Herbert) Associates v Inland Revenue Commissioners** [1977] 1 WLR 1437, referred to in Stroud's Judicial Dictionary of Words and Phrases, 5th edn, vol 4, page 2029

[7] Stroud's, loc cit, referring to RSC Ord 64, r 13

a review of sentence. Section 42L(2)(a) of the amending Act provides that an application under the section must be made "within six months after the appointed day or such longer period as the Minister may by order prescribe". In the absence of any evidence that the six-month period has been extended by ministerial order, it seems clear that, as Mrs Martin-Swaby pointed out, the application in this case, which was filed on 28 June 2016, was out of time.

[17] I would therefore conclude that this application cannot be entertained pursuant to either section 61 or section 42L of the CJAA. The applicant, having already appealed unsuccessfully against both his conviction and sentence, has now exhausted his appeals. It is therefore not now open to me as a single judge of the Court of Appeal (nor, I daresay, to the court itself) to revisit the issue of sentence.

[18] But, in the event that I am wrong about all of this, I should also indicate for completeness that I do not think that Mr Kandekore's principal contention, which is that the sentencing judge wrongly considered that she had no discretion to impose anything other than a life sentence, is well founded. Taken in its context, it seems to me that, as Mrs Martin-Swaby submitted, the judge's remark that she had "no choice" but to sentence the applicant to life imprisonment was simply intended to convey that, in her view, the circumstances of the case warranted a sentence no less than that.

[19] This, as well as the other matters complained of as regards the sentence imposed on the applicant, was a matter for the discretion of the judge. It could well be in recognition of the court's traditional reluctance to interfere with the exercise of such

a discretion that the applicant's legal advisors did not see fit to advance any argument in support of the appeal against sentence when the matter was last before the court in 2010. While it is true that, contrary to what is now the court's usual practice[8], the sentencing judge did not give the applicant full credit for the time spent in custody before his third trial, I have no power, in my view, to address this particular deficit in the manner in which he was sentenced on an application such as this.

[20] These are my reasons for refusing this application.

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[8]As to which, see **Tafari Williams v R** [2015] JMCA App 36, para [7]