[2015] JMCA Crim 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 28/2013

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (AG)
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

JIMMY MURRAY v R

Delano Harrison QC for the applicant

Mrs Tracey-Ann Johnson and David McLennon for the Crown

29 June and 3 July 2015

ORAL JUDGMENT

MCDONALD-BISHOP JA (AG)

[1] This is an application by Mr Jimmy Murray (the applicant) for leave to appeal his conviction and sentence in the Clarendon Circuit Court on 22 March 2013 for the offence of rape contrary to section 3(1) of the Sexual Offences Act. The applicant was tried on a single-count indictment before V Harris J (Ag) (as she then was) sitting with a jury. The particulars of that offence were that on 29 December 2011 in the parish of Clarendon, the applicant had sexual intercourse with the complainant without her consent. He was sentenced to 18 years imprisonment at hard labour with the stipulation that he should serve a minimum of 12 years before being eligible for parole.

[2] The application was first considered by a single judge of this court who refused it. The applicant, nevertheless, renewed his application before this court.

[3] The primary evidence that was led by the prosecution at trial and which the tribunal of fact, evidently, accepted may be summarized as follows: On 29 December 2011, the applicant and the complainant, a 10th grade student at the time, were at home in Clarendon where they were both residing. They shared a close familial relationship (in law and not by blood) and had lived in the same household for about six years. It was general elections day and the complainant's mother had left the house at around 6:50 am to work at a polling station. At approximately 9:00 am the complainant was in her bedroom sleeping when the applicant entered her room. She was awakened by the applicant who put a pillow over her head which she managed to push off. She then saw the applicant's face and realized that he was the one who had entered the room. He was partially naked (wearing only a shirt) and she threatened him that she was going to tell her mother. He told her not to tell her mother and that he would give her $1,000,000.00. While the complainant was lying on the bed, the applicant proceeded to use one of his hands to cover her mouth while using his other hand to remove her shorts and underwear. A struggle ensued between them for about 20 to 30 minutes with the complainant trying to resist his advances but she was unsuccessful in doing so. The applicant proceeded to have sexual intercourse with her without her consent.

[4] After the applicant was finished, the complainant retrieved her cell phone and ran into the bathroom where she latched the door and sent a "Please Call Me" text message to her mother. Her mother received the text message while she was at the polling station and called the complainant. The complainant reported to her on the phone what had transpired. The mother returned home shortly thereafter and the complainant made the same report that the applicant had raped her. The evidence of the complaint to the complainant's mother was admitted into evidence (as a recent complaint) by virtue of the Evidence (Amendment) Act, the mother having died prior to the trial.

[5] The complainant was taken to the Lionel Town Police Station and later that same day to the Lionel Town Hospital. At the hospital, she was seen and examined by a doctor who was called as a witness by the prosecution. The doctor found injuries to the complainant's genitalia that, in her opinion, were consistent with "most likely recent, penile penetration consistent with recent sexual activity". She also opined, inter alia, that the force that was used to inflict the injuries she saw would have had to be moderate to severe and that the sexual intercourse could have taken place on the day of the examination or up to two days before the examination.

[6] The applicant in his defence made an unsworn statement from the dock in which he denied raping the complainant. His contention, in a nutshell, was that sexual intercourse did take place on the day in question but that it was consensual and was, in fact, initiated by the complainant. According to him, he was in his bedroom sleeping when the complainant came inside on two separate occasions making advances at him

which he initially rebuffed. On the second occasion, however, she started fondling his "private parts" and "he was captured in a moment of weakness". The complainant took out his penis and inserted it in her vagina. He never touched her. He ended his statement by saying that he is a hardworking man who is the breadwinner for his family. He cares for his children, step children and aging parents and he also attends church. These latter assertions as to the type of person he is managed to gain him a good character direction from the learned trial judge.

[7] The applicant in his application has set out his grounds of appeal as follows:

> "(a) Conflicting statement by victim & (witness)
>
> (b) Insufficient evidence to warrant conviction
>
> (c) Sentence manifestly excessive."

He also indicated in a paragraph (d) that "Further Grounds to be filed by my Attorney." No additional grounds were, however, filed.

[8] At the hearing of the application before this court, Mr Harrison, learned Queen's Counsel acting on the applicant's behalf, quite candidly conceded that in relation to conviction, the learned trial judge's "directions in her charge to the jury were generally pellucid". He submitted further that, particularly, with regard to the legal issues that arose in the trial, the learned trial judge's directions were "unimpeachable and comprehensive". He noted too that "plainly out of a sense of absolute fairness to the applicant, [the learned trial judge] even exercised her discretion in favour of directing the jury as to the 'special corroboration warning'".

[9] In relation to sentence, learned Queen's Counsel also opined that the learned trial judge took all relevant matters into consideration in determining the appropriate sentence. He noted that the learned trial judge was "plainly guided" by the provisions of sections 6(1)(a) and 2 of the Sexual Offences Act that prescribe the penalty for the offence of rape. In all the circumstances, he contended, it cannot be reasonably contended that the sentence is manifestly excessive. In the end, there was nothing that learned Queen's Counsel could have advanced in this court to impugn the summing up of the learned trial judge and the sentence she imposed.

[10] Counsel for the Crown, Mrs Johnson, also indicated that the Crown agrees with the views expressed by Mr Harrison as well as that of the learned single judge who, in refusing the application, had opined that "the learned trial judge summed up the case impeccably and the jury obviously found the evidence compelling". Mrs Johnson submitted that in the circumstances the verdict is reasonable; there has been no miscarriage of justice and so the conviction should, therefore, stand.

[11] We do agree with the views expressed by counsel for both sides in relation to the treatment of the case by the learned trial judge and the merits of this application for leave to appeal. We do find, simply put, that the applicant's effort to appeal both conviction and sentence is hopeless. We do share the views of the learned single judge who had refused the application that the learned trial judge "summed up the case impeccably". In a clear, comprehensive and balanced direction, the learned trial judge presented to the jury for their consideration both the case for the prosecution and the case for the applicant.

[12] The resolution of the case rested squarely on the credibility of the complainant and the applicant on a very narrow issue as to whether the sexual intercourse, which was admitted by the applicant, was consensual or not. The jury, having been properly directed on all relevant areas of the law and as to how they should treat with the evidence adduced by the prosecution and the unsworn statement of the applicant, obviously, found the complainant to be a witness of truth and the evidence against the applicant so compelling so as to satisfy them to the extent that they were sure of his guilt. The conviction is, therefore, unassailable and should stand.

[13] We also find, in total agreement with the views expressed by Mr Harrison, that the sentence of 18 years imprisonment at hard labour with the eligibility for parole set at 12 years cannot reasonably be said to be manifestly excessive. The starting point for a consideration of the appropriate sentence is the statutory provision under which the applicant was charged which was section 3(1) of the Sexual Offences Act. The learned trial judge started with a consideration of the relevant provisions of the statute, noting as she did that the minimum sentence prescribed by the statute is 15 years with the minimum period of eligibility for parole being 10 years. She therefore paid due regard to the provisions of the statute as she was obliged to do.

[14] In arriving at 18 years and the minimum sentence that the applicant should serve before becoming eligible for parole, the learned trial judge quite correctly took into account, as matters going to the applicant's credit, his antecedent history which included his age; his hitherto unblemished criminal record; his industry and his value to his family as breadwinner and provider. She weighed those mitigating features against

the aggravating features which, as we see them, were primarily, the seriousness and gravity of the offence; the circumstances of its commission and the relationship between the applicant and the complainant. The most striking aggravating feature, in our view, that was properly taken into account by the learned trial judge and which warranted the prominence that she gave to it in determining the appropriate sentence, was what may be aptly described as the "egregious breach of trust" committed by the applicant. The complainant was not only a minor but, above all, someone to whom he stands in *locus parentis*. As the learned trial judge observed:

> "...And you were sworn to protect her…the very thing that you did to her is the very thing that you were supposed to protect her from. So she suffered sexual abuse in her own home, at the hand of [her relative] in a place where she was supposed to feel safe and protected. There is no greater breach of trust."

[15] The learned trial judge cannot be faulted in her reasoning and ultimate determination that a sentence of 18 years imprisonment, being three years above the statutory minimum sentence, was warranted in all the circumstances of the case. It cannot reasonably be said, therefore, that the sentence imposed by the learned trial judge is manifestly excessive so as to justify interference by this court. In the result, the application to appeal sentence cannot succeed.

[16] We, therefore, order that the application for leave to appeal against conviction and sentence is refused and the sentence is to be reckoned as having commenced on 22 March 2013.