[2016] JMCA Crim 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 102/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

KURT TAYLOR v R

Yushaine Morgan for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Miss Cheryl-Lee Bolton for the Crown

13 June and 1 July 2016

F WILLIAMS JA

[1] On 13 June 2016 we heard this appeal and made the following orders:

> "1. The appeal is allowed.
>
> 2. The sentence of 5 years' imprisonment at hard labour imposed on 5 December 2014 is hereby set aside and a sentence of three (3) years' imprisonment is substituted therefor.
>
> 3. The court orders the immediate release of the appellant on compassionate grounds, and further orders that the remainder of his sentence of three years' imprisonment be suspended for a period of two years from today's date.
>
> 4. The sentence of three years' imprisonment is to be reckoned as having commenced on 5 December 2014."

[2] This is the fulfillment of our promise made then to put our reasons in writing.

[3] This is an appeal against sentence only, the appellant having on 3 December 2014 pleaded guilty to the offence of knowingly possessing identity information of persons contrary to section 10(1) of the Law Reform (Fraudulent Transactions) (Special Provisions) Act, 2013 (the Act). By item 8 of the schedule to the Act, wherein are listed the offences and penalties, the penalty for a breach of the particular subsection under which the appellant was charged is stated to be:

> "Fine or imprisonment not exceeding fifteen years or both such fine and imprisonment".

[4] The guilty plea was entered in the circuit court for the parish of Saint Elizabeth. The appellant was sentenced on 5 December 2014 to serve a period of imprisonment of five years at hard labour.

[5] He now appeals that sentence, having been granted leave to do so by a single judge of this court on 7 March 2016. In the notice of appeal filed by the appellant, these are the stated grounds:

> "a) That the sentence imposed by the Learned Trial Judge was harsh and manifestly excessive having regard to all the circumstances.
>
> b) That the Learned Trial Judge failed to give adequate consideration to the Appellant's Guilty Plea and Good Social Enquiry Report in passing her sentence.
>
> c) That the Learned Trial Judge erred in finding that the Appellant was not remorseful.
>
> d) That the Learned Trial Judge erred in taking into consideration the effect of illegal Lottery scamming on victims when that offence was not a part of the instance [sic] case or the facts outlined."

[6] However, in skeleton submissions dated and filed 9 June 2016, Mr. Yushaine Morgan, counsel for the appellant abandoned ground b and what he refers to as ground 5 (which, actually, does not exist), the former on the basis that it overlaps with ground c. In a nutshell, therefore, the bases of the appellant's challenge to his sentence are that: (i) it is manifestly excessive; (ii) the learned judge erred in regarding him as not having been remorseful; and (iii) the learned judge also erred in considering the effects of lottery scamming on victims.

The background facts

[7] The facts as presented by the prosecution (to be found at pages 2 and 3 of the transcript) after the plea of guilty was entered were to the effect that, on 30 November 2013, the police, acting on information and with the intention of executing a search warrant under the Act, went to the appellant's residence in Jerusalem Housing Scheme, Santa Cruz, in the parish of Saint Elizabeth. A bunk bed in a bedroom in which the appellant was found was searched and a sheet of paper with names along with United States telephone numbers and addresses (commonly referred to as a 'lead sheet') were found below the top bunk. This sheet of paper was seized along with two cellular telephones. In the contacts folder of one of the phones, a name and telephone number that appeared on the lead sheet was found. On being cautioned after being arrested and charged, the appellant made no statement.

The sentencing process

[8] In the sentencing process, the learned judge had the benefit of the antecedents of the appellant, a social enquiry report and the submissions of counsel who appeared for him.

[9] In briefest outline, the antecedent report portrayed the appellant as someone who had been gainfully employed since leaving school, working at various times as a truck driver, mechanic and, at the time of his arrest, as a cellular-telephone technician. At age 32 at the time of his sentencing, he had no previous convictions. The general comments that ended the report stated:

> "The accused is said to be a very hard worker who works for his living and a good father who spends a lot of time with his daughter."

[10] The social enquiry report was not read into the record. However the learned judge made reference to its contents in her sentencing remarks and we were helpfully provided with a copy of it by counsel for the appellant. It mirrors the image of industry that emerged in the reading of the appellant's antecedent history. It indicated that even after being shot in 2010 and, as a result, being confined to a wheelchair, he continued to try to earn an honest living for himself and to provide for his then 10-year old daughter. The following were the words of parts of the last two paragraphs of the social enquiry report:

> "Citizens along with his sister have expressed how surprised they were when they learnt that he was charged for this current offence. They are in sympathy with him and are asking that he be given a non-custodial sentence.

> Mr. Taylor is charged with a serious offence: when his antecedent prior to this incident and his physical status is [sic] considered however there appears to be ground for clemency. Perhaps the honourable court could consider a non-custodial sentence in disposing of this matter."

[11] The oral submissions made on the appellant's behalf in the sentencing process sought to capitalize on these positive features of both the social enquiry report and the antecedents. Counsel tried to persuade the learned judge not to impose a custodial sentencing, urging the learned judge to consider, *inter alia*, two cases in which he said that non-custodial sentences were imposed for similar offences: (i) one he referred to as **R v Kemarley Ballentine** in which he said that on 29 September 2014 a fine of $300,000.00 was imposed in the circuit court for the parish of St Catherine; and (ii) **R v George Thompson**, a 24-year old, in respect of whom he said a probation order was made in the circuit court for the parish of Saint James on 25 January 2014. Counsel also emphasized that the appellant was "extremely physically challenged".

The sentencing remarks

[12] In her sentencing remarks, or even during the plea in mitigation, the learned judge observed that there were cases other than those to which she was referred by defence counsel in which custodial sentences were imposed. And even in respect of those cases to which counsel referred, it appears from her questioning of counsel and his responses that the age of one person and the court regarding the other as destitute were considerations that helped to persuade the judges in those cases to have imposed non-custodial sentences.

[13] It is clear, however, that what seems to have weighed heavily with the learned judge in this case was her perception, based on her interpretation of the contents of the social enquiry report, of what she regarded as the appellant's lack of remorse. This is reflected in the learned judge's observation at page 19 of the transcript, where the following is stated:

> "...it is significant to my mind, is that there is a lack of remorse expressed by Mr Taylor, not even an acknowledgement of the offence by Mr Taylor."

[14] Similarly, at page 21 of the transcript, the learned judge is recorded as saying that:

> "...he had not expressed one iota of remorse for the offence or whether or not he intends not to do such a thing again."

[15] Otherwise, the learned judge in her remarks demonstrates an awareness of and considers many of the various principles of sentencing. It was her view that a custodial sentence was suited to this appellant in this case.

The appeal

[16] When this appeal came on for hearing, the court had the benefit of a new social enquiry report dated 25 May 2016. Its contents addressed in greater detail than the first social enquiry report did (and to some extent, could), the appellant's physical condition and the effects that that condition was having on him in serving his sentence.

[17] These were among the more-significant passages indicating the challenges being faced by the appellant set out at page 5 of the report:

> "**Response to Social And Community Life in Prison**
> Mr. Taylor, from all indication has operated within his limitations. He participates as best as he can and has abided by the institution's rules and regulations and as such, he has no institution breach recorded against him. His conduct and rapport among fellow inmates and Correctional Officers is deemed commendable.
>
> **Current or Potential Welfare Problems**
> Due to his disability he is unable to receive adequate care.
>
> ...
>
> **Attitude Towards Offence(s):**
> Applicant explained that since the incident he has been more attuned to the issue of Scamming. Persons are severely affected by this crime which has plagued the society and persons should desist from being a party to this offence. He cited that he has learnt the hard way."

[18] At page 6 of the report, it is stated, *inter alia*, that:

> "He is admired and commended by correctional staff as well as his peers…"
>
> "…the nature of the consequences being endured is almost inhumane given the fragility of his health and the nature of the surroundings; he is always at risk for infection to [sic] sores that are a challenge to heal in more pristine conditions."
>
> "On the premise of the afore-mentioned, it is being recommended that subject be favourably considered for release on Compassionate Grounds."

[19] It was these contents that led the Crown commendably to declare that it would not be opposing the early release of the appellant on compassionate grounds.

[20] We, however, decided to give the matter further consideration and to go into the substance of some aspects of the appeal itself as a result of some concerns that we had with the way in which the sentencing process was approached in this case.

Discussion and analysis

The central issue

[21] It may be best to state the issue in this case broadly as being: whether the sentence imposed was manifestly excessive as a result of the learned judge's view that there was no indication of remorse on the part of the appellant and a result of the learned judge's giving consideration to the effect of lottery scamming on victims; and whether the learned trial judge erred otherwise in principle in the sentencing of this appellant.

The appellate court's power of review

[22] The best starting point in a matter of this nature has been correctly identified by counsel for the appellant, at page 3 of his written submissions.

[23] At paragraph 7 thereof, he cites the case of **R v Ball** [1951] 35 Cr App R 164, in which Hilbery, J stated at page 165 as follows:

> "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. <u>It is only when a sentence appears to err in principle that this Court will alter it</u>. 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." (Emphasis added).

[24] Miss Cheryl-Lee Bolton for the Crown also referred to this dictum. The Crown and counsel for the appellant also both cited the following dictum from the case of **Regina v Sydney Beckford and David Lewis** (1980) 17 JLR 202, where in the headnote thereof it is stated:

> "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."

Was there an error in principle in this case?

[25] We have observed that in this case the learned judge used as a starting point for the sentencing process, the maximum sentence of 15 years. At page 22, lines 14 to 18 of the transcript, the learned judge's reduction of the sentence by one-third on two occasions, before arriving at the ultimate sentence of five years, confirms the importance to her of the maximum period of 15 years' imprisonment as a starting point.

[26] In this regard, the learned judge fell into error. What was required, on the authorities, was a starting point of a sentence that was the most appropriate sentence in these particular circumstances; and then to make the discounts for matters related to the particular offender, such as the guilty plea and his good record - that is that he had no previous convictions. In **Regina v Delroy Scott** (1989) 26 JLR 409, Carey P (Ag, as he then was), writing on behalf of the court in reviewing sentences, stated that the court used as a starting point "...the range of sentences imposed in [the High Court

Division of the Gun Court] over the last three years, where the second count is wounding with intent. The average for this period was about ten years." (Emphasis added). The court in that case on account of a guilty plea then proceeded to discount by two years the sentence initially imposed.

[27] In **Kirk Mitchell v R** [2011] JMCA Crim 1, Brooks JA (Ag), as he then was, writing on behalf of the court, in reviewing sentences imposed for, *inter alia*, wounding with intent, was of the view that "... the current norm of 15 years, for the offence of wounding with intent (the most serious of the instant offences), should be used as the standard". (Emphasis added).

[28] It should be remembered that in these particular circumstances, the offence consisted of one lead sheet with a telephone number found in one of the cellular telephones that was seized and that the appellant without doubt had no previous convictions. If it was appropriate to have started with the maximum sentence in this case; then with which figure would it be appropriate to start when dealing with, say, a person with a previous conviction or convictions for the offence who was found in possession with 100 lead sheets?

[29] A most helpful case illustrating the importance of the correct approach is that of **Regina v Everald Dunkley** RMCA No 55/2001, delivered 5 July 2002. In that case in which this court allowed an appeal against sentence, varying a sentence of 12 months' imprisonment and substituting it with one of eight months, the court conducted a review of the principles of sentencing and outlined how the sentencing process ought

always to be approached. At page 3 of the judgment, P Harrison JA (as he then was), writing on behalf of the court, observed as follows:

> "The sentencer commences this process…by determining, at the initial stage, the type of sentence suitable for the offence being dealt with. He or she first considers whether a non-custodial sentence is appropriate…If so, it is imposed. If not, consideration is given to the other options, ranging from the suspended sentence to a short term of imprisonment." (Emphasis added).

[30] At page 4 of the judgment, it was also further observed:

> "If therefore the sentencer considers that the 'best possible sentence' is a term of imprisonment, he should again make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise. The factors to be considered in mitigation of a sentence of imprisonment are, whether or not the offender has:
> (a) pleaded guilty;
> (b) made restitution; or
> (c) has any previous conviction.
>
> These factors must be considered by the sentencer in every case before a sentence of imprisonment is imposed."

[31] So that, for example, if the learned judge in the instant case had started with a figure of, say, between seven and nine years as being the "best possible sentence" in this particular case, then the two discounts of one-third might have taken her to a sentence of some two - three years' imprisonment, had she ruled out the possibility of a non-custodial sentence. It was very important that there should have been some demonstration of a consideration of a non-custodial sentence as well for two reasons: (i) that that is what is required by authorities such as **Regina v Everald Dunkley**, and given the various sentencing options available to any sentencing court; and (ii) for this

offence itself, the option of the imposition of a fine is expressly stated in the Act, so that the imposition of a custodial sentence should never be regarded as automatic for an offence of this nature, the deleterious and far-reaching effects of lottery scamming notwithstanding.

[32] We had a concern as well in relation to the learned judge's finding that there was no expression of remorse by the appellant. This concern arose for two reasons: (i) the authorities have observed that a plea of guilty in and of itself may very well be regarded as an indication of remorse; and (ii) issues in relation to the first social enquiry report.

[33] In relation to the effect of the guilty plea, it is expressly stated at page 4 of **Regina v Everald Dunkley**, that:

> "A plea of guilty is an indication of repentance and a resignation to the treatment of the court."

[34] In the case of the first social enquiry report, it appeared to have been prepared in no more than a day: it having been requested on 3 December 2014 and being dated 4 December 2014. We wonder whether the process for obtaining the information that the report contained would not have involved questions being asked of the appellant by the probation officer preparing the report; and, if so, whether the possibility exists that the appellant simply might not have been asked specific questions eliciting responses concerning remorse. Additionally, although the first report makes reference to citizens' view, it does not contain a section headed "Community Report" as we are accustomed to seeing in these reports; and, indeed, as the second report contains. Also, the first report is different from the second in two other respects: (i) the first report attributes

the appellant's paralysis to a shooting by the police; whereas the second report attributes it to shooting in the course of a robbery by gunmen. (ii) The copy of the first report with which we were provided is an unsigned document consisting of three-and-a-half letter-sized sheets; whereas the second, which clearly gives more detail, consists of some six legal-sized sheets. In summary, the first report gives the impression of a document prepared in somewhat of a hurry; and we would be reluctant to set great store by it for all of the above reasons and to use it to conclude definitively that there was an absence of remorse on the part of the appellant.

[35] We consider to be appropriate for this case the application of the observation of Brooks JA in the case of **Christopher Brown v R** [2014] JMCA Crim 5 at paragraph [17] thereof where he observed:

> "[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." (Emphasis added).

[36] Those were the observations of the court in that case in substituting fines for periods of imprisonment. We similarly found that there was an undue stress placed on what the learned judge perceived to have been an absence of remorse on the part of the appellant in this case.

The appropriate sentence

[37] First, we think that the learned judge could have given some consideration to the imposition of a non-custodial sentence, given the particular facts and circumstances of

this case, including the appellant's physical condition. However, if she was correct in her view that a custodial sentence was appropriate, then, while not attempting to lay down any guideline for matters of this nature, it seemed to us that, starting out with the best possible sentence and making the required reductions on account of the appellant's good record and guilty plea, an appropriate custodial sentence in this case would have been a period of some three years' imprisonment. And, in the light of the particular circumstances of this case posed especially by his disability and his inability to receive adequate care, we thought it best to release him immediately and suspend the remainder of his sentence as a deterrent measure.

[38] In coming to this figure, we have, of course, considered the submissions of the Crown and the examples of sentences imposed in the circuit court for that parish by another judge which the Crown proffered. However, while we are always grateful for any help in addressing issues in appeals, it seemed to us that the effectiveness of this assistance might have been enhanced by a wider canvassing of sentences – that is, by reference to sentences imposed by other judges in other circuits, rather than reference to sentences imposed by one judge in one circuit.

[39] We could, however, find no fault with the learned judge having given consideration to the ultimate effect of lottery scamming, as the lead sheet is used (and even needed to be used) to commit the crime of 'scamming'.

Conclusion

[40] We are aware that sentencing is perhaps the most difficult aspect of any trial or court proceedings; and that there is no significant lessening of the challenge that sentencing presents even where a guilty plea is entered. We note as well that this Act is relatively new and that attempting sentencing in respect of any new legislation is for judges to, as it were, chart a new course. This is underscored by the fact that the Act itself, at section 20, provides for its own review by a committee of both Houses of Parliament not later than five years after its coming into force (28 March 2013). This is born out of a realization, no doubt, that it is for Jamaica a new area of law and piece of legislation and some adjustments might be necessary.

[41] Notwithstanding that, however, the record sufficiently demonstrates errors of principle on the part of the learned judge, thus necessitating our intervention. Although with new and relatively-new legislation there might be challenges in ascertaining the average or norm or range of sentences to use as a starting point and, in those cases, the sentencing judge will have to do the best that he or she can do, that starting point ought never to be the maximum sentence.

[42] It was for the foregoing reasons that we made the orders set out herein at paragraph [1].