[2015] JMCA Crim 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 60/2014

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)

SAMUEL BLAKE v R

Miss Yolanda Kiffin for the applicant

Mrs Suzette Whittingham-Maxwell for the Crown

11 March 2015

ORAL JUDGMENT

McDONALD-BISHOP JA (Ag)

[1] On 19 May 2014, Mr Samuel Blake, the applicant, pleaded guilty before David Fraser J, sitting in the Circuit Court for the parish of Westmoreland, to one count on an indictment that charged him with the offence of having sexual intercourse with a person under the age of 16 years contrary to section 10(1) of the Sexual Offences Act.

[2] The particulars of the offence were that on a day unknown between 1 December 2012 and 31 December 2012, in the parish of Westmoreland, he had sexual intercourse with the female complainant who, at the time, was under 16 years old.

[3] The facts, as briefly outlined to the learned trial judge were that the complainant was born in June 1997 and that she knew the applicant as Ben. He operated a shop in the district in which she lived. A relationship was struck up between them in or around October 2012. It became serious over time and in December 2012 the applicant had sexual intercourse with the complainant. The matter was brought to the attention of the police when the complainant was discovered to be pregnant and she alleged at the time that the applicant was the father of her child. The applicant was taken into custody by the police based on that report. He, initially, did not accept paternity but a paternity test, by DNA analysis, was done after the birth of the child which showed that he could not have been excluded as the father of the child and that there is a 99.99% chance that he is the father.

[4] The applicant's response to the facts stated, as gleaned from the plea in mitigation and the social inquiry report that was before the learned trial judge was, basically, that he was lured and tempted by the complainant who would attend on him at his shop dressed in revealing clothes and making sexual advances to him. There were two areas of dispute between the version advanced by the prosecution and that advanced by the applicant. Those related to where the sexual intercourse took place and whether or not the complainant had told him she was 16 years old. The learned trial judge resolved those areas of dispute in the applicant's favour by accepting his version concerning those matters.

[5] As can be seen from the facts that were outlined, the complainant would have been about six months shy of her 16th birthday at the time the sexual intercourse took place. It was also revealed during the course of the sentencing hearing that the applicant was, at the time, about 51 years old.

[6] After a detailed consideration of (i) the facts outlined by the prosecution; (ii) the applicant's response to those facts; (iii) a social inquiry report; (iv) an antecedent report as well as (v) a rather moving plea in mitigation by counsel appearing for the applicant at the time, the learned trial judge imposed a custodial sentence of four years imprisonment at hard labour.

The application for leave to appeal

[7] The applicant, being aggrieved by that sentence, subsequently filed an application to this court for leave to appeal against his sentence and for bail pending the hearing of the appeal. The application for bail was placed for consideration before a single judge in chambers who refused the application for bail but directed that the application for leave to appeal should be heard by the court. It is, therefore, based on that direction that the application for leave to appeal has come before this court for consideration.

[8] The applicant filed one ground of appeal, which stated as follows:

> "(1) The sentence of four years Imprisonment at Hard Labour imposed on the Applicant/Appellant by the Learned Sentencing Judge is manifestly excessive, given all the circumstances."

[9] Miss Kiffin, appearing on his behalf before this court, expanded tremendously on the single ground in her written submissions that she called 'skeleton arguments'. We must state for the record, in commendation of learned counsel, that there is nothing skeletal about those arguments. They are, indeed, comprehensive and enlightening submissions on the law pertaining to sentencing that she has put forward, with admirable tenacity, in her effort to persuade this court that the sentence imposed on the applicant should be reduced. We will surely not do justice to her detailed submissions made before us but we have made an effort to summarize, as best as possible, the gravamen of the arguments she presented in advancing the single ground of appeal. We will attempt to highlight, at this juncture, the basic planks of those arguments under the various headings as put forward by her.

The applicant's contention

(i) **The plea of guilt**

[10] Learned counsel contended, firstly, that the applicant had pleaded guilty at the first opportunity and so the learned trial judge was obliged to indicate as a matter of law not only that he had taken into account the fact that the applicant had pleaded guilty but also the sentence he would have imposed had the applicant gone to a trial and had been convicted. She cited two authorities from this court, **Joel Deer v R** [2014] JMCA Crim 33 and **Basil Bruce v R** [2014] JMCA Crim 10, in advancing this submission. Having relied on those authorities, counsel submitted that the learned trial judge, having not indicated a starting point, has made it difficult for this court to assess how he was influenced by the various factors that he had identified as being mitigating

and aggravating factors in determining an appropriate sentence. She submitted that this omission is not cured by the learned trial judge's comments concerning the amendment to the Sexual Offences Act that provides that the maximum penalty for such offence is now life imprisonment.

(ii) **The age of the complainant**

[11] The second plank of learned counsel's submissions was the age of the complainant. She highlighted the fact that the complainant was 15 ½ years of age at the time of the commission of the offence which shows that she would have been just months away from the age of consent. Her complaint on behalf of the applicant is that the learned trial judge "unwittingly neglected, in his assessment, for the purposes of sentencing, to place any degree of weight on the fact that the complainant was no more than six months younger than the statutory age of consent".

[12] In support of this argument, she relied on the case **R v Muff**, The Times, (1958) 481, judgment of the UK Court of Criminal Appeal. She pointed out that that case is instructive on how the age of the complainant ought to have been treated, albeit that the girl in that case was three days from the age of 16. In that case, the court had set aside the appellant's sentence of two years imprisonment and substituted a sentence that would have allowed for his immediate release based on the age of the girl. Learned counsel maintained, in reliance on that authority, that the fact that the complainant in the instant case was no more than six months away from her 16th

birthday was a factor that the learned trial judge should have demonstrated that he took into account in his assessment of the mitigating factors.

(iii) **The issue of 'consent'**

[13] A related matter that Miss Kiffin also highlighted for the consideration of this court is the issue of consent. She contended that although the law states that there can be no consent by a person under the age of 16 years, the fact that the sexual intercourse was consensual was a factor that the learned trial judge did not take into account as a mitigating factor. She sought to rely on the Canadian case **R v Allen** 1989 Can LII 3932 (NLCA), on the basis that it provides some insight into how the issue of consent may be treated in circumstances where an accused person had pleaded guilty for a sexual offence and the tribunal is assessing the various factors with a view to imposing a sentence. In that case, the court on an appeal against sentence, considered, among other things, that the sexual act was consensual and held that consent may be a mitigating factor depending on the circumstances of the case.

(iv) **Principles of sentencing**

[14] Miss Kiffin also referred to the principles of sentencing as enunciated by this court in several cases, particularly in **Christopher Brown v R** [2014] JMCA Crim 5 and **Marc Wilson v R** [2014] JMCA Crim 41. Her argument, in relying on those authorities, was that the tribunal in determining an appropriate sentence to be imposed would have an obligation to consider the character and antecedents of the applicant, as well as the classical sentencing principles of retribution, deterrence, prevention and rehabilitation.

Her complaint on behalf of the applicant is that the learned trial judge had not demonstrated that he had paid sufficient regard to the attributes in the applicant's favour within the defined objective of sentencing. The mitigating factors were mentioned, she said, but it was difficult to conclude from the judge's ruling how the mitigating factors were applied to the benefit of the applicant in arriving at a sentence especially where a sentence of imprisonment is to be the last resort.

[15] She pointed to some of the primary factors that she said should have been taken into account in the applicant's favour. These she listed as follows: (1) he pleaded guilty at the first opportunity; (2) he is a first time offender; (3) the fact that he now shares a child with the complainant and that the maintenance, welfare, stability, wholesome socialization, among other things, of their child would now be severely affected; (4) he maintains his child; (5) there is no ill-feeling expressed either by the complainant or her mother according to the social inquiry report; (6) there is no evidence of physical or psychological harm to the complainant; (7) the salutary community profile, as seen from the social inquiry report, that he is generous and hard working; (8) the community has made positive comments about him and attested to the fact that he is known to be involved with adult females despite the offence for which he is charged; (9) the offence appears to be an aberration and; (10) that he does not appear to be a threat to society.

[16] Learned counsel's argument was that the learned trial judge, in imposing the sentence, did not demonstrate how the applicant benefitted from the mitigating factors as well as how the classical principles of sentencing were utilized to arrive at the

sentence that was most fitting in the circumstances of the applicant. She pointed to the dictum of Justice Watson (in a dissenting judgment) in the Canadian case **R v Lee** 2012 ABCA 17 (Can LII) at paragraph 141, where the learned judge stated:

> "A key value in a starting point is its reflection of a preliminary evaluation, for proportionality purposes, of the gravity of the offence and the degree of responsibility of the offender in a typical case. Movement from the starting point then requires a reasoned analysis in light of the aggravating and mitigating circumstances and with a focus on the particular objectives of sentencing made relevant by those circumstances and on the ultimate aim of imposing a proportionate sentence disposition which will re-assure the public by amounting to a just sanction."

[17] She also sought to remind the court of the provisions of section 3 of the Criminal Justice (Reform) Act which, basically, establishes that incarceration must be a matter of last resort.

(v) **The parties producing a child together**

[18] Finally, learned counsel asked us to have regard to the fact that the parties had produced a child together. Her complaint was that the existence of the child was treated by the learned trial judge as an aggravating factor rather than a mitigating factor. According to her, "the Learned Judge in his assessment, made no reference to the issue of public policy in circumstances in which it would undoubtedly be in the best interest of the child and the wider society to have the willing applicant play his role in the general welfare of the child". In her view, the welfare of the child should have been given due regard in the assessment of those factors. She pointed to another Canadian case, **R v H S** 2014 ONCA 323 (Can LII), which she said may be distinguished

from the case at bar, in seeking to establish that part of the consideration for the court would include the treatment of the child born to the parties.

[19] Having cited these numerous authorities, Miss Kiffin urged on this court that although the learned trial judge might have looked at the case **R v Rayon Mason** SCCA No 56/2007, delivered on 10 June 2008, a decision of this court, this matter can be distinguished from that case. She cited the age of the complainant in this case and the fact that the applicant was only convicted of one count of having sexual intercourse with the complainant and not for three counts as in the **Rayon Mason** case as distinguishing features. She urged us to find that in all the circumstances highlighted by her, the sentence of four years imprisonment is manifestly harsh and excessive and posited the view that a custodial sentence of two years would be more appropriate in the circumstances.

Reasoning and findings

[20] We have thoroughly examined all the submissions made by counsel, along with the authorities cited by her, although we have not detailed them in our findings. We have also thoroughly examined the detailed reasons advanced by the learned trial judge for imposing the sentence he did. We have no reservation in holding that even though a custodial sentence should be imposed as a matter of last resort, such a sentence was warranted in this case. The proper question before the learned trial judge would, therefore, have been not whether a term of imprisonment should have been imposed but rather the duration of it.

[21] We find that we do agree with Miss Kiffin that the learned trial judge had failed to indicate a sentence that he had used as a starting point in determining the term of imprisonment that should be imposed. He also, within this context, did not indicate what sentence he would have imposed, if the applicant had gone to trial. This would have better guided this court as to his process of reasoning in arriving at four years after he had taken into account what he saw as the mitigating and aggravating factors and having made allowance for the necessary discount.

[22] It is our view, however, that although the indication of a starting point would have been desirable, we do not see the omission as being fatal to the reasoning underlying the sentencing so that it can be a factor to weigh heavily, or at all, in favour of the applicant for reducing the sentence imposed. The learned trial judge, quite accurately, had indicated that the maximum penalty for this offence is life imprisonment as provided for by the statute under which the applicant was charged. He also drew attention to the fact that under the previous legislative dispensation (the Offences Against the Person Act, section 50), the maximum for such an offence was seven years imprisonment. Based on his observation, he expressed the view, which we endorse, that it is clear that Parliament has recognised that such an offence is a serious offence and has indicated its intention, in increasing the penalty, that the court must treat such offence by the imposition of a penalty that is commensurate with the seriousness of the offence.

[23] The fact that Parliament had seen it fit to move the penalty from seven years in the case of older girls to a term of life imprisonment is indicative of its intention that a lengthy term of imprisonment is warranted for these offences. The statute by so doing has also removed the distinction that was formerly made pertaining to sentences relative to girls under 12 and those over 12. This, again, shows the seriousness with which Parliament intends that these offences committed against older girls should be treated. So, the fact that the learned trial judge did not indicate a starting point in the circumstances does not render his reasoning fatally flawed.

[24] We have also noted that the learned trial judge might not have indicated in his reasoning, in forensic terms, the objectives of sentencing by specific reference to the usual principles of sentencing. His reasoning, however, does demonstrate that he had, in substance, taken matters into account that would go towards satisfying those considerations on an objective evaluation of the circumstances of the case. He highlighted the aggravating factors, and identified the seriousness of the offence as "the first and most significant aggravating factor". He also emphasized the age of the applicant, noting that he could have been the complainant's father or grandfather. He then, rightly noted, having made that observation that "… the larger the age range, the applicable principles indicate, the greater the requirements for a custodial sentence".

[25] He also looked at the fact that the applicant did not readily admit to having had sexual intercourse with the complainant but that he did so only after the paternity test revealed that he is likely to be the father of the child. Furthermore, he noted that the

applicant sought to put blame on the complainant for the commission of the offence that she tempted him and made sexual advances at him. He also noted the fact that based on the poor economic circumstances of the complainant, the applicant was of the view that the matter could have been settled out of court. He stated further:

> "…this is not a civil matter for settlement out of court. This is about the law protecting young girls from being interfered with by older men and having their life prospects marred by such exploitation. I have to also consider the negative impact of the offence on the victim. She now has a child to take care of when she should be seeking to further her education. I also have to take into account that the offence is very prevalent and the sentence of the court has to reflect the need to address that. So those are the aggravating factors."

[26] The learned trial judge, after distilling what he saw as the major aggravating factors, turned his attention to the mitigating factors as he ought to have done. He took into account, as he was required to do, the plea of guilt viewing it as a "major factor" in the applicant's favour. He recognised that it did entitle the applicant to a discount. He bore in mind too that the applicant had used no physical force; the fact that he had no previous conviction; the views of the complainant and her mother; the views of the community; and the effect of the sentence on his family and business.

[27] All the factors identified by Miss Kiffin, as going to the attributes of the applicant in mitigation of sentence, were before the learned trial judge and he duly considered them. As he indicated and had later demonstrated:

> "Now, I wait [sic], for the purposes of sentencing, to accept your version of event where there is a conflict between your

> account and the account of the complainant. I also take into account everything that has been urged on behalf by your lawyer, and that is contained in the Antecedent Report and the Social Enquiry Report."

In sum, the learned trial judge considered the plea in mitigation through which learned counsel, then, managed to put all facts favourable to the applicant before the court. Counsel had even prayed in aid the Bible in asking the court to treat with the issue of the temptation of the applicant by the complainant. The social enquiry and antecedent reports also contained some glowing testimonials of his attributes.

[28] Miss Kiffin has brought to our attention the cases from Canada and the UK, and has offered us an insight into how the courts in those jurisdictions treat with matters such as these. Having taken those authorities into account, however, we consider it necessary to state for the record that we have recognised that we have our own peculiar difficulties here in this country in dealing with the scourge of these offences where young girls are constantly being abused and exploited by older men, especially by men who are old enough to be their fathers and grandfathers. The court has to ensure that men who prey on these children really do get the message, loudly and clearly, that the children must be left alone to transition into adulthood without molestation.

[29] Furthermore, when the girls are impregnated by these men, this must not be taken as a mitigating factor as counsel is urging on us because to do so could well send the wrong signal that a man who gets the girl pregnant is likely to be treated more favourably by the court than one who has not done so. While the welfare of the child is

always an important consideration, it cannot be an overriding factor in the context of the criminal law where the child is a direct product of the criminal act being penalized. The learned trial judge cannot, at all, be faulted for viewing it as an aggravating factor in the circumstances of this case and, particularly, so in the light of the substantial age difference between the applicant and the complainant and the adverse impact it has on the complainant's life. She was, at the time, attending school and the applicant knew that.

[30] Having looked at all that Miss Kiffin has urged on us, we can safely say that there is nothing for which this court could fault the learned trial judge in treating with the circumstances of the case and imposing the sentence he did. He might not have employed a formulaic approach in his reasoning but he did consider all the pertinent matters and weighed all the relevant factors in coming to his determination of what he considered to be an appropriate sentence. He appropriately heeded the firm pronouncements of the learned President in **R v Rayon Mason**, as to how judges at first instance should treat with these offences. The learned President stated:

> "We trust that the young men, and indeed the old men too, because the old men are doing it, will recognize that girls are to be left alone and those who interfere with them sexually can expect nothing but imprisonment. We urge the courts below not to fail to impose imprisonment in these situations. If men will not hear, then, they will feel."

We would not move away from those pronouncements, particularly, in the context of the alarming prevalence of these offences in our own local circumstances. We would reiterate strongly that this dictum should be a guiding principle in sentencing in these

matters and, particularly, so in cases like this, in which a substantially older man has had sexual intercourse with an under-age girl resulting in pregnancy.

[31] We do agree with Miss Kiffin that each case must be determined on its own facts and, indeed, that the court cannot be inflexible in the light of the requirement that each offender should be treated uniquely. However, the learned trial judge bore in mind all the relevant special features of this case and of the offender. So, it would not be fair to say that he failed to take into account all relevant matters going to the applicant's credit or that he took into account irrelevant matters.

[32] We believe in all the circumstances that the learned trial judge was rather lenient, bearing in mind that the maximum is life imprisonment. The applicant was not in a position of trust, properly so called, to which the minimum sentence of 15 years prescribed by the statute would apply but he was in a position of superiority given his age, stage of maturity and economic position vis-à-vis the complainant. A sentence of imprisonment of meaningful duration was, therefore, warranted.

[33] Having looked at all that has been urged on us by Miss Kiffin, we have not found any basis on which it may properly be concluded that the sentence of four years imprisonment at hard labour imposed on the applicant by the learned trial judge is manifestly excessive.

[34] Accordingly, the application for leave to appeal against sentence is refused and the sentence is to commence from 12 June 2014.