[2022] JMCA Crim 3

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P (AG)
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2020CR00023

ADRIAN BROWN v R

Miss Yanique Watson for the appellant

Mrs Sharon Milwood Moore and Paulio Williams for the Crown

10 and 21 January 2022

MCDONALD-BISHOP P (AG)

[1] The appellant, Mr Adrian Brown, was charged on an indictment for the offence of rape committed at a high school in the parish of Manchester. As outlined by the prosecution and accepted by the defence, the salient facts are as follows: The appellant and the complainant were both students at the high school. On the morning of 22 September 2017, the appellant took away the complainant's pen and ran to a section of the school that led to the top of the school building. The complainant gave chase to retrieve her pen. Upon catching up with the appellant, the appellant demanded sex for the return of the pen. The complainant refused the demands, but the appellant held her, removed her underwear and proceeded to have sexual intercourse with her without her consent. The complainant made a report to the dean of discipline at the school and, subsequently, the police. The appellant was charged by the police on 25 September 2017 and, when cautioned, said nothing. At the time of the incident, the appellant was 17, and the complainant was 16 years old.

[2] On 7 February 2020, the appellant appeared before the Manchester Circuit Court, where, following a sentence indication by the sentencing judge, he pleaded guilty to the offence of rape. He was sentenced on 6 March 2020 to five years' imprisonment at hard labour.

[3] The appellant applied to this court for leave to appeal his sentence with his proposed grounds of appeal framed in these terms:

> "a) Judge gave sentence indication after which the [appellant] pleaded guilty.
>
> b) Sentence given by judge is direct contravention to indication given.
>
> c) Sentence imposed was excessive in the circumstances."

[4] The appellant also applied for bail pending appeal on the basis that his sentence was wrong in law and manifestly excessive because the sentencing judge failed to act in accordance with her sentence indication. He was granted bail.

[5] Ms Caprice Morrison, counsel who appeared for the appellant in the court below, and Crown Counsel, Mr Rosheide Spence, who was part of the prosecution team that had conduct of the matter, filed affidavit evidence for the purposes of the bail application. Both counsel deposed that on 7 February 2020, Ms Morrison approached the judge for a sentence indication, should the appellant plead guilty to the offence of rape. They confirmed that the sentencing judge gave an indication that if the appellant pleaded guilty, she would impose a probation order if the social enquiry report was favourable but a suspended sentence if it was unfavourable.

[6] Ms Morrison was absent from the sentencing hearing, but another counsel held for her. After the appellant was sentenced, counsel asked the sentencing judge to suspend the sentence that was imposed. The sentencing judge, however, refused that application. As a result, the appellant was sentenced to immediate incarceration. No one raised the issue of the prior sentence indication.

[7] On 27 October 2021, a single judge of this court considered the application for leave to appeal and granted leave. He opined that the main issue is "whether the sentence ought to be set aside if the allegations made in the affidavit evidence are borne out". The single judge also directed that the affidavit evidence filed in this court should be sent to the sentencing judge with a request for a swift response.

[8] By a letter dated 20 December 2021, addressed to the court, the sentencing judge accepted the evidence of counsel in their affidavits as accurate. She indicated that "[t]here was an intention to impose a suspended sentence and it was an oversight during the very busy sentencing period". She noted that the sentence "having not been suspended was an error".

[9] On 10 January 2022, after considering the appeal and the submissions of counsel, we made these orders:

> (1) The appeal is allowed.
>
> (2) The sentence of five years' imprisonment at hard labour imposed on the appellant on 6 March 2020, is set aside and substituted therefor is a sentence of three years' imprisonment at hard labour suspended for three years.
>
> (3) The sentence is to be reckoned as having commenced on 6 March 2020, the date it was imposed by the sentencing judge.

[10] We promised then to reduce to writing our reasons for doing so. These are the reasons for our decision in fulfilment of that promise.

[11] It is not in dispute that the sentencing judge gave a sentence indication that informed the appellant's decision to plead guilty. The indication was that if the appellant pleaded guilty and his social enquiry report was favourable, she would impose a probation order, but if the report was not favourable, she would impose a suspended sentence. The

appellant pleaded guilty but was not sentenced as indicated by the sentencing judge. Instead, he was sentenced to an immediate custodial sentence.

[12] Therefore, the singular issue that arose for the court's consideration is whether the sentencing judge erred when she failed to act in accordance with the sentence indication she had given before the appellant pleaded guilty, and if so, whether the sentence she imposed should be set aside.

[13] In examining the principal issue raised for consideration, the following sub-issues were addressed:

(1) the legal authority of the sentencing judge to give a sentence indication upon the request of counsel for the defence;

(2) the approach that the sentencing judge should have adopted in properly treating with the application for the sentence indication;

(3) the effect of the sentencing judge's failure to adhere to the sentence indication;

(4) whether, in the circumstances, the sentence imposed on the appellant was manifestly excessive to warrant the intervention of this court; and

(5) if the sentence is manifestly excessive, what should the appropriate sentence be?

The legal authority of the sentencing judge to give a sentence indication

[14] Pursuant to the Supreme Court of Judicature of Jamaica, Practice Direction (Criminal), Advance Sentence Indications, PD No 2 of 2016 ('the Practice Direction'), the sentencing judge was empowered to give a sentence indication upon the application of the appellant. The purpose of the Practice Direction is to, among other things, establish

a formal process, following the guidelines in **R v Goodyear** [2005] EWCA Crim 888; [2005] 1 WLR 2532. This process is for a judge to indicate the maximum sentence a defendant will likely receive if he or she pleads guilty at the stage in the proceedings at which the indication is sought. This is borne out in direction 3.5 of the Practice Direction, which states:

> "A sentence indication should be confined to the maximum sentence, to be imposed if a plea of guilty is tendered at the stage of the proceedings at which the indication is sought. The judge should not indicate the maximum possible sentence following conviction, after trial."

[15] The Practice Direction, in its preamble, states that "[t]he primary purpose of a sentence indication is to ensure that a defendant is in a position to make an informed decision as to plea". The preamble further makes it clear that:

> "This formalised sentence indication process is intended to achieve the following:
>
> i) the expeditious disposal of criminal cases, resulting in the optimal use of valuable court time spent on cases that require a trial;
>
> ii) a marked reduction in the trauma suffered by victims of crime by avoiding the rigours of a trial;
>
> iii) a reduction in anxiety suffered by defendants through lessening the time between charge and disposition of cases; and
>
> iv) direct savings in costs and valuable resources resulting from the reduction in the number of cases proceeding to trial."

[16] By virtue of the Practice Direction, "the ***Goodyear*** procedure is expressly adopted and adapted to apply" to our courts at all levels (direction 1.1(a)). Accordingly, the sentence indication procedure that emanated from **Goodyear** has been formally woven within the fabric of our sentencing jurisprudence from as far back as 2016 with the promulgation of the Practice Direction. As a consequence, in 2020, when the appellant,

through his counsel, sought a sentence indication, the sentencing judge had the lawful authority to entertain the application and to make a sentence indication to the appellant. The indication would have informed and guided the appellant's decision regarding his plea at the stage of the proceedings the indication was sought.

The approach to be taken by the sentencing judge on the application for a sentence indication

[17] The undisputed evidence of both counsel who deposed as to what had transpired before the sentencing judge at the time the sentence indication was given is that there was an oral application for it. Although the Practice Direction requires an application for a sentence indication to be in a prescribed form as set out in the schedule, the judge may permit an oral application to be made if that is considered adequate (see direction 3.3 of the Practice Direction). Accordingly, no issue is taken with the form the indication was made.

[18] However, it should be noted that although the sentencing judge had made a sentence indication, there was no record of either the application or the sentence indication on the transcript provided to this court. It seems from the affidavit evidence that the defence counsel had merely "approached the bench" with prosecuting counsel to seek the sentence indication. The omission from the record of the application and sentence indication is not in keeping with the requirements of the Practice Direction. Direction 3.15 provides, in part, that "[w]here an oral application is permitted the fact that counsel has clearly explained the consequences of the application to his or her client should be confirmed to the judge by both the defendant and counsel for the defendant and noted in the official record of the court". Further, Direction 5.1 states that "[a] sentence indication shall be granted in open court with a full recording of the entire proceedings". Direction 6.1 then states that "[t]he court shall record a sentence indication".

[19] The requirement for the proper recording of the proceedings and the sentence indication is to, in part, safeguard against what happened in the instant case, which is

the sentencing judge's failure to recall that she had given a sentence indication. The record of the sentence indication would be there to guide another judge or court in subsequent proceedings related to the defendant plea of guilty to the charge. It is against this background that we found the sentencing judge's explanation for not acting in accordance with the sentence indication, as having been due to an oversight, difficult to appreciate.

[20] It is also noted that the sentencing judge granted the request for a sentence indication before obtaining a social enquiry report. In the absence of a pre-sentence report, she was prepared to indicate that the maximum sentence would have been a suspended sentence and the minimum, a probation order. However, having received and considered the social enquiry report, she found an immediate custodial sentence to have been more appropriate, which was in direct conflict with the sentence indication.

[21] Given that the sentence to be imposed was made contingent on the social enquiry report, the better course seems to have been for the sentencing judge to defer giving a sentence indication until a social enquiry report was obtained. There is nothing wrong in deferring a sentence indication rather than refusing one if a judge believes that he or she could be assisted by further information. In **Goodyear**, the court instructed as part of the sentence indication guidelines:

> "58 Just as the judge may refuse to give an indication, he may reserve his position until such time as he feels able to give one, for example until a pre-sentence report is available. There will be occasions when experience will remind him that in some cases the psychiatric or other reports may provide valuable insight into the level of risk posed by the defendant, and if so, he may justifiably feel disinclined to give an indication at the stage when it is sought. Another problem may simply be that the judge is not sufficiently familiar with the case to give an informed indication, and if so, he may defer doing so until he is.
>
> 59 In short, the judge may refuse altogether to give an indication, or may postpone doing so. He may or may not give reasons… If he has in mind to defer an indication, the

> probability is that he would explain his reasons, and further indicate the circumstances in which, and when, he would be prepared to respond to a request for a sentence indication."

[22] The Practice Direction, similarly, provides:

> "3.8. The judge may request a probation or social enquiry report, a psychiatric evaluation or any other report considered useful to assist in granting a sentence indication."

[23] The deferral of the sentence indication until the social enquiry report was obtained would have allowed the sentencing judge the latitude to consider the imposition of an immediate custodial sentence which, in the end, she considered fit to impose.

The effect of the failure of the sentencing judge to adhere to the sentence indication

[24] Before us, counsel for both sides are agreed that the sentencing judge erred in her approach in sentencing the appellant in contravention of her sentence indication. We shared that opinion and endorsed the views of counsel for reasons that will now be outlined.

[25] Direction 11 of the Practice Direction, headed "BINDING EFFECT OF SENTENCE INDICATION", states:

> "11.1. Subject to direction 8, a sentence indication once given is binding on the judge who gave it and on any judge who subsequently assumes conduct of the case, save in exceptional circumstances.
>
> 11.2. In circumstances where the judge proposes to depart from a sentence indication, this must be done in a way that does not give rise to unfairness."

[26] In **Goodyear**, the guidelines of which are embodied in the Practice Direction, the court held that:

> "61 Once an indication has been given, it is binding and remains binding on the judge who has given it, and it also

> binds any other judge who becomes responsible for the case. In principle, the judge who has given an indication should, where possible, deal with the case immediately, and if that is not possible, any subsequent hearings should be listed before him. This cannot always apply. We recognise that a new judge has his own sentencing responsibilities, but judicial comity as well as the expectation aroused in a defendant that he will not receive a sentence in excess of whatever the first judge indicated, requires that a later sentencing judge should not exceed the earlier indication."

[27] The principle which governs legitimate expectations in these circumstances, in which a guilty plea is given consequent on a sentence indication, was recognised in **R v Nottingham Magistrates' Court, ex parte Davidson** [2000] 1 Cr App R(S) 167, where Lord Bingham CJ stated:

> "The principle which governs legitimate expectations of this kind is not in doubt, and nor is it a matter of controversy between the parties to this application. It is in my judgment unnecessary in the absence of controversy to review the authorities which give rise to the principle, but it can in my judgment be summarised in the following way. If a court at a preliminary stage of the sentencing process gives to a defendant any indication as to the sentence which will or will not be thereafter passed upon him, in terms sufficiently unqualified to found a legitimate expectation in the mind of the defendant that any court which later passes sentence upon him will act in accordance with the indication given, and if on a later occasion a court, without reasons which justify departure from the earlier indication, and whether or not it is aware of that indication, passes a sentence inconsistent with, and more severe than, the sentence indicated, the court will ordinarily feel obliged, however reluctantly, to adjust the sentence passed so as to bring it into line with that indicated."

[28] Therefore, barring exceptional circumstances justifying a departure, the accepted rule is that a sentence indication is binding on the judge who made it as well as a subsequent judge who assumes responsibility for the case. So, while the sentencing judge is empowered to go outside of a sentence indication, this must only be done if it does not cause unfairness or prejudice to the defendant.

[29] In **R v Shane Newman** [2010] EWCA Crim 1566, Gross J examined the binding effect of a sentence indication whilst striking a balance between the public interest in an appropriate sentence and the defendant's legitimate expectation. Gross J observed:

> "17. It would, however, be unfortunate if a practical and pragmatic measure was to become unduly inflexible. Moreover, the Attorney General is not bound by a Goodyear indication. So, where a judge recognises that he has been plainly in error, were it the case that there was no means of correction, the upshot would be the risk of an otherwise unnecessary Attorney General's Reference.
>
> 18. Mr Williams submitted, as we have already recorded, that the indication was binding once acted upon. With respect, we are unable to agree in this sense: Mr Williams' submission is couched in terms of private rights, where such concepts are of course valid and will prevail. But we are not dealing with that situation here. **The public interest in an appropriate sentence must trump any question of disappointment in the rare cases where such a situation might arise. It goes without saying, however, as we have already underlined, that revisions to Goodyear indications should be very much the exception, and, as it seems to us, they can only be made in a manner which is fair to the defendant: in other words, where the matter can be revised without the defendant sustaining any prejudice other than mere disappointment**." (Emphasis added)

[30] In commenting on the judge's approach in that case, where he chose to depart from the sentence indication, Gross J opined:

> "19. In the present case, the judge was plainly in error, as he himself acknowledged, with regard to the guidelines category in which he placed the offence. The judge was understandably anxious about the facts he had subsequently discovered in the pre-sentence report, and the questions which then arose as to whether the case merited a determinate or some other sentence. Had the judge left the matter as set out in the Goodyear indication, first there would have been the unfortunate consequence of an inadequate sentence being passed contrary to the public interest and, secondly, there

> would have been a risk of an Attorney General's Reference to the benefit of no one.
>
> 20. **The course the judge adopted, namely offering the appellant the chance of vacating his plea, was one which was entirely fair to the appellant. The appellant realistically and prudently, if we may say so, chose not to vacate his plea - but he maintained his plea knowing full well that the judge would no longer be bound by the initial Goodyear indication. In these circumstances, we are not persuaded that any injustice resulted or that the appellant now has any legitimate grounds for complaint**." (Emphasis added)

[31] It is clear to us that where a defendant pleads guilty to an offence after a sentence indication, then if, for whatever reason, a judge deems it necessary to depart from that indication, he or she must inform the parties of this, and the defendant must be offered the choice of vacating his guilty plea. In the instant case, the sentencing judge departed from the indication given to the appellant, which informed and influenced his guilty plea. However, in so doing, she neither referred to the sentence indication she had made nor her reason for departing from it. Moreover, by her indication that she would have imposed either a probation order or a suspended sentence, the sentencing judge would have evoked in the appellant a legitimate expectation that he would not be given an immediate custodial sentence if he pleaded guilty to the offence at that stage of the proceedings at which he sought the indication.

[32] In the circumstances, due to the sentencing judge's reported oversight, the appellant was not provided with the opportunity to make his election as to whether he would maintain his guilty plea or proceed to trial. It is also unfortunate that counsel for the prosecution, who was present both at the time of the sentence indication and the sentencing hearing, had not reminded the sentencing judge of the prior sentence indication. It also appears that counsel who held for Ms Morrison at the sentencing hearing was not instructed about the sentence indication and its legal ramifications. In the result, the sentence indication never factored in the sentencing hearing to the detriment of the appellant. This, undeniably, resulted in unfairness to the appellant, which

was over and above just mere disappointment, on his part, that the sentencing judge did not impose the sentence she had indicated in keeping with his legitimate expectations

[33] We found that the sentencing judge erred in departing from the sentence indication in the manner she did and imposed a sentence inconsistent with it. There is, therefore, merit in the appeal. In all the circumstances, the concession of the Crown was rightly made.

Whether the sentence imposed on the appellant was manifestly excessive to warrant the intervention of this court

[34] We now consider whether the sentence should be set aside as being manifestly excessive to warrant the intervention of the court, pursuant to section 14(3) of the Judicature (Appellate) Jurisdiction Act.

[35] In considering this issue, we bore in mind the principle from **R v Ball** (1951) 35 Cr App Rep 164, which has been cited in numerous cases by this court, that:

> "The 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…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."

[36] Having already concluded that the sentence indication was binding on the sentencing judge, and that how she departed from her sentence indication gave rise to unfairness to the appellant, it follows that she erred in principle in imposing the sentence she did.

[37] Furthermore, quite apart from the inconsistency between the sentence imposed and the sentence indication, which resulted from an erroneous application of the legal principles, the sentencing judge also erred in taking into account matters revealed in the social enquiry report that did not form part of the facts that constituted the basis of the

guilty plea or part of the charge laid against the appellant. It is clear from the sentencing remarks of the sentencing judge that the choice of a custodial sentence of five years was informed by extraneous matters that were irrelevant to the sentencing process but which she viewed as aggravating factors.

[38] It is trite law that an offender must be sentenced only for those offences of which he has been convicted or admitted either by his plea or by asking for the offences to be taken into consideration. Accordingly, offences for which he has not been charged must be ignored, even if evidence has emerged during the trial that he has committed them. The same principle applies where the offender is accused of offences with which he has not been charged in material that is not part of the case against him (see Archbold Criminal Pleading, Evidence and Practice 1992 paras. 5-28 – 5-30).

[39] For these additional reasons, coupled with the departure from the sentence indication without prior notification to the appellant, the sentencing judge erred in principle in sentencing the appellant to a custodial sentence of five years' imprisonment. There was a failure to apply the correct principles of law. This error has rendered the sentence imposed on the appellant manifestly excessive as candidly conceded by the Crown.

[40] However, we must hasten to note that in the absence of the sentence indication, the sentence of five years' imprisonment for the offence of rape may not have been considered manifestly excessive to warrant the court's intervention. Therefore, our conclusion that the court's intervention is justified is based solely on the peculiar circumstances of this case, being one to which the **Goodyear** procedure and the Practice Direction apply.

[41] Accordingly, the sentence of five years' imprisonment was wrong in law and, as such, could not be allowed to stand. Consequently, the court was constrained to set it aside.

The appropriate sentence

[42] Based on the sentence indication given by the sentencing judge, the appellant would have received a probation order if the social enquiry report was favourable or a suspended sentence if it was unfavourable.

[43] Section 6 of the Sexual Offences Act provides that a person who commits the offence of rape is liable on conviction in a circuit court to imprisonment for life or such other term as the court considers appropriate, not being less than 15 years. However, despite the stipulation in the Sexual Offences Act of a statutory mandatory minimum sentence of 15 years, section 42D(3) of the Criminal Justice (Administration) Act (as amended in 2015) states that:

> "42D – …
>
> (3) Subject to section 42E, and notwithstanding the provisions of any law to the contrary, **where the offence to which the defendant pleads guilty is punishable by a prescribed minimum penalty the Court may** –
>
> (a) **reduce the sentence pursuant to the provisions of this section without regard to the prescribed minimum penalty**; and
>
> (b) specify the period, not being less than two-thirds of the sentence imposed, which the defendant shall serve before becoming eligible for parole." (Emphasis added)

[44] Accordingly, given the appellant's guilty plea, the sentencing judge was empowered to impose a sentence below or outside the prescribed minimum penalty and specify a period he should serve before becoming eligible for parole. The sentencing judge opted to give a probation order or a suspended sentence depending on the social enquiry report, albeit that neither sentence is provided for under the Sexual Offences Act.

[45] Section 5(2) of the Probation of Offenders Act allows the court to make a probation order, in lieu of imposing a sentence of imprisonment, in circumstances specified by the

statute. Section 6 provides that such an order shall have effect for not less than one year and not more than three years from the date of the order.

[46] Concerning the imposition of a suspended sentence, section 6 of the Criminal Justice (Reform) Act provides that a suspended sentence may be ordered where the court passes a sentence of imprisonment for a term, not in excess of three years for any offence, except where the offence involved the use, or illegal possession of a weapon referred to in the First Schedule of the Act, a firearm or imitation firearm. The statute also provides that a sentence should not be suspended for less than one year or more than three years from the date of the order.

[47] Based on our review of the transcript and the social enquiry report, it is evident that the sentencing judge did not find the social enquiry report favourable to the appellant. In her letter to this court, she also indicated that she made an error in failing to suspend the sentence. Therefore, we found that had the sentencing judge had regard to her sentence indication, the likely sentence she would have imposed on the appellant would have been a suspended sentence.

[48] Both counsel for the appellant and the Crown acknowledged and submitted that a suspended sentence was the more appropriate sentence to be imposed in furtherance of the sentence indication. We agreed with this position and found that the sentencing judge could not have been faulted for electing a suspended sentence over a probation order if she were to give effect to the sentence indication she gave.

[49] On our review of the social enquiry report, we found it to be a mixed one. While it was predominantly favourable, we were, particularly concerned by what was revealed regarding the complainant's vulnerability, and the impact the ordeal reportedly had on her.

[50] Considering the term of years to be imposed on the appellant for the offence, we are severely restricted by section 6 of the Criminal Justice (Reform) Act. This statutory provision prevents the court from ordering a suspended sentence with respect to a

sentence of imprisonment above three years. Therefore, regardless of any view we might have held regarding the reasonableness or propriety of a sentence of less than five years' imprisonment or a suspended sentence, this court was constrained to set aside the sentence of five years' imprisonment imposed on the appellant and impose the sentence authorised by law. Given the seriousness of the offence and the complainant's vulnerability, we believed any further discount that would bring the sentence below three years' imprisonment would have been disproportionate and wholly inappropriate.

[51] Therefore, in accordance with the Criminal Justice (Reform) Act, we imposed on the appellant the sentence that the judge would have been obliged, by law, to impose on him due to the sentence indication she gave that had prompted the appellant to plead guilty. This court was also bound by the sentence indication in the interests of justice.

[52] For the foregoing reasons, we allowed the appeal and made the consequential orders detailed in para. [9] above.