[2019] JMCA Crim 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 23/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE PUSEY JA (AG)

CARL CAMPBELL v R

Miss Gillian Burgess for the appellant

Joel Brown for the Crown

8 May 2018 and 7 June 2019

PUSEY JA (AG)

[1] On 9 March 2015, the appellant, Mr Carl Campbell, pleaded guilty to five offences in the Saint Catherine Circuit Court. The offences were forcible abduction, assault, grievous sexual assault, rape and robbery with aggravation. On 27 March 2015, the court sentenced the appellant to 12 years' imprisonment at hard labour for the charges of forcible abduction and grievous sexual assault (counts one and three), six months' imprisonment at hard labour for assault (count two), 10 years' imprisonment at hard labour for robbery with aggravation (count five) and 45 years' imprisonment at hard labour for rape (count four). With respect to the sentence imposed for rape, the learned

trial judge stipulated that the appellant was to serve a minimum of 35 years in prison before becoming eligible for parole. The sentences were ordered to run concurrently.

[2] The appellant sought leave to appeal against the sentences. A single judge of this court granted him leave to appeal on the basis, among other things that, in light of the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Court ("the Sentencing Guidelines"), a lower sentence would have been more appropriate.

[3] At the hearing of the appeal, the appellant confined his challenge to the sentence of 45 years' imprisonment which had been imposed for the offence of rape. His primary contention was that the sentence which had been imposed was manifestly excessive.

[4] The appeal was heard on 8 May 2018 and, on that date, we made the following orders:

> "1. The appeal is allowed in part.
>
> 2. The sentence imposed by the learned judge is set aside in relation to count 4.
>
> 3. The sentence of 16 years' imprisonment at hard labour is substituted and the sentence is to be reckoned to have commenced on the 27th March 2015."

[5] We had promised then to put our reasons in writing at a later date and this is a fulfilment of that promise.

Background

[6] On 5 February 2014 at about 7:15 am, the complainant, a 13-year-old girl, was walking along the Rio Magna Road in the parish of Saint Catherine on her way to school, when the appellant emerged from bushes armed with a machete. He held on to the complainant and pulled her into the bushes. He then instructed the complainant to sit on a makeshift bed and, when she refused, he swung the machete at her. The complainant subsequently complied and the appellant proceeded to rape her. He also took the sum of $500.00 from her. Thereafter, the appellant told the complainant that she was being allowed to leave, as "he could not take her life". The complainant subsequently reported the incident to the police and later identified the appellant on an identification parade.

The sentencing hearing

[7] At the sentencing hearing, the appellant, who was 42 years of age, admitted to two previous convictions arising from an incident where he was in possession of a firearm, and having committed two indecent assaults. He was sentenced to 18 months' imprisonment at hard labour on each count. The antecedent report disclosed that he had three aliases and his correct name was said to be David Brown.

[8] The appellant's social enquiry report was not helpful. It revealed that he was portrayed by members of his community as a deceiver who would commit heinous acts when he thought no one was looking. It also disclosed that he had been "chased" from the community, by its members, because of his behaviour. His risk of re-offending was characterised as being “high” and the possibility of rehabilitation “far-fetched”.

Submissions

[9] Miss Gillian Burgess, on behalf of the appellant, submitted that the learned trial judge was misguided in her approach to the sentencing of the appellant, with respect to the offence of rape. Counsel cautioned that the usual starting point for this offence, as provided by the Sentencing Guidelines, was 15 years' of imprisonment. As such, whilst it was accepted that there were in fact serious aggravating factors in the case, counsel contended that they were not sufficient to take the case so far outside the usual range of sentences.

[10] In mounting these arguments, counsel very helpfully referred the court to several decisions involving convictions for rape which, she contended, provided useful guidance as to the appropriate sentence that ought to have been imposed by the learned trial judge. Some of these authorities included: **Sheldon Brown v R** [2010] JMCA Crim 38, **Paul Allen v R** [2010] JMCA Crim 79, **Marvin Reid v R** [2011] JMCA Crim 50, **Paul Maitland v R** [2013] JMCA Crim 7, **Percival Campbell v R** [2013] JMCA Crim 48, as well as **Oneil Murray v R** [2014] JMCA Crim 25. Counsel contended that the offences in those cases were all heinous in nature, some of them involving the accused using a weapon. However, the sentences that were imposed in those cases ranged from 10 to 23 years.

[11] Counsel Mr Joel Brown for the Crown, commendably conceded that the sentence of 45 years' imprisonment for rape imposed by the learned trial judge did appear to be manifestly excessive. In weighing the aggravating factors alongside the mitigating factors, and in reliance on the decision of **Oneil Murray v R**, Mr Brown submitted that

a more appropriate sentence would have been one in the region of 19 years' imprisonment.

Discussion and analysis

[12] It is apparent from the sentencing remarks of the learned trial judge that, in coming to her decision as to the appropriate sentence to impose, much consideration was given by her to the impact of the aggravating and mitigating factors in the case. The learned trial judge noted the aggravating factors in the case as being: the age of both the complainant and the appellant, the appellant's previous convictions and his community profile. Although the learned trial judge considered the appellant's age as an aggravating factor, she broadly referred to the appellant as being over 30 years old when he was in fact 42 years old at the time of sentencing.

[13] The mitigating factors considered by the learned trial judge included the guilty plea and the remorse expressed by the appellant. She also gave credence to his background and the indication by the social enquiry report that he had suffered psychological injuries as a child.

[14] Having weighed these factors, the learned trial judge concluded that the aggravating factors outweighed the mitigating factors and that the interest of the society would dictate the type of sentence that would be imposed by her.

[15] Notwithstanding the thoroughness of the learned trial judge's assessment, it is to be noted that she failed to identify an appropriate range for the particular offence within which the sentence should have fallen. Having failed so to do, it stands to reason

that the learned trial judge also erred in principle, as she failed to identify a starting point to be utilized within that range.

[16] It is also evident that the appellant would have spent some time in custody prior to the imposition of sentence, but the learned trial judge failed to state whether, in arriving at the sentence of imprisonment, any consideration was given in this regard.

[17] In arriving at an appropriate term of imprisonment, the learned trial judge ought to have demonstrated her regard for the established principles of sentencing and in particular those that treat with the offence of rape, particularly after an accused may have entered a plea of guilty. The Sentencing Guidelines have sought to set out the relevant principles which should be considered in deciding the appropriate term of imprisonment that should be imposed. Section 6, which deals with the sentencing process, provides that:

> "6.1 Assuming that the sentencing judge has gathered all the material necessary to enable him or her to arrive at a proper sentencing decision, the first step in the process is to determine the normal range of sentences for the particular offence under consideration.
>
> 6.2 This should usually be done by reference to the circumstances of the offence and the offender, the sentencing table in Appendix A, previous sentencing decisions and any submissions made by counsel for the prosecution and counsel for the offender.
>
> 6.3 Having determined the normal range, the sentencing judge should then sentence the offender in accordance with the following steps:
>
> (i) identify the appropriate starting point within the range for the particular offender;

(ii) consider the impact of any relevant aggravating features;

(iii) consider the impact of any relevant mitigating features (including personal mitigation);

(iv) consider, where appropriate, whether to reduce the sentence on account of a guilty plea;

(v) decide on the appropriate sentence;

(vi) make, where applicable, an appropriate deduction for time spent on remand pending trial; and

(vii) give reasons for the sentencing decision."

[18] This guidance is a compilation and distillation of the principles set out by this court in recent times in an attempt to attain or encourage a more uniform approach to sentencing. Additionally, the decision of **Meisha Clement v R** [2016] JMCA Crim 26, largely embodies the recent development in the Jamaican jurisprudence in relation to sentencing; and the Sentencing Guidelines have codified these principles.

[19] Admittedly, the learned trial judge would not have had the benefit of the principles delineated in **Meisha Clement v R** and the Sentencing Guidelines, they having both been promulgated after the case in question. The learned trial judge was, however, not without guidance. This court has over the years laid down, in various cases, some fundamental principles of law and a basic approach to be utilized in the sentencing process. One such decision, of which the learned trial judge would have had the benefit, was that of **Oneil Murray v R**. In that case, Morrison JA (as he then was), having conducted an extensive examination of similar authorities from this court, stated at paragraph [23] that:

> "[23] In our view, these cases, which span a period of close to 15 years, suggest a sentencing range of 15-25 years' imprisonment, with 20 years perhaps most closely approximating the norm, on convictions for rape after trial in a variety of circumstances..."

[20] In **Oneil Murray v R**, the applicant pleaded guilty on two indictments each alleging illegal possession of firearm and rape. With respect to the first indictment, relating to the abduction and rape of a 12-year-old schoolgirl, the applicant was sentenced to five and 23 years' imprisonment respectively, for illegal possession of firearm and rape. In relation to the second indictment, which dealt with the abduction and rape of a 22-year-old woman, the applicant was sentenced to five and 19 years' imprisonment for illegal possession of firearm and rape respectively. In noting the reasons for the court's decision to reduce the sentence imposed with respect to the offence of rape, Morrison JA noted at paragraphs [24] and [28] that:

> "[24] While any list of aggravating and mitigating factors is likely to vary from case to case, there will inevitably be common factors. So, on the one hand, the nature of the victim (for example, whether young or elderly), the position of the victim in relation to the offender and the actual circumstances of the offence are generally accepted aggravating factors. Mitigating factors, on the other hand, may generally include the age of the offender, his general circumstances, his previous good character, his mental state at the time of the offence, the actual circumstances of the offence and a plea of guilty (see generally Australian Sentencing: Principles and Practice, by Richard Edney & Mirko Bagaric, chapters six and seven; and Sentencing and Criminal Justice, 5th edn, by Andrew Ashworth, chapter five). We hasten to say that neither of these lists, which are intended for illustrative purposes only, is exhaustive.
>
> ...

> [28] But the question remains whether, despite her having said more than once that she was taking the guilty pleas into account, the learned trial judge did in fact make a sufficient allowance for the applicant's pleas of guilty. In our view, with utmost respect to the judge's obvious attempt to strike a fair balance in all the circumstances, she did not. The sentences of 23 and 19 years' imprisonment in respect of the first and second incidents would, it seems to us, have been quite unexceptionable in this case had the applicant been found guilty after a full trial of the matter. Therefore, taking into account the applicant's early plea of guilty (in a case in which it could not be said that the evidence of his guilt left him with no choice), we have come to the view that sentences of 18 and 15 years' imprisonment in relation to the first and second incidents respectively would have sufficed to meet the justice of the case...."

[21] This demonstrates that a fair balance must be struck when determining the appropriate sentencing range that is to be adopted. Both counsel correctly identified the appropriate range of sentence for this type of offence to be 15 to 25 years. Not coincidentally, this is also the range for the offence of rape that is indicated by the Sentencing Guidelines. Furthermore, the starting point for this offence would be 15 years' imprisonment, which is the statutory mandatory minimum sentence (see the Sexual Offences Act, section 6(1)). However, taking into account the aggravating and mitigating factors, we formed the view, that an appropriate sentence that would have been imposed on the appellant, had the matter proceeded to trial, would have been a sentence of 25 years' imprisonment.

[22] The appellant's plea of guilty, as was noted by the learned trial judge, must be given consideration for reducing a sentence that would have otherwise been imposed at trial. The learned trial judge correctly identified that credit ought to have been given to

the appellant for this. She, however, failed to identify the degree of the reduction that would have been given by her.

[23] It is to be noted that this sentence was imposed before the amendments to the Criminal Justice (Administration) (Amendment) Act, 2015 that allow sentences below the mandatory minimum sentence. However, even if that legislation applied, it is unlikely that the circumstances of this case, including the appellant's antecedents and his community report, could substantiate a full discount for the guilty plea. The legislation guides a sentencing judge but the circumstances of each case will indicate whether the discount will be allowed, and the range of the discount, if any.

[24] Applying a one-third discount, the appellant having pleaded guilty at an early stage of the proceedings, we therefore formed the view that 17 years' imprisonment would be appropriate.

[25] The transcript disclosed that the appellant was in custody for approximately one year prior to the sentencing date. It was therefore also accepted that the appellant must be given credit for the time spent in custody, prior to sentencing. In the circumstance, the sentence of 17 years' imprisonment would be further reduced by one year to account for this. Taking these factors into account, the sentence of the court was therefore, 16 years' of imprisonment.

[26] For the offence in question, section 6(2) of the Sexual Offences Act requires that the time served before parole, should be specified and that it should not be less than 10

years. In the circumstance, we further ordered that the appellant should serve 10 years' imprisonment before being eligible for parole.

[27] It was for all the foregoing reasons that we allowed the appeal, and made the consequential orders detailed at paragraph [4] above.