[2023] JMCA Crim 22

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE FRASER JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO 45/2019

GARFIELD ELLIOTT v R

Mr Russell Stewart for the appellant

Miss Shanna Ormsby and Miss Jameila Simpson for the Crown

15, 16 and 19 May 2023

Criminal Law – Sentence – Jurisdiction to review mandatory minimum sentences – Credit for time spent on remand - Grievous Sexual Assault – Criminal Justice (Administration) Act section 42K - Sexual Offences Act sections 4(1)(e) and 4(3)(b)

ORAL JUDGMENT

E BROWN JA

[1] The appellant was tried and convicted for sexual assault offences before a judge ('the learned judge'), sitting with a jury, in the Home Circuit Court on 14 March 2019, on an indictment containing three counts. The offences for which the appellant was convicted were grievous sexual assault, buggery and sexual touching, respectively, each committed on separate dates upon a child of 11 years of age. The sentences were imposed on 17 May 2019. For the offence of grievous sexual assault, the learned judge imposed the mandatory minimum sentence of 15 years' imprisonment. A sentence of four years' imprisonment was handed down in respect of each of the other two offences. All the sentences were ordered to run concurrently. Further, the learned judge granted the appellant a certificate pursuant to section 42K of the Criminal Justice (Administration) Act ('CJAA') in relation to the mandatory minimum sentence.

[2] Being dissatisfied with both his conviction and sentence, the appellant filed an application for leave to appeal, challenging both. A single judge of this court reviewed the available transcript of the appellant's trial and refused him leave to appeal his conviction. However, the single judge granted the appellant leave to appeal his sentence for this court to consider the effect of the certificate granted by the learned trial judge. Before considering the submissions, it is useful to contextualise the appeal with a synopsis of the facts relied on by the prosecution.

Background

[3] The following background information is extracted from the learned judge's summation as the evidence taken at the trial did not form part of the transcript. In 2016, the complainant ('SS') resided with her parents in the parish of Saint Andrew. Across the road from SS's home, lived a girl of 14 years of age, together with her mother and brother. This older girl was SS's friend, with whom SS was in the habit of visiting. They played together in the older girl's room. Also living in this yard, in separate quarters from SS's friend, was the appellant.

[4] The appellant's mode of operation was to call SS as she played in the older girl's room. SS would then leave to the appellant's room where the sexual assaults took place. On the first occasion, at about midday on 18 July 2016, after SS entered the appellant's room, he removed all her clothing, including her underwear, put her to lie on his bed and performed oral sex upon her. At the end of that encounter, SS got dressed and returned to the older girl's room and resumed playing with her. The following day, 19 July 2016 at about 12:30 pm, SS again visited her friend across the road. Deploying his mode of operation, SS entered the appellant's room. The appellant pulled down her clothes and removed her underwear. Following that, upon his instructions, she went on the bed and lay on her abdomen. The appellant then penetrated SS anally, with his penis, to the point of ejaculation. SS then got dressed and returned to older girl's room, where she continued playing. The next incident occurred on 21 July 2016. SS entered the appellant's room, following the pattern described above. Acting on the appellant's instructions, SS removed

all her clothing. The appellant then put SS to lie on top of him, placing his penis on her vagina.

[5] SS made no complaint of any of these incidents to either her older playmate or parents. SS explained that she told no one of the incidents voluntarily because the appellant told her not to and he "threatened" her. Things came to a head when, on 22 July 2016, SS's mother saw her leaving the appellant's room and enquired what she was doing there. In response to her mother's questioning, after an initial denial, SS told her mother what had happened with the appellant.

[6] SS was medically examined on 23 July 2016. The doctor found evidence of bruises in the region of her anus, which were consistent with infliction by a blunt object such as a penis.

[7] The appellant gave evidence and called two witnesses. He denied the allegations, and specifically denied threatening SS not to tell her mother. He also spoke to his good character.

The appeal

[8] At the beginning of the hearing, counsel for the appellant sought and obtained the leave of the court to abandon the original grounds listed in the appellant's Criminal Form B1 and argue a solitary supplemental ground, contesting the sentence of 15 years' imprisonment. The supplemental ground, as it appears in counsel's skeleton submissions, is quoted below:

> "The sentence of fifteen (15) years to [sic] Grievous Sexual Assault is manifestly excessive in the circumstances and in light of the fact that the Learned Trial Judge issued a Certificate pursuant to section 42K of the Criminal Justice (Administration) (Amendment) Act, 2015".

The abandonment of the original grounds of appeal, in the circumstances of this case, means also that the appellant is no longer pursuing the application for leave to appeal his convictions. The appellant's counsel informed the court that this position was

discussed with the appellant and that he has the appellant's agreement to proceed as he proposed.

Submissions on behalf of the appellant

[9] The appeal is therefore confined to the sentence imposed on count one. Counsel for the appellant submitted, amongst other things, that the mandatory minimum sentence is excessive in the circumstances. Counsel contends, in his skeleton submissions, that there are compelling reasons rendering the mandatory period of 15 years' imprisonment manifestly excessive and unjust. Counsel listed the following for the court's consideration:

> "a) There were no acts of violence committed by the Appellant towards the complainant during the act of grievous sexual assault.
>
> b) No trauma and/or injuries sustained by the complainant when the Appellant committed the act of grievous sexual assault.
>
> c) It was not, based on decided cases within our jurisprudence, the worst case of grievous sexual assault.
>
> d) The mitigating factors outweigh the aggravating factors which renders the sentence manifestly excessive."

[10] These submissions were concluded by the following two points. Firstly, a request that the appellant be credited for time spent in custody before he was sentenced. This request was premised on **Lennox Golding v R** [2022] JMCA Crim 34. Secondly, we were invited to adopt the view of the learned trial judge that 10 years' imprisonment would be appropriate in the circumstances; from which would be subtracted the three years' pre-sentence incarceration, resulting in a sentence of seven years, with the recommendation that the appellant serves two-thirds of that sentence before parole eligibility.

Submissions on behalf of the Crown

[11] Learned counsel for the Crown disagreed that the sentence is manifestly excessive. However, the intellectual platform from which this position was launched appears similar, in essence, to those undergirding the position of the appellant. Whereas

the appellant asserted the presence of compellable reasons to pronounce the prescribed minimum sentence manifestly excessive and unjust, counsel for the Crown asserted the contrary position, but for one factor. The Crown's major proposition is: any analysis of the excessive and unjust nature of the mandatory minimum sentence ought to commence with a predicate assumption; that is, the sentence is generally applicable in cases admitting of an absence of factors increasing the culpability of the offender and the resulting harm, as well as the offender having good antecedents. **Kimani McDermott v R** [2022] JMCA Crim 38 was cited as authority for that position.

[12] The respondent's one concession of a compellable reason for disturbing the mandatory minimum sentence is to allow the appellant credit for the time spent in custody before sentence was pronounced upon him. Counsel for the respondent was critical of the learned judge's approach to the sentencing exercise, largely for his lack of strict adherence to the procedure laid down in the Sentencing Guidelines For Use By Judges Of The Supreme Court of Jamaica And The Parish Courts, December 2017 ('the Sentencing Guidelines') and the articulation of a relationship between the maximum sentence for buggery (10 years) and the 15 years' mandatory minimum. A properly conducted sentencing exercise, it was submitted, would have yielded a balanced scorecard of aggravating and mitigating factors. Hence, nothing compelling would have emerged from that to warrant disturbing the sentence. Therefore, that only left giving credit for time served, a position supported by the authorities, for example **Paul Haughton v R** [2019] JMCA Crim 29.

Discussion

[13] As intimated above, this appeal comes before us by virtue of the provisions of section 42K of the CJAA. This section grants to this court the power to review a mandatory minimum sentence that is assessed to be excessive, in a particular case. Whether the mandatory minimum sentence is, to use the legislative language, "manifestly excessive and unjust", is, first, an initial determination to be made by the sentencing judge and,

second, by this court, on a review, is constrained to similarly conclude. Section 42K is quoted below:

> "42K. – (1) Where a defendant has been tried and convicted of an offence that is punishable by prescribed minimum penalty and the court determines that, having regard to the circumstances of the particular case, it would be manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty for which the offence is punishable, the court shall-
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> (a) sentence the defendant to the prescribed minimum penalty; and
>
> (b) issue to the defendant a certificate so as to allow the defendant to seek leave to appeal to a Judge of the Court of Appeal against his sentence.
>
> (2) A certificate issued to a defendant under subsection (1) shall outline the following namely –
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> (a) that the defendant has been sentenced to the prescribed minimum penalty for the offence;
>
> (b) that the court decides that, having regard to the circumstances of the particular case, it would be manifestly unjust for the defendant to be sentenced to the prescribed minimum penalty for which the offence is punishable and stating the reasons therefor; and
>
> (c) the sentence that the court would have imposed on the defendant had there been no prescribed minimum penalty in relation to the offence.
>
> (3) Where a certificate has been issued by the Court pursuant to subsection (2) and the Judge of the Court of Appeal agrees with the decision of the court and determines that there are compelling reasons that would render it manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty, the Judge of Appeal may –
>
> (a) impose on the defendant a sentence that is below the prescribed minimum penalty; and
>
> (b) notwithstanding the provisions of the *Parole Act*, specify the period, not being less than two-thirds of the

> sentence imposed by him, which the defendant shall serve before becoming eligible for parole." (Italics as in the original)

[14] As was said above (see para. [1]), the learned judge issued a certificate, in pursuance of which, leave to appeal was granted. The learned judge gave two reasons for issuing the section 42K certificate. Those reasons are:

> "a) Defendant has spent 34 months in custody.
>
> b) Sentence seems to me to be excessive having regard to the evidence given on the nature of the grievous sexual assault (notwithstanding age (11 yrs) [sic] of complainant."

The learned judge was more expansive in relation to what he meant by "the nature of the grievous sexual assault" in his sentencing remarks. Firstly, the learned judge drew a distinction between cases of grievous sexual assault which are extraordinarily serious and accordingly of comparable gravity with the offence of rape and cases, such as the present one which, he opined, the intention was not for the latter to attract the prescribed mandatory minimum punishment. At page 151 of the transcript, lines 8-19, the learned judge said:

> "… I think, having regard to the nature of the Grievous Sexual Assault, it does not fall in the range of the types of Grievous Sexual Assault that are extraordinarily serious and really would be considered to be of the same gravity as Rape, because it is 15 years [sic] mandatory sentence, mandatory minimum, applied to both Grievous Sexual Assault and to Rape. And, I think, with that information that the intention was to apply it to extraordinarily serious types of Grievous Sexual Assaults ..."

[15] Secondly, quite apart from introducing 'categories' into the offence of grievous sexual assault, the learned judge sought to analogize the seriousness of this offence with that of buggery, albeit within the context of the case before him. At page 149 of the transcript, between lines 8-17, the learned judge said:

> "In respect of count 2, Buggery, which ironically, in the circumstances of this case, it is a much more serious offence, in my view, the maximum sentence permitted by law is only 10 years. So, we have a situation where the sentences, the sentence that I have imposed for putting your mouth on the vagina of the girl, is a minimum of 15 years and the sentence that can be imposed for the Buggery is a maximum of 10 ..."

Respectfully, neither view supports the position that the prescribed minimum sentence for grievous sexual assault is manifestly excessive and unjust in the present case.

[16] Counsel for the appellant strove valiantly to demonstrate the presence of compelling reasons for this court to agree with the learned judge that in the circumstances of this case, there are compelling reasons to say the mandatory minimum is manifestly excessive and unjust. His was a two-pronged approach. Counsel first tried to persuade us that it is dangerous to apply the principle established in **Kimani McDermott v R** across the board as sentences should be individualized. This submission did not resonate with the court. The clear legislative intention is that the sentence should be imposed upon all offenders convicted of grievous sexual assault and, the sentence should not be disturbed in the absence of compelling reasons in a particular case.

[17] Failing to move the court on that limb, counsel next submitted that many of the positive elements found in **Rashane DeSouza v R** [2023] JMCA Crim 1 are present in this case. In that case, this court, further to the issuance of a similar certificate under section 42K of the CJAA, reduced a sentence of 15 years' imprisonment for rape, to nine years' imprisonment, before deducting time served on remand. **Rashane DeSouza v R** is readily distinguishable from this case. In that case, this court, disagreeing with the trial judge, found that there were no aggravating factors. On the contrary, there were several mitigating factors. Chief among them is that he was a young offender whose offending was considered uncharacteristic conduct in the life of a student at a tertiary institution. And, the victim herself being a young adult, not many years separated her from the perpetrator. The appellant stands in stark contrast as a man in his 40s preying on an impressionable 11-year-old girl over several days. This submission also foundered.

[18] On the other hand, we agree with the submission of counsel for the Crown that the learned judge's classification approach to the offence of grievous sexual assault is without legislative support. The singular act of putting the mouth on the vagina constitutes the offence for a child under 16 years of age; although in this case the evidence is that the appellant went on to suck the vagina of 11-year-old SS. The offence of grievous sexual assault is created by section 4 of the Sexual Offences Act, 2009 ('SOA'). The section reads, so far as is relevant:

> "4.- (1) A person … commits the offence of grievous sexual assault upon another … where, in the circumstances specified in subsection (3), the offender-
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> (a) … –
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> (i) …; or
>
> (ii) …;
>
> (b) …
>
> (c) …
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> (d) …
>
> (e) **Places his or her mouth onto the vagina, vulva, penis or anus of the victim**; or
>
> (f) …
>
> (2) …
>
> (3) The circumstances referred to in subsection (1) are that any of the acts specified in paragraphs (a) to (f) of that subsection is –
>
> (a) carried out –
>
> (i) without the consent of the victim; and
>
> (ii) knowing that the victim does not consent to the act or recklessly not caring whether the victim consents or not; or
>
> (b) **carried out upon a victim under the age of sixteen years …**" (Emphasis added)

[19] Aside from making oral vaginal contact upon a victim under 16 years, a completed offence, the legislature, contrary to the views expressed by the learned judge, declares a clear intention to regard the offence of grievous sexual assault, even without penetration, as no less of an attack upon the bodily integrity of the victim, than rape. This much is clear from the punitive equivalence of both offences, laid down in the SOA (life imprisonment with a prescribed minimum sentence of 15 years' imprisonment).

[20] Perhaps these errors would have been avoided had the learned judge given full consideration to the sentencing exercise articulated by this court in **Meisha Clement v R** [2016] JMCA Crim 26, **Daniel Roulston v R** [2018] JMCA Crim 20 and the Sentencing Guidelines. Under the Sentencing Guidelines, the normal range of sentence for grievous sexual assault is 15-25 years' imprisonment, with the usual starting point being 15 years. In accordance with the methodology laid down in **Meisha Clement** and **Daniel Roulston**, the learned judge was then required to consider the aggravating and mitigating factors, to see whether the sentence should be increased or decreased. Following on that, he would give full credit for time spent on remand (see **Callachand and Another v The State** [2008] UKPC 49; **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ)).

[21] In our view, it is only after completing the sentencing exercise that it can be said whether the resulting sentence, if imposed, would be excessive. Put another way, it is a departure from the principled, methodological approach set out in the authorities which may result in the imposition of a manifestly excessive or unjust sentence. That is, adapting the learning in **Meisha Clement** and turning it upon its head, a sentence may be said to be manifestly excessive or unjust if it: was arrived at without regard to the usual principles of sentencing; was commenced at an unusually high, or low, starting point, without justification; falls outside the normal range of sentences which (a) the court is empowered to pronounce, and (b) is usually given for similar offences in like circumstances.

[22] In this case, the lowest starting point the learned judge was obliged to adopt, in principle, was 15 years, that being the prescribed mandatory minimum sentence. That is the acceptable starting point where the commission of the offence involved no gratuitous violence and the offender was of previous good character (see **Kimani McDermott v R**). It was accepted on both sides that no violence other than that inherent in the commission of the offence was perpetrated and the appellant was a man of previous good character.

[23] So, having started with the notional sentence of 15 years, the next consideration is the aggravating and mitigating factors. Counsel for the Crown helpfully collated a list under both categories, we gratefully adopt. The aggravating factors comprised the age of SS (11 years), the maturity of the appellant (44 years at the time of sentencing), the prevalence of the offence, the prospective long-term trauma for SS and that she was threatened. The mitigating factors are, a previously unblemished character, no previous convictions, a good community report and prospects for rehabilitation. When the aggravating and mitigating factors are weighed, the latter, at best, neutralize the impact of the former.

[24] That leaves only the factor of the time spent on remand to be considered. The appellant was on remand for 34 months before he was sentenced. The learned judge rounded that figure upwards to three years. We are not inclined to adopt a different position. Therefore, if the appellant is ordered to serve the prescribed mandatory minimum sentence, without taking account of the time spent on remand, he would, in effect, have been sentenced to 18 years' imprisonment. That would not only be contrary to acceptable sentencing principles but manifestly excessive and unjust. This, therefore, is a compelling reason to say, in the circumstances of this particular case, the imposition of the prescribed mandatory minimum sentence of 15 years would be manifestly excessive and unjust. Similarly, in **Lennox Golding v R**, which applied **Paul Haughton v R**, although this court disagreed that the mandatory minimum sentence was manifestly

excessive and unjust, the sentence was adjusted to give full credit for time spent on remand.

Conclusion

[25] This appeal concerned a challenge to appropriateness of the imposition of the prescribed minimum sentence of 15 years for grievous sexual assault. Having considered the matter in the round, we conclude that there was one compelling reason for the learned judge to issue a certificate to the appellant in respect of this offence (giving credit for time spent on remand). However, after undertaking the sentencing exercise, we disagreed with the learned judge that a sentence of 10 years' imprisonment should be imposed. The sentence of 15 years' imprisonment will, however, be adjusted to reflect full credit for time spent on remand, in the manner intended by the learned judge.

Order

[26] We therefore make the following orders:

1) The application for leave to appeal conviction is dismissed.
2) The appeal against sentence is allowed in part. The sentence of 15 years' imprisonment is set aside and a sentence of 12 years' imprisonment is substituted therefor.
3) The appellant is to serve eight years' imprisonment before becoming eligible for parole.
4) The sentence is to be reckoned as having commenced on 17 May 2019.