[2023] JMCA Crim 10

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL COA2022CR00003

NEWTON JACKSON v R

Miss Venice Brown for the applicant

Ms Kathy-Ann Pyke for the Crown

17 and 20 February 2023

ORAL JUDGMENT

DUNBAR GREEN JA

[1] The applicant, Mr Newton Jackson, was charged on an indictment containing 13 counts. On 1 February 2021, he pleaded guilty in the Home Circuit Court, before Wolfe-Reece J ('the learned judge') to counts 1 to 4, 8 to 10, 12 and 13 of the indictment. He pleaded not guilty to counts 5, 6, 7 and 11. The prosecution offered no evidence on counts 5, 6 and 7 but not on count 11.

[2] On 18 March 2021, the applicant was sentenced as follows: count 1 (indecent assault) to two years and three months' imprisonment; counts 2, 3 and 8 (grievous sexual assault) to 12 years and eight months' imprisonment, with eligibility for parole after serving nine years (the sentences were ordered to run concurrently); counts 4, 9, 10 and 11 (incest) to 16 years and four months' imprisonment (the sentences were ordered to run concurrently); and counts 12 and 13 (attempting to pervert the course of justice) to 12 months' imprisonment (stipulated by the learned judge as time served). Although the

front page of the record indicates that he was sentenced in relation to count 6, the transcript reveals otherwise.

Case for the prosecution

[3] The material facts, outlined by the prosecution, are that on divers days between 27 July and 23 September 2018, the applicant performed sexual acts and inflicted other types of violence on his daughter, the complainant, who was 16 years of age. Counts 1 to 4 and 8 describe incidents which took place on 27 July 2018. At about 1:00 am, the applicant was at home with the complainant when he woke her and dragged her into his room. He took off her blouse; fondled and bit her breasts; performed oral sex on her; inserted a finger inside her vagina; penetrated her vagina with his penis; and attempted to choke her. Later that day, he performed oral sex on her.

[4] On 13 and 15 September 2018, he yet again had sexual intercourse with the complainant (counts 9 and 10).

[5] On 23 September 2018, after the complaints in those matters were placed before the court, the applicant telephoned the complainant and invited her to tell the court that she had falsely accused him of the offences. He also promised to give her $10,000.00 for withdrawing the complaints against him (counts 12 and 13).

Grounds of appeal

[6] A single judge of appeal refused the applicant leave to appeal his sentences. Consequently, this is a renewed application.

[7] At the commencement of the hearing, the applicant was granted permission to abandon his original grounds of appeal and argue, instead, these supplemental grounds:

> "1. That the learned trial Judge erred in her determination of the sentences to be imposed.
>
> a) That the learned Trial Judge erred by failing to identify an appropriate starting point within the normal

sentencing range for incest and thereby imposed a sentence which was excessive.

b) That the learned Trial Judge failed to give due and sufficient regard to the Applicant's guilty plea.

2. That the learned Trial Judge erred by imposing a sentence for an offence for which the Applicant pleaded not guilty.

a) That the Applicant pleaded not guilty for Count 11 (incest). Notwithstanding his not guilty plea, he was sentenced on that count.

b) This error contributed to the Applicant not getting a fair sentence."

Submissions

[8] As regards count 1, Miss Brown, appearing for the applicant, advanced the following arguments. Firstly, that the learned judge erred when she failed to identify an appropriate starting point for the counts of incest. Secondly, the learned judge erred by not giving a reason for her adoption of a starting point above the usual starting point of seven years. Thirdly, when setting the starting point, she ought to have directed her mind to whether: (i) any weapon was used; (ii) there was any threat of injury; and (iii) there was violence beyond that inherent in the offence. Fourthly, the sentence was excessive as it was inconsistent with sentences for like offences in partially similar circumstances. Lastly, the learned judge gave a discount below that which was contemplated by section 42D of the Criminal Justice Administration (Amendment) Act, 2015 ('CJAAA'), for pleas occurring after the first relevant date but before the commencement of a trial. The level of discount ought properly to have fallen between 15 and 35%, it was argued.

[9] In support of the argument that the sentence was inconsistent with sentences for similar offences, counsel sought support from the cases of **Daniel Roulston v R** [2018] JMCA Crim 20 and **Carl Campbell v R** [2019] JMCA Crim 22. The former case involved pleas of guilt for rape and grievous sexual assault. For the count of rape, a sentence of 20 years' imprisonment was reduced to 15 years' imprisonment on appeal (after a credit of two years was applied for time spent in custody). The appellant in that case had six

previous convictions including rape and attempted rape which were committed outside of Jamaica. The case of **Carl Campbell v R** involved multiple sexual offences. On appeal, a sentence of 16 years' imprisonment at hard labour (after a credit of one year was applied for time spent in custody) was substituted for 45 years' imprisonment for the count of rape. The appellant had previous convictions including two for indecent assault.

[10] Counsel for the applicant contended that, unlike the instant case, the sentence for rape in each of those cases was lighter than the one imposed by the learned judge for incest even though each of those appellants had previous convictions for sexual offences.

[11] On behalf of the Crown Miss Pyke submitted that there was no apparent error in the sentences. Counsel argued that although the reason given for adopting a starting point above the usual for incest amounted to a non – reason, the court would have been impelled by the fact that most of the offences occurred on the same day. She also indicated that the sentences fell within the normal sentencing range for those offences and that, given the circumstances of this case, the discount for the guilty pleas was appropriate. She posited that it was inescapable that the sentence for each count of incest would not have been on the higher end, given the fact that there were multiple counts of incest.

[12] As regards ground two, Miss Pyke conceded that the learned judge had erroneously sentenced the applicant on count 11 (a fourth count of incest). She indicated that the sentence imposed for that count was therefore a nullity. Counsel further indicated that no evidence would be offered against the applicant on that count. Consequently, she requested that this court make an order that the record be endorsed, accordingly, instead of remitting the count to the Home Circuit Court for further consideration by the Crown.

Analysis

[13] We are guided by the principle that the appellate court does not alter a sentence because the members of the court might have imposed a different one (see for example,

R v Ball (1951) 35 Cr App 164, 165). The proper approach was outlined by Morrison P at para. [43] in **Meisha Clement v R** [2016] JMCA Crim 26 where he stated:

> "On an appeal against sentence … this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[14] At the start of the sentencing hearing, the learned judge referred to the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('Sentencing Guidelines'). She remarked that the applicant was 54 years old and had attended high school, but stopped short of saying whether those factors would mitigate his sentences. Nevertheless, she considered, as mitigating factors, that he was gainfully employed prior to being placed in custody; had dependent children whom he maintained; was industrious and willing to work hard; owned a home; had a challenging upbringing; was himself abused; was a ward of the State; and had a relatively good community report.

[15] The learned judge then considered the aggravating features. These were that: (i) the complainant was a minor and the applicant's daughter; (ii) the applicant had breached her trust; (iii) the offences were repeated; and (iv) the applicant had tried to get the complainant to change her story. These factors were balanced against the mitigating factors including the fact that the applicant expressed remorse, had apologised to his daughter, and was considered by the probation services to be a low to medium risk offender.

[16] The learned judge also considered the general principles of sentencing including the possibility of rehabilitation, prevention, deterrence and elements of retribution as well as the very serious nature of the offences and the circumstances in which they were

committed. She considered that it was in the applicant's favour that his previous offences were dissimilar to the instant ones and had been committed between 19 and 30 years before. Those offences were: (i) 1989 - unlawful wounding; (ii) 1990 - unlawful gaming (two convictions); (iii) 1992 - affray; (iv) 1995 - larceny of motor vehicle; and (v) 2002 - supplying a controlled drug, cocaine (out of this jurisdiction).

[17] As regards indecent assault (count 1), the learned judge took note of the normal sentencing range of three to 10 years' imprisonment with a prescribed statutory maximum of 15 years' imprisonment. She accepted the usual starting point of three years then added five years for the aggravating factors which took the figure to eight years. She then subtracted two years for the mitigating factors. That reduced the figure to six years. She then discounted the six years by 10% for the guilty plea which took it to five years and four months. She applied a credit of two years and five months for time spent in pre-sentence custody. The sentence imposed for this offence was two years and three months' imprisonment.

[18] As it concerns grievous sexual assault, she acknowledged the sentencing range of 15 to 25 years, and adopted the usual starting point of 15 years (the prescribed statutory minimum sentence). Five years were added for the aggravating factors, then two years deducted for mitigating factors. She then reduced the figure by 10% for the guilty plea. The figure arrived at was 15 years and two months' imprisonment. A credit of two years and five months was applied for time spent in custody which took the sentence to 12 years and eight months' imprisonment. She indicated a parole ineligibility period of nine years. The sentences were ordered to run concurrently.

[19] For the offence of attempting to pervert the course of justice, the learned judge indicated that the maximum sentence is two years' imprisonment. She adopted a starting point of 12 months and added four months for the aggravating factors. She then reduced the 16 months by two months on account of the mitigating factors. This figure was further reduced by 10% on account of the guilty plea. The result was a sentence of 12 months' imprisonment. She then indicated that because of the time spent on pre-sentence remand

the applicant's sentence would be time served. The learned judge also recommended that the applicant should receive treatment for his admitted drug abuse.

[20] The sentencing process adopted in relation to those offences was generally consistent with the approach outlined by the authorities from this court including **Meisha Clement v R**. Also, the sentences imposed were within the accepted ranges for those offences.

[21] The focus of this renewed application for leave to appeal is the sentence for each count of incest. The learned judge acknowledged that the normal sentencing range for incest was five to 25 years and adopted a starting point of 18 years on the basis that "it was a completed offence". It was not explained what she meant by "completed offence", neither was the meaning apparent from the context. She then added five years for aggravating factors. Other adjustments were made subsequently.

[22] It is not unreasonable for counsel to have argued that by not demonstrating what she meant by "a completed offence" (particularly in a context where all the other relevant offences could be so described), and how that operated to increase the usual starting point by such a significant margin, the learned judge would have erred. Section 15.1 of the Sentencing Guidelines imposes a duty on the sentencing judge to give reasons in relation to each step in the sentencing process. However, the absence of reasons or a suitable reason does not necessarily mean that the sentence imposed for this offence was excessive. However, that error provides an opportunity for this court to intervene and consider that sentence afresh.

[23] In setting an appropriate starting point we have taken cognizance of the extreme nature and seriousness of the offence reflected in multiple features of culpability and harm. These were multiple acts of incest committed over a two-week period. These factors would justify a much higher starting point than seven years. In the circumstances, we believe 15 years would be an appropriate starting point.

[24] The circumstances were exacerbated by the fact that the victim was still a minor and that other types of violence were perpetrated against her during the commission of at least one count of incest. For those other aggravating features we would add eight years, resulting in a figure of 23 years. That figure would then be reduced by two years, on account of the mitigating factors. The result would be 21 years.

[25] As it appears that the applicant pleaded guilty after the first relevant date but before the commencement of trial, he could have had a discount of "up to" 35% (see section 42D of the CJAAA). Both the CJAAA and the several authorities from this court have indicated that the level of discount is at the sole discretion of the sentencing judge, after considering the factors in section 42H of the CJAAA (see **Lincoln Hall v R** [2018] JMCA Crim 17, para. [22]). Although the learned judge did not say why she believed only 10% was appropriate, she did indicate, among the several aggravating factors, that the more egregious of the offences were repeated. It is also apparent that many of the factors to be considered, under section 42H of the CJAAA, would operate against the applicant. Foremost in our mind is the question of "whether the reduction [or a particular level of reduction] of the sentence… would be so disproportionate to the seriousness of the offence, or so inappropriate…that it would shock the public conscience" (section 42H(a) of the CJAAA).

[26] We do not accept the submission advanced on the applicant's behalf that the legislative intent under section 42D of the CJAA was to confine the exercise of the sentencing judge's discretion to a discount within the range of 15% to 35% where, as in the instant case, the plea of guilt was given after the first relevant date but before trial commenced. Bearing in mind all the factors for consideration under section 42H of the CJAAA, we believe that a discount of 10% is appropriate. When that discount is applied, the result is 18 years and nine months' imprisonment. A full credit of two years and five months would then be applied for time spent on pre-sentence remand. This results in a sentence of 16 years and four months' imprisonment for each count of incest.

[27] This sentence, in our view, is proportionate to the offending behaviour, and approximates to the sentence for rape in the cases of **Daniel Roulston v R** and **Carl Campbell v R**, relied on by the applicant. In those cases, the sentence for rape was in the region of 17 years before the credit was applied.

[28] The alleged distinguishing features among the cases are insignificant, in our view. Given the number of counts of incest and the nature of the offence itself, this is clearly a more serious case.

[29] For these reasons ground one fails.

[30] As regards ground two, we agree with counsel that the learned judge erred when she imposed a sentence for count 11 as the transcript clearly shows that the applicant pleaded not guilty to that count. The sentence for count 11 is therefore a nullity. Nonetheless, it is our view that no undue prejudice was caused to the applicant on account of that mistake since he pleaded guilty to three other counts of incest, among the several counts of sexual violence committed on the complainant.

[31] Counsel for the Crown indicated that the Crown was prepared to offer no evidence on that count. She, therefore, requested that the record be endorsed to reflect that position. We do not agree that this approach is the correct one. In the circumstances, we are minded to remit the matter to the Home Circuit Court for the sole purpose of a determination, by the Crown, as regards count 11 of the indictment.

[32] In the circumstances, except for the error in relation to count 11 of the indictment, we see no reason to disturb the sentences imposed by the learned judge.

[33] Accordingly, the court makes the following orders:

1. Leave to appeal against sentence is granted.

2. The hearing of the application for leave to appeal is treated as the hearing of the appeal.

3. The appeal is allowed in part. The sentence for count 11 of the indictment (incest) was improperly imposed and is therefore a nullity. The conviction for count 11 is, therefore, quashed and the sentence set aside. The matter is remitted to the Home Circuit Court for that count to be considered by the Crown as it deems appropriate.

4. The sentences for indecent assault (count 1), grievous sexual assault (counts 2, 3 and 8), incest (counts 4, 9 and 10) and attempting to pervert the course of justice (counts 12 and 13) are affirmed.

5. The sentences are reckoned as having commenced on 18 March 2021 the date on which the sentences were imposed.