[2019] JMCA Crim 16

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 28/2016

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

CHARLEY JUNIOR v R

Leonard Green for the applicant

Miss Sophia Thomas for the Crown

26 February and 12 April 2019

BROOKS JA

[1] The issue raised by this application for leave to appeal is the credit that should be given to a convicted person for time spent in custody awaiting trial, when, for a portion of that time, the convicted person was serving a sentence for other offences.

[2] The applicant, Mr Charley Junior, pleaded guilty to the offence of rape, which was committed in 2003. He was taken into custody in 2006, but did not plead guilty until 4 March 2016. He was in custody for the entire period. He was sentenced in 2007 for other offences committed by him, some of which were unconnected to the circumstances surrounding the rape that was the subject of this case.

[3] He was sentenced, in respect of this case, on 17 March 2016, to 25 years imprisonment, which the learned sentencing judge ordered be reduced by one year. The reduction was in recognition, said the learned sentencing judge, of some of the time that Mr Junior had served in custody, prior to his conviction, in relation to the offence. The learned sentencing judge refused to give credit to Mr Junior for the entire time that he was in custody. She based her refusal on the fact that, for the period in excess of that year, Mr Junior was serving sentences for other offences.

[4] Mr Junior seeks to challenge the learned sentencing judge's approach to the sentencing. He contends that she should have given him the benefit of the entire period that he spent in custody prior to sentencing.

The circumstances of the offence

[5] The case which was outlined by the prosecution, in support of the conviction in this case, was that on Thursday 31 July 2003 Mr Junior forcibly abducted the physically impaired complainant (she has a foot missing). He told her that he was now her man and she would have to stay with him. He took her to a hut where he kept her for several days, during which time, that is on 1 August 2003, he had sexual intercourse with her without her consent. Sometime after that day, he took her back to her house. She, thereafter, made a report about the assault. A warrant was issued for Mr Junior's arrest, but it was not executed until February 2006, when he was arrested and charged for the offence of rape.

The sentencing exercise

[6] No explanation was given to the learned sentencing judge, for the long delay in apprehending Mr Junior. Nor was there any explanation given, on the record in the court below, for the long lapse of time between his arrest and his plea of guilty to the charge. It was apparent, however, that he had continuously been in custody since the time of his arrest in 2006.

[7] An antecedent report, which was produced as a precursor to sentencing, showed that Mr Junior had 10 previous convictions recorded against his name. Two of those were for abduction, two for rape, one for indecent assault, and one for manslaughter. The indecent assault conviction was in 1975. The abduction and rape convictions were all on the same date in 2007. The manslaughter conviction was in 2013.

[8] He was, at the time of sentencing in the present case, serving sentences in respect of the abduction, rape and manslaughter convictions. The details of those sentences are important:

A. 28 June 2007 sentences:

(i) Abduction - 10 years imprisonment

(ii) Rape - 30 years imprisonment

(iii) Abduction - 7 years imprisonment

(iv) Rape - 15 years imprisonment

B. 20 December 2013 sentence:

Manslaughter - 12 years imprisonment

[9] In imposing the sentence in this case, the learned sentencing judge, rightly, considered:

a. the similarity of the previous offences;

b. the circumstances of this offence;

c. the usual range of sentences for the offence of rape, namely 15-25 years;

d. the fact that Mr Junior pleaded guilty; and

e. the likelihood of rehabilitation.

She came to the conclusion that despite the guilty plea, the appropriate sentence was 25 years imprisonment.

[10] The learned sentencing judge, however, said that since Mr Junior had spent some time in custody prior to conviction, in respect of this offence, that one year should be deemed as having been already served. The sentence was ordered to run concurrently with the sentence that he was then serving.

[11] There is some discrepancy in the documentation as to the sentence imposed. The document from the Supreme Court suggests that the sentence was 21 years imprisonment. That seems to be an error however, as the endorsement on the indictment states that the sentence is 25 years, which is to be reduced by a year as credit being given for time already served in custody. The document from the prison states, not unreasonably, that the sentence is 24 years imprisonment.

The application for leave to appeal

[12] In his original application, Mr Junior filed what could be considered four grounds of appeal. Two grounds of appeal contested his conviction, one contended that he was forced to plead guilty and the fourth contended that the sentence was harsh and excessive. In the two proposed grounds dealing with conviction, Mr Junior contended that he was not guilty of the offence, and that he had had consensual sexual intercourse with the complainant.

[13] A single judge of this court considered his application and refused leave to appeal.

[14] Mr Green, who appeared for him in this court, quite properly did not seek to argue either of the grounds dealing with conviction. There is also no basis for accepting, as reliable, Mr Junior's accusation against his attorney-at-law. Indeed, Mr Green, who did not appear in the court below, informed the court that Mr Junior is not pursuing that complaint. Learned counsel also correctly did not advance any arguments in respect of the contention that the sentence was harsh and excessive.

[15] Mr Green did submit, however, as a supplemental ground of appeal, that Mr Junior ought to have been given credit for the entire 10 years that he was in custody prior to being sentenced. Learned counsel argued that the learned sentencing judge was wrong to have rejected the submission, made in mitigation, that Mr Junior should have had the full benefit of those years in custody.

[16] Mr Green submitted that the authorities now suggest that full credit must be given in those circumstances. Learned counsel relied on the decision of the Caribbean Court of Justice in **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 in support of his submissions.

[17] Miss Thomas, for the Crown, submitted that the learned sentencing judge got it right. Learned counsel submitted that the learned sentencing judge's approach to the sentencing was consistent with the approach advocated for in **Daniel Roulston v R** [2018] JMCA Crim 20. Miss Thomas submitted that the sentence imposed was not manifestly excessive.

[18] Learned counsel conceded, however, that based on the history of Mr Junior's appearances before the court below, in respect of this case, there was a basis for giving credit for more than one year of pre-trial custody.

Analysis

[19] Although not expressly following the careful and appropriate reasoning in **Daniel Roulston v R**, there can be no proper complaint about the analysis that the learned sentencing judge used to arrive at the sentence of 25 years. Her approach has been set out above. The number of years imprisonment that she determined was appropriate, was consistent with the normal range for this offence. The fact that it was at the top of the range was a reflection of Mr Junior's previous offences.

[20] In rejecting the submission made to her by defence counsel that Mr Junior should have had the benefit of the entire time that he was in custody, prior to being sentenced in this case, the learned sentencing judge is recorded, at page 25 of the transcript, as saying:

> "So what I am saying…the Court takes into consideration time served in custody for the offence. It's only one year you are telling me that he would have served in prison for this offence, one year in custody prior to being sentenced. So maximum, I would have [to] take into consideration is just one year. I couldn't take into consideration the prison years, because those prison years were as a consequence of convictions."

[21] The issue raised in this case requires acknowledgment that there has been a radical shift in recent years in the attitude of the courts towards the treatment of pre-sentencing custody. The current approach is to be derived from the cases of **Romeo Da Costa Hall v The Queen** and **Meisha Clement v R** [2016] JMCA Crim 26. It is that an offender should be credited with the full period spent awaiting trial.

[22] In **Romeo Da Costa Hall v The Queen**, the Caribbean Court of Justice conducted a careful expose' and analysis of the cases from various jurisdictions. Both the majority judgment and the minority judgment demonstrated that the current approach to this issue, in an number of jurisdictions across the world, is to give full credit for the pre-trial incarceration. The learned judges in the majority, at paragraph [17] of the judgment, stated that, in the absence of legislation on the point, the "primary rule", in circumstances such as these, should be to give "full credit for time served in pre-sentence custody".

[23] In **Meisha Clement v R**, this court relied on the decision in **Callachand and another v The State** [2008] UKPC 49 and **Romeo Da Costa Hall v The Queen** and gave Ms Clement full credit for the time spent in custody prior to the date of sentencing. That time was deducted from the sentence that was deemed appropriate in her case.

[24] There are, however, bases on which to depart from that primary rule referred to by the majority in **Romeo Da Costa Hall v The Queen**. The majority said, at paragaph [18] of the judgment, that a sentencing judge would, nonetheless, have a discretion to depart from the primary rule. The learned judges said:

> "[18] We recognize a residual discretion in the sentencing judge not to apply the primary rule, as for example: (1) where the defendant has deliberately contrived to enlarge the amount of time spent on remand, (2) where the defendant is or was on remand for some other offence unconnected with the one for which he is being sentenced, (3) where the period of pre-sentence custody is less than a day or the post-conviction sentence is less than 2 or 3 days, **(4) where the defendant was serving a sentence of imprisonment during the whole or part of the period spent on remand** and (5) generally where the same period of remand in custody would be credited to more than one offence.
>
> This is not an exhaustive list of instances where the judge may depart from the *prima facie* rule, and other examples may arise in actual practice." (Emphasis supplied)

[25] The Board in **Callachand and another v The State** also recognised exceptions from the primary rule, as the term has been used above. Their Lordships stated at paragraph 10 of their judgment:

> "Their Lordships recognise that there may be unusual cases where a defendant has deliberately delayed proceedings so as to ensure that a larger proportion of his sentence is spent as a prisoner on remand. In such a case it might be appropriate not to make what would otherwise be the usual order. **Similarly a defendant who is in custody for more than one offence should not expect to be able to take advantage of time spent in custody more than once**…. Other factors, such as exceptionally good behaviour whilst on remand or assisting the police with their investigations, might seem not to have any relevance to the extent to which time spent in custody on remand should be taken into account. But they may be reflected in the overall sentence." (Emphasis supplied)

[26] There was no discussion in **Meisha Clement v R** of a discretion to deviate from the primary rule mentioned above.

[27] The Sentencing Guidelines For Use By Judges Of The Supreme Court Of Jamaica And The Parish Courts (the Sentencing Guidelines) did, however, speak to the discretion to deviate. The Sentencing Guidelines reproduce almost exactly the guidance given in **Romeo Da Costa Hall v The Queen**. The relevant guideline, guideline 11, advises that reasons should be given where there is a departure from the primary rule. The relevant portion of guideline 11 states as follows:

> "11.6 However, because the primary rule is that substantially full credit should be granted for the time spent on remand, the sentencing judge must give reasons for not doing so in any case in which it is decided to depart from the rule in any way."

It would seem that, depending on the circumstances, it may be only necessary for a sentencing judge to state that the reason for not applying the primary rule is the existence of circumstances which amount to one of the exceptions identified by the majority verdict in **Romeo DaCosta Hall v The Queen**.

[28] Guideline 11 of the Sentencing Guidelines also addresses the manner in which the deduction is to be made. In this regard, it states:

> "11.1 In sentencing an offender, full credit should generally be given for time spent by him or her in custody pending trial. **This should as far as possible be done by way of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing**.
>
> 11.2 The sentencing judge should therefore ensure that accurate information relating to the time spent in custody is made available to the court.
>
> 11.3 In pronouncing sentence arrived at in this way, **the sentencing judge should state clearly what he or she considers to be the appropriate sentence, taking into account the gravity of the offence and all mitigating and aggravating factors, before deducting the time spent on remand**." (Emphasis supplied)

[29] Guideline 11.3 reflects the method approved by the majority in **Romeo DaCosta Hall v The Queen**. The majority recognised that, where the pre-trial time spent on remand is significant, the result of the difference after subtraction could open the resultant sentence to the criticism that it is inconsistent with sentences imposed on other persons committing similar offences. Those judges were of the view that

legislation was required to permit a sentencing approach that allowed for the pre-trial custody time to be referred to as "time served under the…sentence". Justice Wit, in his minority judgment, disagreed on this latter point, among others (see paragraphs [46] and [47] of his judgment). He was of the view that that approach was within the inherent discretion given to a sentencing judge and that legislation was not necessary.

[30] Another principle to be considered is that departure from the Sentencing Guidelines does not necessarily mean that the result will invariably be set aside. The Sentencing Guidelines have not been expressed as being binding, but rather as a "best practice" guide at a particular point in time (see guideline 16.1).

[31] The final principle to be noted before further considering this case, is that this court will not normally disturb:

a. the result of an exercise of the discretion by a judge of the court below; or

b. the sentence imposed by a sentencing judge,

unless it is shown that the sentencing judge erred in principle or in understanding or applying the facts or law involved in the case. The authority for the principle, where it applies to the exercise of discretion, albeit stated in the context of treating with prejudicial evidence, is **Quincy Todd v R** [2008] UKPC 22 at paragraph 25. The authority in respect of sentences is **Lincoln Hall v R** [2018] JMCA Crim 17.

[32] It is to be noted that the sentencing in the present case took place prior to the establishment of the Sentencing Guidelines, but after the decision in **Romeo Da Costa**

Hall v The Queen. In applying the principles derived from **Romeo Da Costa Hall v The Queen** to the present case, it is patent that the learned sentencing judge was also correct in her decision on the pre-sentencing custody. She correctly applied the exception to the primary rule that dealt with incarceration by virtue of the offender "serving a sentence of imprisonment during the whole or part of the period spent on remand" (see guideline 11.4(iii) of the Sentencing Guidelines).

[33] The learned sentencing judge, in reducing the 25 year sentence, that she had arrived at, "by one year for the time spent in custody", was also acting in accordance with the approach of the majoriy in **Romeo Da Costa Hall v The Queen** and the Sentencing Guidelines. This is despite the fact that she did not mention the case and the Sentencing Guidelines were not yet in existence.

[34] It may be said, however, that apart from stating the principle allowing for departure from the primary rule, the learned sentencing judge did not expand on her reason for deciding to adopt that reason for departure. There is no requirement for her to have done so. The portion of the transcript where the learned sentencing judge states, "I couldn't take into consideration the prison years, because those prison years were as a consequence of convictions", is sufficient explanation.

[35] It cannot be said that she was wrong in her refusal to apply the primary rule. Mr Junior's previous convictions for abduction and rape, although contemplated in arriving at the appropriate number of years for the sentence, could have properly influenced a thoughtful sentencing judge not to apply the primary rule. The learned sentencing

judge's decision to order that the sentence, which she imposed, should run concurrently with the sentences that Mr Junior was previously serving, also indicated that she applied a reasoned approach to the sentence.

[36] The information provided by Ms Thomas as to the length of time that it took for Mr Junior to get to the point where he could plead guilty, and the number of times that Mr Junior attended court during that time, was distressing. The reasons that Mr Junior was not arraigned earlier were all administative, and fell into three broad categories:

a. the prosecution witnesses did not attend;

b. the defence counsel did not attend; and

c. the presiding court was otherwise engaged when the prosecution and defence were both ready for trial.

[37] It must be noted however, that Mr Junior did not signify his intention to plead guilty until very late in the day. Had he done so at an earlier stage his pre-trial remand period in this case may well have been shorter.

Summary and conclusion

[38] Considering all the relevant matters in this case, the sentence of 25 years' imprisonment, as calculated by the learned sentencing judge, cannot be impugned.

[39] The learned sentencing judge's decision not to apply full credit for the period that Mr Junior spent in custody prior to sentencing is also correct. Mr Junior was not entitled to be credited with the period that he spent serving a sentence for other

offences. This is one of the exceptions to the primary rule that full credit should be given for time spent in custody on remand prior to trial and sentencing.

[40] The learned sentencing judge did not need to consider the requirement of section 6(2) of the Sexual Offences Act, which provides that, where a person has been sentenced for rape, the court should specify a period of not less than 10 years which that person should serve before becoming eligible for parole. The provision is not relevant in this case because the offences were committed prior to the promulgation of that Act.

[41] Accordingly, the orders are:

1. The application for leave to appeal is granted.
2. The hearing of the application is treated as the hearing of the appeal.
3. The appeal is dismissed and the sentence imposed by the learned sentencing judge is affirmed.
4. The sentence is to be reckoned as having commenced on 17 March 2016.