[2015] JMCA Crim 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 77/2013

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MS PAULETTE WILLIAMS JA (AG)

LINFORD McINTOSH v R

Gladstone Wilson for the applicant

Mrs Natalie Ebanks-Miller and Ms Theresa Hanley for the Crown

21, 22 and 28 September 2015

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] This is an application by Mr Linford McIntosh, the applicant, for leave to appeal his conviction and sentence for the offences of grievous sexual assault and rape. The applicant was convicted following a trial on a two-count indictment before Harris J (Ag) (as she then was) sitting with a jury in the Home Circuit Court on 31 July 2013.

[2] The particulars of count one of the indictment that charged the applicant with the offence of grievous sexual assault contrary to the Sexual Offences Act were that on

9 July 2011, in the parish of Saint Andrew, he penetrated the vagina of the complainant with a body part other than his penis, the complainant being a person under the age of 16 years. The particulars of count two that charged him with the offence of rape also contrary to the Sexual Offences Act were that on the same date and at the same place (and time), he had sexual intercourse with the complainant without her consent, knowing that she was not consenting.

[3] The applicant was sentenced on count one to 18 years imprisonment with the stipulation that he should serve a minimum of 12 years before being eligible for parole. On count two, he was sentenced to eight years imprisonment at hard labour with the sentences on both counts ordered to run concurrently.

[4] The applicant, being aggrieved by this outcome, filed an application for leave to appeal his conviction and sentence. His grounds of appeal were set out in his filed application as follows:

> "(1) **Misidentity by the Witness: -** That the prosecution witness wrongfully identified me as the person or amoung [sic] any persons [sic] who committed the crime.
>
> (2) **Unfair Trial: -** That the evidence and testimonies upon which the learned Trial Judge relied on for the purpose to convict me lack facts and credibility thus rendering the verdict unsafe in the circumstances.
>
> (3) **Lack of Evidence: -** That the prosecution failed to present to the court any "concrete" piece of evidence material, forensic or scientific evidence to link me to the alleged crime.

(4) **Miscarriage of Justice**: - That the Court wrongfully convict me for a crime I knew nothing about."

[5] On 16 October 2014 the application was considered and refused by a single judge of this court who opined that the main issue in the case was one of credibility and that the learned trial judge gave the jury the necessary directions, which were adequate. The learned single judge, therefore, found no reason to disturb the findings of the jury or the sentences imposed by the learned trial judge. Notwithstanding the ruling of the learned single judge, the applicant had considered it necessary to renew his application before this court.

[6] The circumstances that gave rise to the conviction of the applicant for the two sexual offences are that on 9 July 2011 at about 4:00 pm, the virtual complainant, who was at the time 15 years old, was at home inside her bedroom preparing for a bath. She was getting ready to go to Devon House with the applicant and other family members. The applicant was in a relationship with the complainant's sister who was living with him at the material time. Up to that time, the complainant had known the applicant for approximately six years and would see him on a regular basis.

[7] While the complainant was inside the room, the applicant came and stood at her room door and started making sexually charged remarks to her to which she did not respond. When she attempted to pass him at the door, he asked her twice to allow him to touch her vagina and she told him no. She kept on trying to pass him at the door but he pushed her on the bed, lay on top of her and inserted his finger in her vagina. The

complainant put up as much resistance as she could but was unsuccessful in her attempts to repel the applicant's advances. Despite her objections, the applicant proceeded to have sexual intercourse with her without her consent.

[8] After the incident that same evening, the complainant went to the applicant's house where she saw her sister but she made no report to her about the incident. The complainant also, that same evening, went to Devon House with the applicant and other family members as was previously arranged. The complainant reported the incident to no one until 13 August 2011, after it was discovered that she was pregnant. The complainant testified that she did not report the incident to anyone because she was traumatized, scared and embarrassed. She indicated that she regarded the applicant as her brother-in-law and friend and that she thought she could have trusted him.

[9] In his defence at the trial, the applicant gave an unsworn statement from the dock in which he denied having had any sexual intercourse with the complainant. He also indicated that he was a good person who had never been in trouble with the law. That assertion earned him a good character direction. According to him, the complainant fabricated the story after being pressured to do so because his relationship with her sister had ended and his relationship with her mother had gone bad. In further support of his defence, he drew support from the fact that the complainant did not make a report to anyone until the discovery of her pregnancy and also that after the alleged incident, she came to his house and went to Devon House with him. According to him, the complainant had not spoken the truth.

[10] At the hearing of the application before this court, Mr Wilson, counsel acting on behalf of the applicant, stated that the two issues for the court's consideration are the applicant's conviction and sentence. He indicated, quite appropriately, that after having had a careful consideration of the matter, he found that there was nothing he could properly urge on the court to impugn the finding of the jury that the applicant is guilty. Counsel's position with respect to the conviction of the applicant is, indeed, quite comprehensible.

[11] In treating with the sentences imposed, learned counsel also candidly accepted that given the minimum sentence for the offence of grievous sexual assault, being 15 years, and with the period of 10 years prescribed by the legislature as a minimum period for eligibility for parole, he could not conscientiously argue that the additional two to three years above the mandatory sentence imposed by the learned trial judge for that offence rendered the sentence manifestly excessive. Learned counsel did not advance any argument or make any comment in relation to the sentence for rape, apparently, having recognized that there is no way that he could have successfully advanced an argument that the sentence of eight years imprisonment is manifestly excessive. Accordingly, learned counsel conceded that there was nothing that he could have reasonably advanced in the applicant's favour in support of the application for leave to appeal sentence. He informed the court that he had advised the applicant of his view of the prospect of success of the appeal and the applicant had expressed consent with the position he has taken not to pursue it.

[12] Mrs Ebanks-Miller, similarly, submitted on behalf of the Crown that the issue for the resolution by the jury was one of credibility and that the jury had found that the complainant gave credible evidence and that the applicant was not to be believed. From the perspective of the Crown, therefore, there is no proper basis on which the finding of the jury could be disturbed. Learned counsel for the Crown was content to leave the issues concerning the appropriateness of the sentences for the determination of the court.

[13] We find the concession of counsel for the applicant and the views expressed on behalf of the Crown to be apt in all the circumstances. As the learned single judge opined, the issue in the case was one of credibility. The resolution of the issues thrown up for the jury's consideration rested squarely on the credibility of the complainant and the applicant on one single question and that is whether the incident alleged by the prosecution to have occurred did, in fact, occur as stated by the complainant. The correctness of the identification of the alleged perpetrator was never an issue for the applicant to succeed on the basis that there was mistaken identity.

[14] The jury, being faced with the sole question in issue, were properly directed by the learned trial judge as to the approach they should take as the sole judges of fact in treating with the evidence adduced by the prosecution and the unsworn statement of the applicant. The learned trial judge gave a clear and balanced summation touching on all issues relative to the question of credibility that confronted the jury as well as the applicable law and the relevant facts that were required to prove the offences. She fairly placed for the jury's consideration the applicant's unequivocal denial of the

incident alleged against him, the motive that he had put forward for what he asserted to have been the complainant's false allegations against him as well as his good character.

[15] The jury, after the necessary and proper assistance from the learned trial judge, obviously, found the complainant to be a witness of truth who had managed to satisfy them to the extent that they were sure of the applicant's guilt. There is no basis on which the findings of the jury that the applicant is guilty of both offences could be denounced. Accordingly, the conviction of the applicant for both offences is safe and, as such, must be allowed to stand.

[16] In respect of the sentences imposed by the learned trial judge, we are also in agreement with Mr Wilson that the sentence for the offence of grievous sexual assault of 18 years imprisonment with the eligibility for parole set at 12 years cannot reasonably be said to be manifestly excessive. The starting point for a consideration of the appropriate sentence for this offence is the penalty prescribed by the statute under section 6(1)(b)(ii) which states that where the offender is tried in the Circuit Court, the penalty is "imprisonment for life or such other term as the court considers appropriate not being less than 15 years". Section 6(2) then provides that for such offence, the court shall specify a period of not less than 10 years, which the offender shall serve before becoming eligible for parole.

[17] The learned trial judge had paid due regard to the relevant provisions of the statute, as was incumbent on her to do and she cannot be faulted for imposing an

additional three years on the mandatory minimum and setting the period for eligibility for parole at 12 years. She took into consideration, as she was obliged to do, all pertinent matters relating to the commission of the offence and the circumstances of the applicant's previously unblemished antecedents and good character were weighed in the equation, to his credit, but weighing heavily against him, as an aggravating factor, was the betrayal of trust arising from his close relationship with the complainant and her family.

[18] It cannot reasonably be said, therefore, that the sentence imposed by the learned trial judge for grievous sexual assault is manifestly excessive so as to warrant the interference of this court.

[19] The same considerations of the totality of the circumstances of the case would apply to the sentencing of the applicant for the offence of rape. However, with regard to this offence, the learned trial judge had imposed a sentence of eight years imprisonment and in so doing she noted:

> "So, as it relates to the offence of Rape, the maximum penalty, of course, is life imprisonment. So the Court can impose any number of specified years for that offence…"

[20] Regrettably, the learned trial judge, by that statement, had misdirected herself on the applicable sentence for rape in stating that she was at liberty to set any number of specified years. This is so because section 6(1) of the Sexual Offences Act that prescribes the penalty for the offence of rape contrary to section 3, under which the

applicant was charged on the indictment, provides for a mandatory minimum sentence. It states:

> ‘‘6 – (1) A person who-
> (a) commits the offence of rape (whether against section 3 or 5) 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 fifteen years.**” (Emphasis added)

[21] The period prescribed before eligibility for parole for the offence of rape is also 10 years, like in the case of grievous sexual assault. So, both offences carry the same prescribed penalty. The learned trial judge had inadvertently treated with the penalty for the offence of rape as if the applicant was indicted for rape contrary to common law, for which the penalty was prescribed under the repealed section 44 of the Offences Against the Person Act. No minimum sentence was provided for under that statute. The learned trial judge would, therefore, have acted in excess of her jurisdiction in stipulating a penalty not prescribed by the Sexual Offences Act, which governs the offence of rape for which the applicant was charged. The sentence is, therefore, not in accordance with the law. We have deemed it prudent not to ignore the error because of the need to ensure that in the future trial judges are fully cognizant of the change in the penalty for rape that was brought about by the Sexual Offences Act.

[22] The court’s discovery of the error in the sentence, however, came within a context in which the applicant did not seek to advance any arguments in support of his application for leave to appeal. In fact, he did not pursue the application. The position taken on the applicant’s behalf before this court, is, for all intents and purposes,

tantamount to a withdrawal or abandonment of the application for leave to appeal. Learned counsel, however, did not do so in any formal way and so it is against the background of such circumstances that the issue has arisen for the court's consideration as to how to treat with the error of the learned trial judge.

[23] Based on the fact that the error was discovered by the court and that counsel on both sides did not have an opportunity to address the court on the matter, we considered it only fair to invite further submissions from them, in particular, Mr Wilson, so that the record of the court formally reflects its treatment of the issue in disposing of the application for leave to appeal. The material question that necessitated the input of counsel was whether the court should correct the error, which, essentially, would mean an increase in the sentence of rape.

[24] Mr Wilson reiterated that his position would remain the same as earlier indicated that he had nothing to urge on the court in relation to the conviction and sentences. In relation to the offence of rape, he reminded the court that he had made no comment on the sentence, not even in passing, because the position taken by the applicant as conveyed to the court is that that the application not be pursued. We have interpreted that to mean that, for all intents and purposes, the application for leave to appeal was to be treated as being withdrawn, albeit that counsel had not initially sought or obtained the leave of the court to do so. Mrs Ebanks-Miller was content to indicate on behalf of the Crown that the court has the power under section 14(3) of the Judicature (Appellate Jurisdiction) Act to vary the sentence (which would include increasing it) and that, in her view, it would be prudent for the court to impose the minimum mandatory

sentence since the sentence imposed by the learned trial judge would have been a nullity.

[25] Section 14(3) provides:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."

[26] The exercise of the power of the court under equivalent statutory provisions in Trinidad and Tobago (section 44(3) of the Supreme Court of Judicature Act) was considered by their Lordships of the Judicial Committee of the Privy Council in **Williams (Earl) v The State** [2005] UKPC 11 ("**Williams**"). We have obtained invaluable guidance from the authoritative pronouncements of their Lordships (and from the authorities cited by them) in determining the proper approach in treating with the instant case. In that case, the Court of Appeal of Trinidad and Tobago was of the view that the sentence of 25 years imprisonment that was imposed by the trial judge for the offence of rape, committed at a police station by a serving member of the police force, was too low and it increased the sentence to 30 years. The court had increased the sentence, however, while refusing the application for leave to appeal. The order varying the sentence was quashed by the Privy Council on the basis that the proper procedure was not followed.

[27] Their Lordships after referring to section 44(3) of the Trinidad and Tobago statute, which is equivalent to our section 14(3), noted:

> "[5] It may be seen from this provision that the Court of Appeal has to take a series of steps to vary a sentence. It must consider the sentence imposed by the trial judge and form the view that a different sentence should have been passed. At that stage, if leave to appeal has not earlier been given, it must give leave and turn the application for leave into an appeal. It must then quash the sentence passed at the trial and pass such other sentence in substitution therefor as it thinks ought to have been passed."

The requirement that leave to appeal should first be granted arises from the fact that the court may only properly invoke section 14(3) and vary a sentence where there is an appeal against sentence before the court.

[28] Even more importantly for present purposes, their Lordships further stated:

> "[10] … **an appellate court which has power to increase a sentence and is considering the exercise of that power should invariably give the applicant for leave to appeal against sentence or his counsel an indication to that effect and an opportunity to address the court on the increase or to ask for leave to withdraw the application… failure to do so would in their opinion be unfair and a breach of natural justice.** The arguments to be presented against an increase in sentence may vary from those advanced in favour of a reduction and the applicant should have the opportunity to put them before the court." (Emphasis added)

[29] Admittedly, the circumstances of **Williams** were slightly different from the circumstances of the instant case, in that, in **Williams**, the sentence was a matter of the exercise of the trial judge's discretion in imposing the sentence of 25 years with which the Court of Appeal did not agree, while in this case, the sentence is, simply, *ultra vires*. We find that notwithstanding the distinguishing features between the two cases, the approach prescribed by their Lordships is, nevertheless, relevant in treating with the question with which we are now confronted.

[30] Having obtained the requisite guidance from their Lordships in treating with the powers of the court under section 14(3), it is clear that this court can only increase the sentence where there is an appeal. There is no appeal in this case and so the grant of leave to appeal would be a prerequisite for this court to increase the sentence. Although, initially, our instinct had led us to the view that we should take steps to ensure that the sentence properly accords with the applicable law by increasing it. However, having had regard to the approach prescribed by their Lordships in **Williams**, and in the light of the circumstances of this case, we have seen it fit to refrain from doing so for two primary reasons.

[31] Firstly, and most significantly, we have had regard to the position taken by the applicant in not seeking to advance his application for leave to appeal at the hearing before us. Indeed, the result is, for all practical purposes, tantamount to a withdrawal of the application except that counsel had not formally sought leave of the court to do so. The option to apply for leave to withdraw the application was one that we could have given the applicant in the circumstances of the case. Within this context, the Privy

Council in **Williams** had observed "that it is also the regular practice of those courts [in England and Wales] to accede to applications for such leave". We are minded, therefore, to treat the position taken by Mr Wilson with the reported concurrence of the applicant as amounting to such an application for leave to withdraw his application for leave to appeal.

[32] The second reason, which is no less compelling, is that we are of the view that the sentence imposed on the applicant for grievous sexual assault is, indeed commensurate with the seriousness of the offence of rape for which he was also charged. The two offences were actually committed during the course of the same transaction and so when the sentences are viewed globally, having regard to the totality of the circumstances, the sentence of 18 years imposed for the offence of grievous sexual assault also falls within the appropriate range of sentences approved by this court for the offence of rape committed in such situations involving a breach of trust.

[33] We conclude, then, that in all the peculiar circumstances of this case, which include the position taken by the applicant when his application came up for hearing before this court, no useful purpose would be served in granting the applicant leave to appeal solely for us to increase the sentence imposed for rape. We are of the view that the ends of justice can properly be served by the relatively long sentence that was imposed for grievous sexual assault.

[34] Accordingly, the order of the court shall be as follows:

(1) The application for leave to appeal against conviction and sentence is refused.

(2) The sentences are to be reckoned as having commenced on 31 July 2013.