[2022] JMCA Crim 10

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE BROWN JA(AG)

SUPREME COURT CRIMINAL APPEAL NO 46/2017

MIGUEL MOSS v R

Miss Melrose Reid for the appellant

Mrs Christine Johnson Spence and Janek Forbes for the Crown

7 December 2021 and 11 February 2022

FOSTER-PUSEY JA

[1] The appellant was arrested and charged on an indictment for the offences of burglary and larceny, rape, grievous sexual assault and robbery with aggravation. On 21 November 2016, he pleaded guilty to the charges of rape and grievous sexual assault before D Palmer J ('the sentencing judge'), in the Home Circuit Court in Kingston. The prosecution offered no evidence in respect of other two charges.

[2] On 6 April 2017, the appellant was sentenced to serve 15 years' imprisonment at hard labour for rape and grievous sexual assault. The sentencing judge clearly believed that those sentences were the mandatory minimum which had to be imposed, but made it clear that if he had not believed himself to be so bound, he would have imposed a sentence of six or seven years. Relying on section 42K of the Criminal Justice (Administration) (Amendment) Act ('the Act'), to which counsel sitting in court (but not

involved in the matter) had referred him when he asked for assistance, he issued an oral certificate that the sentence of 15 years' imprisonment was manifestly unjust.

[3] The appellant sought permission to appeal on the grounds that the sentences imposed were harsh and excessive, and the sentencing judge "did not temper justice with mercy" as his guilty plea was not taken into consideration. On 12 April 2021, a single judge of this court granted the appellant leave to appeal on the strength of the sentencing judge's "oral certificate".

[4] We heard this appeal on 7 December 2021. After hearing the submissions of counsel, we made the following orders:

> "(1) The appeal against sentence is allowed.
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> (2) The sentences imposed by the learned sentencing judge are set aside and sentences of nine years and seven months for the offences of rape and grievous sexual assault are substituted therefor; however, in giving credit for the time of four months spent in custody before sentence, the appellant is to serve nine years and three months' imprisonment at hard labour. The appellant is to serve six years and two months before becoming eligible for parole.
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> (3) The sentences are to be reckoned as having commenced on 6 April 2017, the date the appellant was originally sentenced."

We promised to provide brief reasons for our decision and now do so.

The facts outlined by the prosecution

[5] On 11 January 2015, at about 2:00 am, the complainant was sleeping at her home in the parish of Saint Catherine. On awakening to fetch her cell phone to make a call to a friend, she heard a loud sound coming from her back door which was then kicked open. Two men entered her home, ransacked it and demanded money. The men took her

outside and forced her to kneel under a tree. One of them pointed a gun at her head and demanded to know "where the money was". However, worse was to come.

[6] One man had sexual intercourse with her at first and the other forced her to perform oral sex. She began choking and vomiting and the other man then also had sexual intercourse with her. The men then left.

[7] The complainant was assisted by the police to the police station and was also taken to the May Pen Hospital for examination. While she was at the Old Harbour Police Station, a man, later identified as the appellant, was brought in. The complainant pointed him out as one of the persons who had raped her. Under caution, the appellant stated, "Officer, a noh mi alone, a me an Jerome. Wi split di ting after we mash di works".

[8] DNA analysis was conducted on a pair of shorts taken from the appellant. The analysis showed that the sperm and spermatozoa found in the complainant's vagina matched the sample taken from the appellant's shorts.

The grounds of appeal

[9] Counsel for the appellant, Miss Melrose Reid, sought leave to abandon the original grounds of appeal and to, instead, argue the following:

> "1. Both Crown Counsel and Defence Counsel failed to assist the LSJ in the law, resulting in the LSJ imposing a sentence under the incorrect section of the Law.
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> 2. The LSJ erred in law in believing that he had to impose the statutory minimum sentence of 15 years; - the Accused having taken a plea of guilty **and further** at the first relevant date.
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> 3. The LSJ failed to specify a period before becoming eligible for parole in accordance with the law.
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> 4. The LSJ erred in his application of Section 42K of the Criminal Justice Administration (Amendment) Act.

5. That the LSJ failed to apply the principles of sentencing in imposing the sentence of 15 years (albeit he 'issued' a certificate)." (Emphasis as in original)

[10] We granted permission for counsel to abandon the grounds originally filed, and to pursue the grounds of appeal outlined at sub-paragraphs (2) - (5) above. Counsel for the appellant, after some discussion, acknowledged that the proposed ground 1 would not qualify as a ground of appeal and so did not pursue it. Counsel, however, asked the court to address the issue.

Submissions

The appellant's submissions

[11] Miss Reid, on behalf of the appellant, referred to and relied on sections 42D and 42H of the Act. Counsel submitted that these provisions empowered the sentencing judge to impose lesser sentences than the prescribed minimum penalties outlined in the Sexual Offences Act ('SOA') for the offences of rape and grievous sexual assault, and this could be done without the judge issuing a certificate. Counsel further submitted that section 42K of the Act, on which the sentencing judge relied when he issued an oral certificate, applied when a defendant was tried and convicted, and not when a defendant pleaded guilty. Counsel argued that, due to the sentencing judge's reliance on section 42K of the Act, he failed to apply the principles of sentencing generally, and in addition, did not take into account the time the appellant had spent in custody.

[12] Counsel submitted that the sentencing judge had also failed to comply with section 42(D)(3)(b) of the Act, as he had not specified the period which the appellant should serve before he would be eligible for parole. Counsel relied on a number of cases including **R v Kenneth Ball** [1951] 35 Cr App R 164, **Meisha Clement v R** [2016] JMCA Crim 16 and **Callachand and another v The State** [2008] UKPC 49 in support of her submissions. She agreed with the sentences, which Crown Counsel recommended to the court in their written submissions.

The Crown's submissions

[13] Mr Janek Forbes, in making submissions for the Crown, conceded grounds of appeal 2, 3 and 4. He, however, disagreed with the appellant's argument, as outlined in ground 5, that the sentencing judge had failed to take into account the relevant sentencing principles. Counsel submitted that the sentences which the sentencing judge had imposed ought to be set aside, and instead sentences of nine years and three months' imprisonment imposed for each offence with the appellant being eligible for parole after serving six years' imprisonment. He referred to **Horace Gordon v R** [2020] JMCA Crim 2, in which the appellant pleaded guilty to the offence of having sexual intercourse with a person under the age of 16 years and successfully challenged the sentence of eight years and nine months which was imposed by the sentencing judge.

[14] While in its written submissions the Crown had asked that a suspended sentence imposed on the appellant in respect of a separate offence arising out of different circumstances be activated, counsel abandoned this submission in his oral arguments.

The approach taken by the sentencing judge

[15] It is important to outline in a little more detail, the remarks made by the judge during sentencing. The sentencing judge stated that the particulars of the offences outlined to the court were very disturbing. He noted that the complainant was made to gag, and certain acts performed on her. He stated that the appellant was 17 years old, was being influenced and acted along with an adult, was otherwise of good character, had no previous conviction and had spent some time in custody as a result of the offences.

[16] The sentencing judge also noted that, by virtue of the appellant's early plea, there would usually be an automatic discount in any sentence the court would consider. He, however, went on to state at pages 59 – 60 of the transcript:

> "However, there are no mandatory guidelines in relation to sentence of this type, both Rape and Grievous Sexual Assault. That carries with it a mandatory period of imprisonment of 15 years imprisonment. However, the Court may, where it deems

> it suitable, and I believe this is one of those instances where it is suitable, to direct that a certificate be prepared."

The sentencing judge indicated that, but for what he believed to be the mandatory sentence, he would have been prepared to give the appellant a sentence closer to six or seven years in light of the appellant's age, the fact that he was influenced by an adult, and he did not waste the court's time "from day one".

[17] In the course of the sentencing exercise, the sentencing judge asked for assistance. Counsel seated in court, though not appearing in the matter, in a bid to assist the sentencing judge, referred him to section 42K of the Act. The sentencing judge relied on that section of the Act as well as section 42A(1) and ultimately sentenced the appellant to 15 years' imprisonment for each offence. He orally certified that he considered that the prescribed minimum penalty of 15 years was manifestly excessive.

Discussion

[18] Grounds 2, 3, 4 and 5 were interlinked and, consequently, were addressed at the same time. As both counsel acknowledged, and the court agreed, the sentencing judge erred when he relied on section 42K(1) of the Act, which states:

> "**Where a defendant has been tried and convicted of an offence that is punishable by a prescribed 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
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> 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." (Emphasis supplied)

[19] The sentencing judge was correct in his reference to the provisions of the SOA which provide that a person who commits the offences of rape or grievous sexual assault,

on conviction in a Circuit Court, is liable to imprisonment for life or such other term as the court considers appropriate not being less than 15 years (see sections 6(1)(a) and (b) of the SOA). However, he erred when he relied on section 42K of the Act. The words emphasized in section 42K of the Act speak for themselves. The section is only applicable in circumstances where a defendant has been tried and convicted. In this instance, the appellant had pleaded guilty. Section 42K of the Act was therefore inapplicable. We agreed with the submissions, which counsel for the appellant made that the sentencing judge, in focussing on section 42K of the Act, did not apply, or felt unable to apply, the established sentencing principles.

[20] There are other provisions in the Act that govern circumstances in which a defendant pleads guilty to an offence for which legislation provides a mandatory minimum sentence. The appellant having pleaded guilty, the sentencing judge ought to have applied section 42D of the Act, which states:

> "(1) Subject to the provisions of this Part, where a defendant pleads guilty to an offence with which he has been charged, the Court may, in accordance with subsection (2), reduce the sentence that it would otherwise have imposed on the defendant, had the defendant been tried and convicted of the offence.
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> (2) Pursuant to subsection (1), the Court may reduce the sentence that it would otherwise have imposed on the defendant in the following manner –
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> (a) where the defendant indicates to the Court, on the first relevant date, that he wishes to plead guilty to the offence, the sentence may be reduced by up to fifty percent;
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> (b) where the defendant indicates to the Court, after the first relevant date but before the trial commences, that he wishes to plead guilty to the offence, the sentence may be reduced by up to thirty-five percent;

(c) where the defendant pleads guilty to the offence after the trial has commenced, but before the verdict is given, the sentence may be reduced by up to fifteen percent; …

(3) Subject to section 42E, and notwithstanding the provisions of any law to the contrary, **where the offence to which the defendant pleads guilty is punishable by a prescribed minimum penalty the Court may-**

(a) reduce the sentence pursuant to the provisions of this section without regard to the prescribed minimum penalty; and

(b) specify the period, not being less than two thirds of the sentence imposed, which the defendant shall serve before becoming eligible for parole.

(4) In determining the percentage by which the sentence for an offence is to be reduced pursuant to subsection (2), the Court shall have regard to the factors outlined under section 42H, as may be relevant." (Emphasis supplied)

[21] Section 42E of the Act does not apply in this matter, as it addresses how the court should approach a guilty plea to the offence of murder falling within section 2(2) of the Offences Against the Person Act.

[22] As is reflected in section 42D of the Act, upon the entry of a guilty plea for an offence punishable by a prescribed minimum penalty (other than murder), a sentencing judge is empowered to reduce the sentence without regard to the prescribed minimum penalty and must specify the period which the defendant must serve before becoming eligible for parole. The sentencing judge, therefore, erred when he considered himself bound to impose the prescribed minimum penalty. In addition, he failed to specify the period which the appellant ought to serve before he would be eligible for parole.

[23] This court, therefore, proceeded with a fresh sentencing exercise to determine an appropriate sentence on application of the correct legal principles.

[24] The circumstances surrounding the appellant, the offences and the victim were important considerations in the sentencing exercise. The appellant was 17 years old when he committed the offences and was in the company of an adult male. He had a good social enquiry report. It was clear that he had good academic potential, as he had been recommended to sit eight subjects at the Caribbean Examinations Council level. However, because of the incident, he was unable to sit the exams. Members of the community in which he lived thought he was of good character and not a trouble maker, and his mother had expected good things of him. The appellant expressed remorse for his actions and a desire for the opportunity to apologize to the complainant. He said he was negatively influenced by his friend.

[25] When the complainant was contacted, she stated that she was not available for an interview. However, she said that she was angry with the appellant for what he did to her and wanted him to be punished.

[26] The case of **Meisha Clement v R** is very instructive in outlining a systematic approach to determining the appropriate sentence to be imposed. Morrison P (as he then was) wrote:

> "[41] As far as we are aware, there is no decision of this court explicitly prescribing the order in which the various considerations identified in the foregoing paragraphs of this judgment should be addressed by sentencing judges. However, it seems to us that the following sequence of decisions to be taken in each case, which we have adapted from the SGC's definitive guidelines, derives clear support from the authorities to which we have referred:
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> i. Identify the appropriate starting point;
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> ii. consider any relevant aggravating features;
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> iii. consider any relevant mitigating features (including personal mitigation);

iv. consider, where appropriate, any reduction for a guilty plea; and

v. decide on the appropriate sentence (giving reasons).

[42] Finally, in considering whether the sentence imposed by the judge in this case is manifestly excessive, as Mr Mitchell contended that it is, we remind ourselves, as we must, of the general approach which this court usually adopts on appeals against sentence. In this regard, Mrs Ebanks-Miller very helpfully referred us to **Alpha Green v R** 43, in which the court adopted the following statement of principle by Hilbery J in **R v Ball** 44:

> 'In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene.'

[43] On an appeal against sentence, therefore, 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."

[27] According to the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017, ('the Sentencing Guidelines'), the usual starting point for both the offences of rape and grievous sexual assault is 15 years, and

the normal range is 15 - 25 years. We considered a starting point of 15 years to be appropriate.

[28] Rape and grievous sexual assault are heinous offences in and of themselves. However, there were aspects of the circumstances in the case at bar which we considered as aggravating factors. These were:

a. The use of a firearm;

b. The invasion of the complainant's home;

c. The humiliation of the complainant; and

d. The involvement of more than one person in the offences.

As a comment, and perhaps by way of clarification of our approach in this particular matter, we included the use of a firearm as an aggravating factor as this was a part of the facts outlined by the Crown in respect of the circumstances in which the sexual offences were committed. We noted, however, that the appellant had not been charged for illegal possession of firearm. Turning to the computation, we agreed with the submissions made by counsel for the Crown that it was appropriate to add five years to the starting point of 15 years in reflection of these aggravating factors.

[29] There were, however, clear mitigating factors in the appellant's favour. These included:

a. His age -17 years old;

b. He was influenced by an adult;

c. He was remorseful;

d. He had no previous conviction and was of good character;

e. He cooperated with the police early after the offences were committed; and

f. He exhibited a capacity for reform.

[30] Bearing these mitigating factors in mind, the court felt that a discount of four years would be appropriate. We therefore arrived at 16 years as an appropriate sentence, had the appellant not pleaded guilty. The next step in the sentencing process was to determine what discount (if any) was appropriate in light of the appellant's guilty plea.

[31] The Act lists some of the factors which the court ought to take into account in determining an appropriate discount on a sentence when a defendant pleads guilty. Section 42H of the Act states:

> "Pursuant to the provisions of this Part, in determining the percentage by which a sentence for an offence is to be reduced, in respect of a guilty plea made by a defendant within a particular period referred to in 42D(2) and 42E(2), the Court shall have regard to the following factors namely-
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> (a) whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;
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> (b) the circumstances of the offence, including its impact on the victims;
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> (c) any factors that are relevant to the defendant;
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> (d) the circumstances surrounding the plea;
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> (e) where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;
>
> (f) whether the defendant has any previous convictions;
>
> (g) any other factors or principles the Court considers relevant".

[32] We arrived at a 40% discount bearing in mind a number of factors including the following: a discount of 50% would have shocked the public conscience and would have

been disproportionate to the seriousness of the offences; in light of the DNA evidence it was unlikely that the appellant could have been acquitted; the appellant saved time by acknowledging his wrong early in the day; the appellant did not have any previous convictions; was led astray by an adult and was remorseful; and the appellant had a good social enquiry report. A 40% discount on 16 years resulted in a sentence of nine years and seven months.

[33] Finally, the time which the appellant spent in custody had to be taken into account. He was remanded when he pleaded guilty on 21 November 2016, but was sentenced approximately four months later on 6 April 2017. The sentence that we imposed was therefore nine years and three months.

[34] The Act required us to specify a period, not less than two-thirds of the sentence, which the appellant must serve before becoming eligible for parole. We specified that the appellant serve a period of six years and two months before he will become eligible for parole.

[35] In our view, the stance taken by the prosecution that it would not pursue the activation of the suspended sentence which had been imposed on the appellant was correct for a number of reasons, including the fact that the sentencing judge, though aware of it, had not ruled that it be activated. This was perhaps due to the fact that the offence in respect of which the suspended sentence was imposed took place in October 2015, while the sexual offences to which the appellant pleaded guilty occurred in January 2015. Therefore, the appellant would not have committed the sexual offences during the tenure of the suspended sentence.

[36] Finally, we thought it prudent, as suggested by counsel for the appellant, to remind counsel appearing in matters before the court of their duty to assist the court when legal questions arise. Counsel's failure to do so, however, would not be supportive of a ground of appeal, as it could not constitute a basis on which to set aside a conviction or sentence.

[37] It was for the above reasons that we made the orders outlined at paragraph [4] above.