**[2019] JMCA Crim 41**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 46/2016**

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA**
**THE HON MR JUSTICE BROOKS JA**
**THE HON MRS JUSTICE MCDONALD-BISHOP JA**

**ROY NEIL v R**

**Lloyd McFarlane for the applicant**

**Orett Brown and Mrs Nickiesha Young Shand for the Crown**

**16, 17 October and 13 December 2019**

**MCDONALD-BISHOP JA**

[1] The applicant, Mr Roy Neil, was convicted in the Saint Elizabeth Circuit Court on a two-count indictment, which charged him with the offence of burglary on count one and indecent assault on count two. He was tried by a judge sitting with a jury between 2 and 9 March 2016. On 31 March 2016, he was sentenced to 15 years' imprisonment at hard labour for the offence of burglary, and 10 years' imprisonment at hard labour for indecent assault. The sentences were ordered to run concurrently.

[2] The applicant filed an application for leave to appeal against conviction and sentence and for an extension of time to file his application for leave to appeal. He based his application for leave to appeal on four grounds of appeal, which, in outline were, mistaken identification; unfair trial; lack of evidence and miscarriage of justice. His application was considered by a single judge of this court who granted the application for extension of time within which to apply for leave to appeal but refused the application for leave to appeal the conviction and sentence.

[3] The applicant renewed his application for leave to appeal before this court, as he was at liberty to do. Counsel appearing on his behalf, Mr Lloyd McFarlane, was granted leave to abandon the original grounds of appeal and to argue three supplemental grounds. Supplemental grounds one and two challenge conviction. They raised questions as to the accuracy and adequacy of the learned trial judge's directions to the jury regarding corroboration, as it relates to the offence of indecent assault (supplemental ground one), and his directions on the mental element required to prove the offence of burglary (supplemental ground two). The applicant challenged his sentence on a single ground set out in supplemental ground three, arguing that the sentences imposed on him are manifestly excessive.

**The prosecution's case**

[4] The case brought by the prosecution against the applicant, which was accepted by the jury to ground his conviction for both offences, was as follows. During the night of 8 September 2013, RG, the complainant named in count one of the indictment, locked up his dwelling-house located in the parish of Saint Elizabeth, where he resided

with his common law spouse and her two children, a six year old girl, C, and a three year old boy. The family retired to bed at about 10:00 pm but before doing so, RG securely locked all doors and windows through which access could be gained from the outside to the inside of his house. The lock to one of the doors leading from the outside was broken but he secured it by using a nail on the inside.

[5] RG went to sleep in the bedroom he shared with his common law spouse, while the children slept together in a separate bedroom. The children's bedroom adjoins the one bathroom in the house. The family's helper would usually sleep in the third bedroom, when she stayed there, but she was absent on the night in question. She had not been there for two weeks up to that night.

[6] At about 2:30 am, RG got out of bed to use the bathroom. While in the passage on the way to the bathroom, he saw the applicant, whom he knew before, coming from the children's room and heading towards the door of the house that leads to the outside. The applicant was naked. The children were also moving towards RG while he spoke to the applicant, saying, "a hope a nuh the kids you come molest". The applicant responded, "a di bathroom mi come use". He again asked the applicant, "a wah you come do in a mi yard" and the applicant reiterated, "a bathroom mi come use". The applicant at some point during the dialogue specifically told RG, in colourful language, that he was at the house to defecate. The applicant then ran from the house to the house next door. Up to then, he was naked. The children were making noise and calling

for their mother who came and attended to them. C was crying and her mother examined her.

[7] C immediately reported to her mother that the applicant had come into the room and touched her on her vagina. The police were called and a report was made to them. This led to the arrest and charge of the applicant, three days later, for the offences of indecent assault and burglary. When cautioned by the police, the applicant stated, "Offisa, mi nuh know weh dem a talk bout".

[8] At the trial, C gave evidence that on the night in question, the applicant took her from her bed and put her on another bed in her room. He proceeded to put her to lie on her belly and he then sat on her back. He used one hand to cover her mouth and "feel up [her] vagina". He was naked at the time.

[9] RG gave evidence that he had known the applicant for a very long time as they attended the same school. The applicant assisted persons in the community by carrying out duties for them and he would come to RG's house only when the helper was there and assist her with chores around the home. The applicant would sometimes visit the house at night but RG did not know if he had ever slept there. The house was not available to the applicant when the helper was not there. The applicant knew everything about the house.

[10] After the applicant left the house, RG observed that the nail, which was earlier bent to secure the door, had been straightened to allow access to the inside of the house.

**The defence's case**

[11] The applicant denied the charges in a very terse unsworn statement made from the dock. He simply said:

> "Mi never break anywhere. Mi nuh feel up anybody. I don't know what dem talking about."

**Supplemental ground one**

**Inadequate directions on the issue of corroboration in relation to indecent assault**

[12] The applicant's complaint in ground one is that the learned trial judge failed to give the jury the proper direction that it is not safe to convict upon the uncorroborated evidence of the complainant on the count which charged him with the offence of indecent assault, and that there was no evidence extraneous to the complainant's that supported the charge.

[13] The impugned direction of the learned trial judge is this:

> "...Mr. Foreman and your members, when it comes to the evidence of children of tender years like [C], it is said that children of tender years have quite fanciful imagination and sometimes make up stories and are influenced by adults to say things or believe things. So you have to examine the evidence of the young girl carefully. I must say that allegations of sexual misconduct are very easy to make and very difficult to disprove even by an innocent person. You heard [C] say that she told her mother what happened and her mother said what [C] said to her, these are what we call recent complaint, showing consistency, that is what it does."

[14] Mr McFarlane's complaint is that the learned trial judge ought to have directed the jury, "that it is not safe to convict upon the uncorroborated testimony of the

complainant but that if [they were] satisfied of the truth of her evidence, they may, after paying attention to the warning, nevertheless convict". He also noted that the mother of the complainant could only testify as to the recent complaint, which is not corroboration, and so, the learned trial judge ought to have made it clear to the jury that there was no corroboration in the case.

[15] Relying on some well-known English authorities, such as **R v Whitehead** [1929] 1 KB 99; **R v Jones** 19 Cr App Rep 40; **R v Freebody** (1925) 25 Cr App Rep 69 and **R v Mitchell** (1952) 36 Cr App Rep 79, Mr McFarlane argued that the learned trial judge's direction was inadequate and did not amount "to the proper direction required in the absence of corroboration".

**Analysis and finding**

[16] It is noted that the learned trial judge, at no time, used the word corroboration, albeit that he was not obliged to do so. He also did not explain to the jury any requirement for corroborative evidence, given the nature of the offence and the age of C. Furthermore, he did not specifically say that there was no corroboration in the case nor did he direct the jury that the recent complaint, to which he had referred, as emanating from the mother's evidence, was not corroboration. Even more importantly, he did not, as Mr McFarlane contended, give the warning that it was not safe to convict the applicant in the absence of corroboration.

[17] In **R v Uriah Lemard** (1975) 13 JLR 132 at page 135, this court opined that whether the word "corroboration", or some synonym is used, the concept to be

conveyed to the jury is always the same, that is, some independent evidence supporting in a material particular that which is to be supported or confirmed and implicating the accused. The court continued:

> "As this court understands it a "material particular" is some matter adduced by the prosecution which tends the proof of the guilt of the accused. This is what we apprehend to be involved in the classic definition in *R. v. Baskerville* (2), [1916] 2 KB at p.67..."

The court concluded that the jury were not so directed and quashed the conviction.

[18] It is palpably clear in this case, that the direction would have fallen short of what was required at common law. Had it not been for the passing of the Evidence (Amendment) Act, 2015, on 11 August 2015, which was prior to the trial of this case in 2016, this ground of appeal would have succeeded.

[19] The need for a corroboration warning in relation to sexual offences and children of tender years has been abrogated by two pieces of legislation that would have applied to the circumstances of this case at the time of trial, respectively: the Sexual Offences Act, 2009 and the Evidence (Amendment) Act, 2015.

[20] Section 26 of the Sexual Offences Act, 2009 provides:

> "26.-(1) Subject to subsection (2), where a person is tried for the offence of rape or any other sexual offence under this Act, it shall not be necessary for the trial judge to give a warning to the jury as to the danger of convicting the accused in the absence of corroboration of the complainant's evidence.

> (2) Notwithstanding the provisions of subsection (1), the trial judge may, where he considers it appropriate to do so, give a warning to the jury to exercise caution in determining-
>
> (a) whether to accept the complainant's uncorroborated evidence; and
>
> (b) the weight to be given to such evidence."

[21] Section 31Q of the Evidence (Amendment) Act, 2015 reads:

> "31 Q. – (1) Subject to subsection (2), it shall not be necessary for the evidence given by a child in civil or criminal proceedings to be corroborated for a determination of liability, a conviction or any other issue, as the case may be, in such proceedings.
>
> (2) Notwithstanding the provisions of subsection (1), the trial judge (whether a judge of the Supreme Court or a [Parish Court Judge]) may –
>
> (a) in a trial by jury, where the trial judge considers the circumstances of the case so require, give a warning to the jury to exercise caution in determining whether to accept uncorroborated evidence of the child and the weight to be given to such evidence; or
>
> (b) in a trial by judge alone, where the trial judge considers that the circumstances of the case so require, give himself the warning as provided under paragraph (a)."

[22] It is clear from the foregoing statutory provisions that the question of whether a corroboration warning was necessary in these circumstances was one solely for the discretion of the learned trial judge. Given the terms of the direction given to the jury, the question for this court is whether he erred in not giving the full corroboration warning, as the applicant has contended.

[23] It cannot be said with any certainty that the learned trial judge intended to give the classic warning. Having examined the circumstances of this case, it seems fair to say that even if he intended to give the warning and failed to properly and adequately do so, in accordance with the requirements of the common law, that would not be enough to vitiate the conviction. It would only do so if it is a case in which the full-fledged warning was required. The warning was not necessary in the circumstances of this case. There was independent evidence from RG, which placed the applicant inside the house, naked and exiting C's bedroom (the scene of the crime) at the material time. Also, C's complaint to her mother was spontaneous and closely contemporaneous with the events. There was no evidence arising on the case from either the prosecution or the defence that would have pointed to any malice or oblique motive on the part of C or her parents to fabricate a story against the applicant. There was also nothing pointing to C being a potentially unreliable child witness.

[24] Alternatively, had the learned trial judge considered the warning, and intentionally exercised his discretion not to give it, there would be no basis on which this court could justifiably hold that he erred in the exercise of his discretion. This is because, as already indicated, nothing on the evidence or in the circumstances of the case would have necessitated such a warning. As Morrison P, in **Mervin Jarrett v R** [2017] JMCA Crim 18, noted:

> "[19] The question of whether or not to give a corroboration warning in respect of the evidence of the complainant in this case was therefore entirely a matter for the discretion of the judge. Accordingly, on the basis of standard appellate

> court doctrine governing review of the exercise of a judicial discretion, this court will be loath to interfere unless it can be shown that the judge exercised it on an erroneous basis or principle (as to which see the **Attorney General of Jamaica v John Mackay** [2012] JMCA App 1)..."

[25] There is no basis for this court to disturb the conviction for indecent assault. The conviction is safe and shall be allowed to stand.

**Supplemental ground two**

**Inadequate directions on the *mens rea* for burglary**

[26] In respect of the charge of burglary, the applicant contended that the learned trial judge failed to properly direct the jury that before they could convict him of that offence, they must be satisfied, that at the time of his entry into the house, he intended to commit a felony.

[27] Mr McFarlane submitted, in advancing this ground that *mens rea* had to be proved by the prosecution in relation to the offence of burglary, and so, if at the time of the breaking and entering there was no felonious intent, the charge must fail. In support of this argument, he relied on the case of **R v Pearson** (1910) 4 Cr App Rep 40.

[28] Counsel argued further that the learned trial judge should have directed the jury that, in light of the evidence that the house was available to the applicant when the helper was there, they had to be satisfied that he had entered the house as a trespasser, and not to use the bathroom, as he is alleged to have said. In support of this, he cited **R v Collins** [1972] 2 All ER 1105. He also pointed to the evidence of the

investigating officer, Corporal Donna Robertson, that the door through which it was alleged the applicant would have gained entry to the house could be pushed open with force.

[29] The learned trial judge, in dealing with the offence of burglary, directed the jury in these terms, in so far as is immediately relevant:

> "Now, the charge of Burglary have [sic] certain ingredients that the Crown must prove. The Crown must prove that there was a breaking-in, in the house...
>
> The Crown must also prove to you that the breaking-in took place in the night. In law, as I said, night is 7:00 p.m. this afternoon to 6:00 a.m. the next day, that is what the law says that night is from one day to to the next day. In this case, it is at about 2:30 in the morning when it is said that it took place, that is in the night. You heard the indictment was read and you heard the words intention, it is part of the ingredients that the Crown must prove, that intention, when I read it, as I said, it is part of the ingredients. The only way to prove a person's intention is by looking at what they say or do. In this case, the Crown is saying that this accused man came into the house and indecently assaulted [C] and they're asking you to infer that intention, a matter for you..."

[30] That direction, according to Mr McFarlane, was not enough since the intention must have been formed at the time of the breaking and entering for the offence of burglary to be committed.

**Analysis and findings**

[31] There is a justifiable basis for the applicant's complaint concerning the learned trial judge's directions on the mental element of burglary that must be proved by the prosecution.

[32] Section 39 of the Larceny Act creates the offence of burglary; it states:

> "Every person who in the night –
>
> (1) breaks and enters the dwelling-house of another with intent to commit any felony therein; or
>
> (2) breaks out of the dwelling-house of another, having –
>
> *(a)* entered such dwelling-house with intent to commit any felony therein; or
>
> *(b)* committed any felony in such dwelling-house,
>
> shall be guilty of felony called burglary,..."

[33] The applicant was charged under section 39(1). It means that the prosecution was alleging that the act of breaking and entering the dwelling-house of RG was accompanied by an intention to commit a felony, that is, with a felonious intent. Accordingly, it was incumbent on the prosecution to prove, as a matter of fact and law, not only that the applicant broke and entered the dwelling-house in the night but that he did so with the requisite intention, which was to commit a felony therein. Nothing short of an intention to commit a felony in the dwelling-house would suffice.

[34] It should be noted, at the outset, that the indictment on which the applicant was charged, and to which he had pleaded not guilty, averred that he broke and entered the dwelling-house of RG, "with intent to commit a felony therein". The felony he intended to commit was not specified. This, in itself, would have posed a problem in law for the learned trial judge because the felony that the prosecution was obliged to

establish, in order to show the requisite *mens rea* for the charge of burglary, was not known.

[35] In Russell on Crime, 11th edition, Volume 2, at page 937, it states that, "[t]he felony really intended must be laid in the indictment and proved as laid". Similarly, in Archbold, Pleading, Evidence & Practice in Criminal Cases, thirty-sixth edition, at paragraph 1819, it is similarly noted that, "[t]he intent laid in the indictment must be to commit some felony (a) in the dwelling-house, such as larceny, murder, rape, etc; and the intent must be proved as laid". **R v Pearson**, the same case being relied on by the applicant, was cited by the learned authors for this principle.

[36] The learned authors went as far as to note that, "[w]here the intent is at all doubtful, it may be laid in different ways in different counts: *R v Thompson*, 2 Leach 1105... alternatively, in the alternative in the same count: *Indictments Act*, 1915".

[37] Just recently, after the hearing of arguments in this case, this court had to resolve the same issue concerning the requisite mental element on a charge of burglary in the case of **Dudley Willie v R** [2019] JMCA Crim 39. The appellant was convicted for burglary contrary to section 39(1) of the Larceny Act (as in this case), by a judge sitting alone in the Western Regional Gun Court. The indictment did not specify the felony which was allegedly intended and no felony was committed in the dwelling-house. On appeal to this court, the prosecution sought to rely on certain items of evidence to convince this court that even though no felony was specified in the indictment, there was evidence to satisfy the requirement that the appellant had a

felonious intent when he broke and entered the complainant's dwelling-house. They failed to move the court to that conclusion. The court found that burglary was not proved because the prosecution failed to establish the requisite intent. The conviction for that offence was quashed.

[38] Brooks JA, in voicing the unanimous opinion of the court, considered, more or less, the same authorities referenced above in relation to the *mens rea* for burglary. In treating with the failure of the prosecution to specify in the indictment the felony which was alleged to have been intended, Brooks JA, after referencing several extracts from the relevant authorities, said this:

> "[19] The extracts demonstrate that the prosecution should not be at large in drafting the indictment, hoping for evidence that will support some felony, which it eventually proves had occurred on the premises. The finding is consistent with section 4(1) of the Indictments Act, which requires the indictment to contain "such particulars as may be necessary for giving reasonable information as to the nature of the charge…"

[39] After referencing section 39 of the Larceny Act, against the background of the principles speaking to the requirement for specificity in the indictment (at paragraph [21] of the judgment), Brooks JA continued:

> "[21] The learning above suggests that the indictment in this case was defective insofar as it failed to particularise the intended felony. Based on the analysis that will immediately follow, it is not necessary to make a definitive statement in that regard."

[40] It seems in the glaring light of the authorities, coupled with the provisions of the Indictments Act, which require reasonable particularity, that the indictment charging burglary under section 39(1) should, as a matter of course, specify the felony intended to be committed. This is a matter of disclosure, which is integral to the fairness of the trial process. It is also a fundamental principle of natural justice that a person should be made aware of all aspects of a charge being made against him in order for him to adequately prepare to meet the case against him. This translates into being part and parcel of a defendant's constitutional right to a fair hearing.

[41] It behoves the prosecution then to ensure, at all times, that the indictment, alleging burglary, specifies the felony which is alleged to have been intended or which was allegedly committed. In the instant case, the problem with the case for the prosecution, and which posed a challenge for the learned trial judge, would have started with the indictment, which specified no felony. The problem for the prosecution did not end there, however.

[42] It is established by the authorities that on a charge of burglary, evidence of what was intended may be inferred from what was actually done in the dwelling-house, and so, the requisite intention can be inferred from the felony that was actually committed or from any other fact from which the intention to commit a felony may be inferred.

[43] The learned authors of Russell on Crime, 11th edition, Volume 2, at page 935 explained:

> "...[A]n intention to beat a person in the house is not sufficient to sustain the indictment; for though killing or murder may be the consequence of beating, yet if the primary intention were not to kill, the intention of beating will not make burglary. But if a felony is actually committed, this fact is prima facie pregnant evidence of an intention to commit it and a man who commits one sort of felony in attempting to commit another cannot excuse himself upon the ground that he did not intend the commission of that particular felony."

[44] The learned authors noted further that, "[i]t makes no difference whether the felony intended is so at common law or by statute..."

[45] It was incumbent on the prosecution, therefore, to prove a felonious intent. In the absence of direct evidence as to what the applicant's intention may have been when he broke and entered the dwelling-house, that would have had to be proved inferentially. It would have had to be proved either from the commission of a felony in the dwelling-house, or from some other relevant fact from which an intention to commit a felony could be deduced.

[46] The case of **R v Pearson** is illustrative of this principle. The facts are very simple. The door to the complainant's house was shut but not locked. The defendant entered the house and was found in an armchair sitting by the fireplace. When told to leave, and even after a dog was set on him, he refused to move. The defendant's case was that he merely went for a rest. He stole nothing. The Crown conceded that it could not argue that there was evidence of a felonious intent. The court held that "the gist" in the case was the felonious intention and that there was no evidence to prove that the defendant had any such intention. The conviction was quashed.

[47] Counsel for the Crown in their submissions argued, through Mr Orrett Brown, that the case at bar is distinguishable from **R v Pearson,** and so, cannot assist the applicant. Mr Brown stated that in this case, unlike in **R v Pearson**, the applicant did something. He was seen naked, leaving the children's bedroom, and when confronted by RG, he ran. Counsel pointed to several facts in support of his viewpoint that it was open to the jury to infer that the applicant entered the dwelling-house with the intention to commit a felony. These are: he entered the house without permission; he was naked at the time; he was seen coming from the children's bedroom; he had access to the house when the helper was there but the helper had not been there for two weeks; he did not have access to the house when the helper was not there; RG's house is 10 to 15 minutes walk from where the applicant was living; and having been asked by RG what he was doing at the house, the applicant said that he was there to use the bathroom and then he ran to the next door neighbour's house.

[48] It is accepted that the matters highlighted by Mr Brown do provide cogent evidence that could have led to a reasonable inference that the applicant did not enter the house to use the bathroom as he had reportedly asserted upon being confronted by RG. What the facts highlighted have failed to do, however, is to establish the felony that the applicant intended to commit in the house.

[49] It must be borne in mind that section 39(1) of the Larceny Act does not speak simply to an intent to commit an offence or any offence; it specifically speaks to an intent to commit a felony in the dwelling-house itself. It follows then, that the historical

distinction between felony and misdemeanour remains an important consideration in determining whether the offence of burglary has been committed. This distinction ought to have been appreciated and demonstrably considered by the learned trial judge.

[50] In this case, the offence that was alleged to have been committed was indecent assault, which was the offence, charged in count two of the indictment, although no reference was made to that offence in the particulars of the offence of burglary, charged in count one. That notwithstanding, the learned trial judge directed the jury that the necessary intention could have been inferred from the fact that the applicant indecently assaulted C, as alleged by the prosecution. That would have been an accurate direction in law only, if (a) indecent assault, contrary to section 13 of the Sexual Offences Act, is a felony; and (b) the applicant had intended to commit that offence, at the time he broke and entered the dwelling-house. Of necessity, these questions must be resolved, if the conviction for burglary is to stand. Each question will be examined in turn.

a. *Is the offence of indecent assault, contrary to section 13 of the Sexual Offences Act, a felony?*

[51] Counsel were invited to assist the court, by way of submissions, on this issue, given the point raised by counsel on the applicant's behalf, that there must be felonious intent to ground burglary. The recent development in the law, with the creation of a statutory offence of indecent assault, without any indication in the statute whether it is a felony or misdemeanour, invokes a crucial question that has to be settled by this court, as it relates to the charge of burglary.

[52] Indecent assault at common law, which was made punishable by section 53 of the Offences Against the Person Act (section now repealed) was classified as a misdemeanour at common law and had continued to be so treated under the Offences Against the Person Act. This was clear from a reading of the now repealed section 49, which stated:

> "49.- (1) If upon the trial of any indictment for rape, the jury are satisfied that the defendant is guilty of an offence under section 48 or 50, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in the indictment or of an attempt to commit the same, the jury may acquit the defendant of such felony and find him guilty of an offence under section 48 or 50 or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment **for such offence as aforesaid, or for the misdemeanour of indecent assault**." (Emphasis added)

[53] When an examination is conducted of the sections of the Offences Against the Person Act, that have since been repealed by the Sexual Offences Act, Parliament had expressly stated what offences were felonies and which were misdemeanours. In fact, this is seen in all the older pieces of legislation, including the Larceny Act.

[54] Apart from indecent assault, the Sexual Offences Act has created many new offences, such as sexual touching, sexual grooming and grievous sexual assault, while retaining some that were formerly offences at common law (such as rape). There is no indication throughout the statute as to whether these statutory offences are felonies or

misdemeanours, in keeping with the legislative tradition. All are simply classified as offences.

[55] Indeed, section 37 of the Sexual Offences Act that seems to be intended as the replacement for the repealed section 49 of the Offences Against the Person Act (paragraph [52] above), while providing that on an indictment for rape or grievous sexual assault, lesser offences such as having sexual intercourse with a girl under 16 or indecent assault may be left to the jury as alternatives, has not mentioned the words "felony" or "misdemeanour".

[56] This reflects the position of jurisdictions, like the United Kingdom, where the distinction between felonies and misdemeanours has long been abolished. It follows then, that the Sexual Offences Act of the UK, for instance, would not bear such references. We have adopted that approach in a context where there has been no expressed abolition of the distinction in our jurisdiction, and so, other pieces of legislation, which have not been repealed, still carry the distinction.

[57] Mr Brown reminded the court of the dictum of Carey JA in **Bank of Jamaica v Dextra Bank & Trust Co Ltd**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 61/1994, judgment delivered 29 July 1994. Carey JA, in speaking to the rule in **Smith v Selwyn** (1914-1915) All ER 229, which relies for its operation on the distinction between felonies and misdemeanours, stated at page 5 of the judgment:

> " ...The distinction between felonies and misdemeanours has been abolished in England, but the rule in *Smith v Selwyn* nonetheless remains as reformulated in *Jefferson Ltd v*

> *Bhetcha* (1979) 2 All E.R. 1108... **In this country, where the distinction has only historical interest and no practical significance, I would suggest that a court in considering a stay of a civil action where there are concurrent criminal proceedings should likewise ignore entirely the categorization of felonies and misdemeanours**." (Emphasis added)

[58] Carey JA's dictum is not applicable to criminal proceedings and, particularly, in situations like these, where the distinction is important in proving the commission of a criminal offence. The distinction is also important within the context of establishing the jurisdiction of the Gun Court in relation to certain offences committed with the use of a firearm. See section 25(1) of the Firearms Act and the case of **Everton Lynton v R** [2014] JMCA Crim 17.

[59] If the distinction is to be of no significance, then Parliament would have had to say so expressly and make amendments to legislation, which provides that for there to be criminal liability, the intent to commit a felony or the commission of a felony must be proved as an essential ingredient of the charge. Until then, the distinction between felonies and misdemeanours cannot be taken to be of historical interest and of no significance in criminal proceedings in this jurisdiction.

[60] An examination of the Hansard of the Proceedings of the House of Representatives of Jamaica, session, 2008-2009, Vol 34, Nos 2 and 3, relating to the Sexual Offences Act, provided to the court at its request, through the assistance of counsel for the Crown to whom we are grateful, is silent on this matter of the classification of felonies and misdemeanours. The legislature has left a gap in the law by not indicating whether the statutory offence of indecent assault is to be treated as a

felony or misdemeanour. This lacuna has implications for the proof of the offence of burglary, in this case, which requires proof of a felonious intent and no other mental element. The lacuna, will also, most notably, affect proof of the commission of a felony with the use of a firearm under section 25(1) of the Firearms Act, in grounding the Gun Court jurisdiction, where the offence committed by use of a firearm is one under the Sexual Offences Act.

[61] It is a matter of grave concern (and one which will lead to much confusion) that Parliament has thrown out the important classification of offences into felonies and misdemeanours with the repealed portions of the Offences Against the Person Act, without any amendment to other statutes that are dependent on the classification for legal and practical efficacy. Parliament ought to be mindful of the importance of the distinction between felonies and misdemeanours in our legislative tradition, so that, if the classification is to be abolished, then other offences, dependent on the classification, must be revisited. The offence of burglary is, obviously, one such offence.

[62] In the light of this gap or silence in the current law, and in the absence of anything from which it could properly be implied that indecent assault is now to be classified as a felony, the court has no choice but to resort to the common law position. It has always been that indecent assault is classified as a misdemeanour, at common law. This classification was preserved by the Offences Against the Person Act. This was made abundantly clear by this court in **Everton Lynton v R** at paragraphs [27] – [30]. We see no reason to depart from that position.

[63] In the absence of any indication that Parliament intended that indecent assault should no longer be a misdemeanour (as classified at common law and so treated under the Offences Against the Person Act), this court will continue to hold that it is not a felony but a misdemeanour. If it is intended to be a felony, Parliament must so indicate, expressly, by clear and unambiguous words that would require no construction by the court.

[64] It follows from this that the commission of indecent assault, which was accepted by the jury, could not have given rise to an inference of an intent to commit a felony for the purpose of proving the charge of burglary. The learned trial judge would have been in error in so directing the jury because indecent assault is not a felony. Burglary was, therefore, not properly made out on the basis of the commission of indecent assault.

b. *Did the applicant intend to commit a felony at the time he broke and entered the dwelling-house?*

[65] Given that indecent assault cannot provide the legal and factual basis from which the felonious intent may be inferred, then the remaining question is whether there was such an intent otherwise established on the evidence by the prosecution. In Archbold, Pleading, Evidence & Practice in Criminal Cases, thirty-sixth edition, at paragraph 1819, it is stated that the best evidence of the intent is that the defendant actually committed the felony alleged to have been intended by him or the prosecution may give in evidence any other facts from which the intent may be presumed by the jury. The example is given by the authors of the case of **R v Brice** (1821) Russ & Ry 450, where the defendant was discovered in the chimney of a shop, in the night-time, and the jury

found him guilty of burglary with the intent to steal. It was held that the evidence was sufficient to warrant that conclusion, although no offence was committed.

[66] Mr McFarlane argued that there was no evidence that the applicant, when he broke and entered, intended to commit any offence at all, in the light of the evidence of what he reportedly told RG that he was there to use the bathroom.

[67] This alleged assertion of the applicant would have had to be examined against the background that he was not a stranger to the home and that he would visit the house, albeit, it was said, only when the helper was there. There is nothing to suggest that he said anything else about his purpose for being in the house. The learned trial judge ought to have pointed to the jury the effect of that evidence, if they accepted it, on the issue of what he may have intended or did intend at the time he broke and entered the house. It would have been for the jury to determine whether the intent was proved, once the case was left to them with all the attendant circumstances.

[68] In the text, A Treatise on Crime and Misdemeanors 8th edition, Volume 2 by Sir WM Oldnall Russell KNT (the late Chief Justice of Bengal) at page 1054, the old case of **R v Tucker** (1844) 1 Cox CC 73 was cited. It is reported that, in that case, on an indictment for burglary with intent to steal the goods of WS, it appeared that the defendant broke a pane of glass, put in a knife, and pushed back the window fastener, after which he pulled the sash of the window down. He was then disturbed. Alderson B held that although there was sufficient entry by the prisoner, there was no evidence of the intent laid in the indictment (to steal). He stated that, "**[i]t is the immediate**

**intent with which the entry is made, that is the material one, and not a remote intent having no immediate connection with the entry**" (Emphasis added).

[69] It was also explained, by the same author at page 1054, that if the intention of the entry is either laid or proved to have been only for the purpose of committing a trespass, the offence will not be burglary. Therefore, according to the learned author, "an intention to beat a person in the house is not sufficient to sustain the indictment".

[70] Similarly, this court in **Dudley Willie v R** [2019] JMCA Crim 39 had to determine the central issue, as it is in this case, of whether the prosecution had led any evidence to prove that the intruder intended to commit a felony at the time of breaking and entering the complainant's home. The court concluded at paragraph [27] that no such evidence was led, and so, there was no proof of an intent to commit a felony at the time of the breaking and entering.

[71] In this case, the critical question for the jury to have resolved as a question of fact was, what was the immediate intent with which the breaking and entry was made? In resolving that question, these subsidiary questions would have had to be addressed: did the applicant break and enter the dwelling-house to use the bathroom, as he had allegedly indicated to RG or did he do so with the specific intention to commit another offence (other than indecent assault), which is a felony? Those were the questions that would have had to be resolved by the jury upon proper guidance from the learned trial judge, he having left the case to them.

[72] The jury would have had to be instructed that if they believed that the immediate intention with which the applicant entered the house was to use the bathroom for the purpose he allegedly indicated, or if they were in doubt about it, then they would have been obliged to give him the benefit of that doubt and find the mental element necessary, to establish the charge of burglary, not proved. This would have been so, because an intention to use the bathroom would not have been a felonious intent and would have also been the applicant's immediate intent. The authorities are clear that if the evidence negatives a felonious intent, the offence is not proved.

[73] It is only if the jury had rejected the applicant's alleged asserted need to use the bathroom as an explanation for his entry, and were satisfied beyond a reasonable doubt that he broke and entered with a felonious intent, that he could have been properly found guilty of burglary. Like in **R v Pearce** and **Dudley Willie v R**, the gist of this case, in relation to burglary, was establishing a felonious intention.

[74] The failure of the learned trial judge to bring all these matters that raised pertinent questions regarding the applicant's intention at the time he broke and entered the dwelling-house to the jury's attention amounted to a misdirection.

[75] It should be noted, however, that had a felonious intent been established on the evidence, the omission of the learned trial judge to draw the jury's attention to the aspect of the evidence about the applicant saying that he was at the dwelling-house to use the bathroom may not, by itself, have been fatal to the conviction. This is so, because the applicant neither upon being cautioned by the police nor at his trial in his

unsworn statement before the jury, accepted the prosecution's case that he was seen naked in the house and that he said he wanted to use the bathroom. He denied the incident in his terse unsworn statement. There was, therefore, nothing coming directly from him before the jury explaining his purpose for entering the house.

[76] The insurmountable challenge for the prosecution at trial is that indecent assault is not a felony and there was no other evidence from which a felonious intent could have been presumed to support a charge of burglary.

[77] The learned trial judge did not sufficiently address his mind to the question of what was required, in law, to prove the *mens rea* for burglary, before calling upon the applicant to answer. He was to have first satisfied himself, as the tribunal of law, that the prosecution had raised a prima facie case of an intent to commit a felony. If adequate consideration was given to that issue, he would have had to arrive at a conclusion that indecent assault is not a felony, and that there was no other evidence from which the felonious intent could have been inferred. In such a case, the applicant ought not to have been called upon to answer to the charge because a prima facie case would not have been made out.

[78] If it were a situation in which a prima facie case of a felonious intent was properly established, the learned trial judge would have been required to point the jury to the felony, which the prosecution is alleging was committed, or to any other circumstance, from which the felonious intent could be inferred. Within that context of explaining the requisite intention, he would have been required to highlight the reason

the applicant allegedly gave for being in the dwelling-house, upon being confronted by RG, for them to say what they made of it, in the light of all the evidence in the case and the applicant's unsworn statement. The learned trial judge's direction to the jury, having left the case to them, would have fallen short of what was required of him in law.

[79] This court finds that the learned trial judge erred in law in his directions to the jury in relation to the requisite *mens rea* for burglary, as contended by the applicant. The offence was not proved by the prosecution, and so, the conviction cannot stand.

[80] Supplemental ground two succeeds.

**Supplemental Ground three**

**Sentence**

[81] The applicant complains that the sentence of 10 years' imprisonment for indecent assault is manifestly excessive.

[82] The learned trial judge, in sentencing the applicant, referred to the evidence against him and the information obtained from the antecedent and social enquiry reports. He then indicated that he took into account the following matters in deciding the appropriate sentence to impose:

i) the principles of sentencing, specifically, protection of the public, deterrence and rehabilitation;

ii) previous convictions "for all sort of offences", including housebreaking;

iii) breach of trust; and

iv) three years' pre-trial remand.

**Analysis and findings**

[83] The learned trial judge did not demonstrate a proper application of the principles of sentencing, in keeping with long established tradition in this court. See for instance, **R v Everald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrate's Criminal Appeal No 55/2001, judgment delivered 5 July 2002 and **Basil Bruce v R** [2014] JMCA Crim 10. Admittedly, he did not have the benefit of the more structured approach to sentencing that has evolved, following the guidance in **Meisha Clement v R** [2016] JMCA Crim 26 and the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ("the Sentencing Guidelines").

[84] In keeping with the structured approach to sentencing, he would have been required, in the circumstances of this case, which involved a trial, to:

i) identify the sentence range;

ii) identify an appropriate starting point within the range;

iii) consider any relevant aggravating factors;

iv) consider any relevant mitigating features (including personal

mitigation);

v) decide on the appropriate sentence (giving reasons); and

vi) give credit for time spent in custody up to the date of sentence.

[85] By failing to disclose the methodology he employed on his route to sentence, the learned trial judge would have erred, in principle. The duty, therefore, falls on this court to apply the relevant legal principles and the methodology involved in the accepted structured approach in its effort to ascertain whether, indeed, the sentence is manifestly excessive.

*a. the sentence range*

[86] The statutory maximum for indecent assault is a sentence of imprisonment of 15 years. It is accepted that the maximum is reserved for the most serious form of this offence and the worst offender. There is nothing in the circumstances of this case to categorise it as the worst of its kind and the applicant as the worst offender. He would not deserve the maximum sentence, despite the egregious nature of his offending.

[87] It is acknowledged that for the offence of indecent assault, the Sentencing Guidelines prescribe a normal range of between three to 10 years. It is, however, accepted that a case may fall outside the range, depending on the circumstances.

*b. the starting point*

[88] The usual starting point for this range is recorded to be three years. It is noted, that, unlike the Sexual Offences Act 2003 of the United Kingdom, there is no distinction

drawn in our statute in relation to this offence on the basis of the age of the victim. It seems fair to say that even though our statute is silent as to a distinction based on age, the court must treat indecent assault on a child as a more serious offence than one on an adult and as even more grave, when the child is below the age of 13. Our treatment of sexual offences, in relation to young children, must reflect the court's abhorrence for such offending and establish the court's position that young children should be left alone to enjoy their childhood and to develop into maturity, free from sexual molestation and exploitation. These are considerations that should be reflected in setting the starting point for this offence.

[89] Given the nature and seriousness of this offence, particularly as it relates to (a) the age of the child (six years old); (b) her state of being asleep in the privacy of her own bed and not in the applicant's home; (c) the part of her body that was touched (her vaginal area); and (d) the fact that it took place during the course of a forced and uninvited entry into her home, a starting point of six years' imprisonment seems appropriate.

*c. aggravating factors*

[90] There are various aggravating features relating to both the offence and the offender (that were not taken into account in setting the starting point), which serve to push the sentence upward away from the starting point of six years. The following aggravating features have been identified:

i) The time of the commission of the offence – the offence was committed about 2:30 am, the dead of night, when all occupants of the house had retired to bed and were at their most vulnerable.

ii) The maturity of the offender - The applicant is a man of 39 or so years old, which makes the gap between his age and that of the victim, a six year old, one of great magnitude. He could have been her father. He should have been protecting her.

iii) Previous convictions – The applicant had six previous convictions, which include house-breaking (and other kindred offences) as well as an offence against the person. Although there is none for a sexual offence, the convictions are relevant to the circumstances under which he committed this offence of indecent assault. He committed it after breaking and entering the dwelling-house without the owner's permission, which is similar to house-breaking and shop-breaking for which he had previous convictions. The previous convictions are, therefore, not irrelevant because, at minimum, they reflect a pattern of reoffending, which is indicative of a resistance to rehabilitation and an enhanced need for retribution, deterrence, greater rehabilitation and the continued protection of society from his offending.

iv) Nakedness and use of force – the applicant applied more bodily force to the person of the complainant above what was inherent in the commission of the offence. There was not merely a touch on the vagina but he lifted her from one bed to another, sat on her back and covered her mouth with his hands to prevent her from alerting anyone. On top of this, he presented himself naked to the young and impressionable complainant. The effect of this on a child of tender years, being asleep in her bed, and waking up to face such an experience, must have been extremely frightening, to say the least.

v) Breach of trust – the applicant was well-known to the family. He was allowed open access to their home, when the helper was there, to assist with chores. He used special knowledge of the house to gain unauthorized entry during the course of which he violated the privacy and security of the young complainant. This amounted to a betrayal of trust.

vi) Offence committed whilst on suspended sentence – On 8 April 2013, the applicant was given a sentence of six months' imprisonment suspended for 12 months, on a charge of unlawful wounding. He committed this offence on 8 September 2013, five

months later. This shows scant regard for law and order and the authority of the court.

[91] These aggravating features, when viewed within the context of his generally unfavourable community report, have managed to more than double the starting point, pushing the sentence upward and outside the upper limit of the usual range to 12 years' imprisonment.

*d. mitigating factors*

[92] Mr McFarlane submitted, however, that certain matters be considered in mitigation of sentence. He raised the following:

i) no evidence that it was premeditated;

ii) no violence used on the complainant;

iii) the probation officer's comment that he was not beyond redemption, even though that was qualified by the officer; and

iv) the community report that he is hardworking, helpful in the community and got on well with his peers.

[93] Absence of premeditation - It is not easy to accept that the commission of the offence was not premeditated because although the applicant entered the dwelling-house, he took nothing from it and he denied having entered it. He was naked in the house and he did not put forward any excuse in his unsworn statement at trial for being

in the house, which could furnish the court with material to say the commission of the offence of indecent assault was not premeditated. No weight is attributed to lack of premeditation as a mitigating factor so as to cause a downward adjustment from the starting point. He has already benefitted from the uncertainty of premeditation by it not having been treated as an aggravating feature.

[94] Absence of violence - It is also accepted that apart from the acts of covering the complainant's mouth and sitting on her (which have been already considered in aggravation), there is no evidence of sustained touching and of any appreciable form of violence or threat of violence meted out to her. It is also not clear whether the complainant was touched on her naked genitalia and there is no medical evidence of any physical or psychological trauma to her resulting from the encounter. There is, however, information in the social enquiry report that her mother reported that she continues to suffer emotionally and psychologically. This, therefore, reduces the mitigating effect of the absence of physical violence or threat of violence.

[95] Favourable aspects of community/antecedent report - It is accepted that the applicant works hard and he is helpful to persons in the community. The mitigating effect of this, however, is reduced by the fact that, rather ironically, he steals from the same community he would assist. His previous convictions for larceny-related offences and other information gleaned from the community report lend credence to this observation. It is, however, taken into account that he has no previous conviction for a sexual offence.

[96] These matters, while of mitigating effect, are significantly outweighed by the overwhelming aggravating features, thereby rendering them of relatively less significant impact on the starting point.

*e. other relevant considerations*

[97] Finally, the court must have regard to the objectives of sentencing and must ensure that the punishment fits the crime. While the applicant must be punished and steps be taken to deter him in protection of the public, some consideration must be given, nevertheless, to continue to aim at rehabilitation. Although, he seems resistant to rehabilitation, the court still hopes that he is not beyond redemption as the probation officer opined.

[98] Taking the aggravating and mitigating circumstances into consideration, on the one hand, and the objectives of sentencing, on the other, a sentence of 11 years' imprisonment would be appropriate. This would bring the sentence slightly outside the usual range for this offence. The egregious nature of the offence and the antecedent history of the applicant warrants such a sentence.

[99] He is, however, entitled to full credit for time spent on remand, prior to being sentenced. The learned trial judge, although stating that he had taken the pre-trial remand into account, did not indicate the extent of the credit given or the sentence that would have been imposed before taking account of pre-trial remand. For him to have arrived at 10 years' imprisonment as the ultimate sentence, he would have had to arrive

at 13 years' imprisonment as the sentence before giving credit for time spent in pre-trial custody, which he recorded to be three years.

[100] The evidence reveals that the applicant spent two years and (approximately) seven months on remand up to the date of sentence (11 September 2013 to 31 March 2016). This should be deducted. The sentence should be 11 years less two years and seven months for time spent on remand. The term of imprisonment to be served as of the date the sentence for the offence of indecent assault was imposed is, therefore, eight years and five months.

[101] The term of imprisonment of 10 years imposed by the learned trial judge, although falling within the usual range of sentence, on the face of it, was arrived at without a demonstrable application of the relevant principles of sentencing and for that reason he erred in law. This court is, therefore, justified in disturbing the sentence. The sentence of 10 years must be set aside to take account of the full credit to which the applicant is entitled for pre-trial remand, in keeping with binding authority.

**Conclusion**

[102] For these reasons, the application for leave to appeal conviction and sentence is granted and the hearing of the application for leave to appeal is treated as the hearing of the appeal. The following consequential orders are now made:

1. The appeal against conviction and sentence for the offence of burglary is allowed.

2. The conviction for burglary is quashed and the sentence of 15 years' imprisonment set aside. Judgment and verdict of acquittal entered for burglary.

3. The appeal against conviction for the offence of indecent assault is refused and the conviction is affirmed.

4. The appeal against sentence for indecent assault is allowed.

5. The sentence of 10 years' imprisonment at hard labour for indecent assault is set aside, and a sentence of 8 years and 5 months' imprisonment at hard labour is substituted therefor (being 11 years' imprisonment imposed as the ultimate sentence for the offence less 2 years and 7 months deducted as full credit for time spent on pre-trial remand).

6. The sentence is to be reckoned as having commenced on 31 March 2016.