JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO COA2020PCCR00002

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE FRASER JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

DONOVAN POWELL V R

Mrs Valerie Neita-Robertson QC for the appellant

Mrs Kameisha Johnson-O'Connor and Mrs Nickiesha Young-Shand for the Crown

8 February and 24 March 2021
Reissued 29 October 2021 – see [2021] JMCA Crim 11A

P WILLIAMS JA

[1] On 22 July 2019, Mr Donovan Powell, the appellant, appeared in the Parish Court for the Corporate Area (Criminal) before the Judge of the Parish Court Her Honour Miss Jacqueline Wilcott ('the Parish Court Judge') and pleaded guilty on three informations charging him with breaches of the Cybercrimes Act, 2015. A social enquiry report was requested and his sentencing was adjourned.

[2] On 22 November 2019, the appellant was sentenced to two terms of 12 months' imprisonment at hard labour on two of the informations, with the sentences to run concurrently and on the third he was ordered to pay a fine of $1,000,000.00 or serve

four months' imprisonment in default of payment. This term of imprisonment of four months was to run consecutively to the sentences of 12 months.

[3] The appellant gave verbal notice of his intention to appeal this sentence and was granted bail pending the outcome of the appeal.

The facts

[4] The Parish Court Judge recorded the following as "the allegations read by the [C]rown". The complainant, DC, and the appellant had been involved in an intimate relationship between November 2016 and the spring of 2018. During this time, DC said the appellant took "photographs of her and they both took photographs of her". She however never gave him permission to take photographs of her nude body. She also told him to desist from videoing her.

[5] After the relationship ended, DC was threatened that she would either be shot stabbed, ruined or destroyed. (As recorded by the Parish Court Judge, there was no indication who issued those threats.)

[6] On 12 January 2017, the appellant sent DC, through WhatsApp messenger, a video that he had created. She observed that the video was naked photographs and private sexual images taken of her. She had not consented to the creation of this video. She also noted that along with the images were vulgar memes and pictures with typed words to the effect that she had a sexually transmitted disease which she had passed on to the appellant. DC recognised that an aspect of the video was of her exiting the bathroom at the Couples' Hotel in November 2016.

[7] On 2 March 2017, the appellant sent her nude photographs and explicit photographs of her genitalia (it is not stated by what method these photographs were sent). These photographs had been taken of her while she slept. Also on that day in March, the appellant told DC that he had created videos and that he and others had access to them.

[8] On 9 March 2017, the appellant sent DC a text message inviting her to visit a particular website. This was followed by an email again inviting her to visit the website. She visited and saw the same images and videos depicting her genitalia and those of her exiting a bathroom. The appellant told her he had created the website and he would be calling everyone she was associated with to tell them about this site. He also told her he would send explicit videos around her son's campus and threatened that her son would never play football again.

[9] On 9 March 2017, DC was no longer able to access the website. However, she said on 3 April 2017, the site had been restored and that it contained the same private sexual images and videos.

[10] The Parish Court Judge noted that in the plea in mitigation made on his behalf by Mrs Neita-Robertson QC, the appellant denied the allegations of physical threats and refuted those charges. He however accepted that he published private photographs that would cause her embarrassment but said he was given the photographs. He also said he accepted responsibility.

The charges

[11] It is useful to note the charges as laid in the informations to which the appellant pleaded guilty. He was charged for breaches of section 9 of the Cybercrimes Act, which provides:

> "(1) A person commits an offence if that person uses a computer to send to another person any data (whether in the form of a message or otherwise) —
>
> (a) that is obscene, constitutes a threat or is menacing in nature; and
>
> (b) with the intention to harass any person or cause harm, or the apprehension of harm, to any person or property,
>
> but (for the avoidance of doubt) nothing in this section shall be construed as applying to any communication relating to industrial action, in the course of an industrial dispute, with the meaning of the *Labour Relations and Industrial Disputes Act*.
>
> (2) An offence is committed under subsection (1) regardless of whether the actual recipient of the data is or is not the person to whom the offender intended the data to be sent."

[12] The informations on which the appellant pleaded guilty outlined the charges as follows:

> "Information CA2018CR02462-2
>
> [The appellant] on the 12th day of January 2017, in the parish of Saint Andrew, used a computer to send data to [DC], which is obscene, with the intention to cause harm or to harass [DC] contrary to section 9 of the Cybercrimes Act.

> Information # CA2018CR02462-4
>
> [The appellant] on the 2nd day of March 2017, in the parish of Saint Andrew, used a computer to send data to [DC], which is obscene with the intention to cause harm or to harass [DC] contrary to section 9 of the Cybercrimes Act.
>
> Information # CA2018CR02462-5
>
> [The appellant] on a day unknown between 2nd day of March 2017 and 9th day of March 2017 in the parish of Saint Andrew used a computer to send obscene data to [DC] and persons unknown via website [DirtyD.com], with the intention to cause harm or to harass [DC]."

The social enquiry report

[13] The Parish Court Judge had the benefit of a social enquiry report, which she acknowledged was fulsome. She also acknowledged that it gave a good community report in relation to the appellant.

[14] The report indicated that the appellant was born on 1 November 1964 and was 55 years of age at the time he was interviewed. It was noted that during his interview, the appellant was polite and cooperative. He sought to explain his actions. He explained that he had a relationship with DC while he was living in the United States of America ("USA") which had ended many years ago. Twenty-seven years after it had ended, they rekindled the relationship and since he was now living in Jamaica, she came here to spend time with him. He alleged that the relationship soured when he contracted herpes and a sexual transmitted infection from her which caused him to believe that she was unfaithful.

[15] This led to a confrontation which he said resulted in an intense quarrel. At the time they separated, DC left the condominium where they were staying in his absence and

took with her some of his valuable possessions plus a telephone that had, recorded on it, most of their sexual encounters. He said that some months after she called him to say that he was a fool and she had used him to get a break and also have a good time. He also said she admitted to him that she had multiple sex partners hence the reason he contracted herpes.

[16] The appellant stated that DC sent slanderous pictures and messages to his friends and family which caused him much shame and embarrassment. He explained that she had told him that she was going to ensure that he would not be able to return to the USA and she also exposed him on social media and the activist group 'ME TOO'. He said he told her that if she did not stop slandering and discrediting him, he would do the same to her. He eventually retaliated by "sending pictures to her friends and family expressing what she did to him". He said that he reacted out of anger and impulse but "regrets what his anger drove him to do and is remorseful for his deed, but never threatened her about rekindling the relationship".

[17] The residents from the community in which the appellant resides, described him as a pleasant and quiet individual. They added that he was helpful and cooperative and said that they never heard of any negative reports, wrong doings or rowdy behaviours in relation to him.

[18] The complainant was also interviewed and stated that she had lived with the appellant in Jamaica for six months. She related that it was in November 2014, after they had ended their relationship and she went back to collect her belongings, that he began

to blackmail her by sending her pictures online and threatened to kill her if she did not rekindle the relationship. She said that he also threatened to send the pictures and videos to family, friends and business colleagues in an attempt to ruin her reputation and credibility. She explained that this was the worse time of her life, as his actions made her feel ashamed, humiliated and reduced her ability to gain employment as a television show host and speaker. She further explained that she was affected emotionally and mentally. It was her wish that the appellant receive the maximum sentence.

[19] Ultimately it was recommended that the appellant receive a non-custodial sentence.

The sentencing

[20] The Parish Court Judge acknowledged that the law provided for a sentence of up to four years' imprisonment with or without hard labour and/or a fine of $4,000,000.00. She thereafter identified the starting point she believed was appropriate as "$1.5 million and 8 months...taking into account the discount for early plea and the SIR [sic]".

[21] She then proceeded to identify the mitigating and the aggravating factors. The migrating factors she identified are as follows:

> "The SIR [sic] gives a good community report in relation to [the appellant]
>
> It also indicates a degree of remorse.
>
> He has no previous convictions in this jurisdiction.
>
> Pleaded guilty without the need for [DC] to give testimony and waste of the court's time."

[22] The aggravating factors she identified as follows:

> "The age of Mr Powell - so there can be no excuse of youthful exuberance. He ought to have known that this course of action was wrong.
>
> The premeditation of the act - the calls, the creation of a website upon which images of [DC] were embedded. The distribution of same to persons where the intent was to cause harm and embarrassment to [DC]. The exposing and sharing of material obtained within the confines of their relationship at applicable time - to persons known and unknown with an intent to do harm."

[23] The Parish Court Judge recognised, and indicated that she would bear in mind, the four principles of sentencing as enunciated in **R v Beckford and Lewis** (1980) 17 JLR 202 – retribution, deterrence, prevention and rehabilitation. She also considered the approach recommended by this court in **R v Perlina Wright** (1988) 25 JLR 221. She noted the following observation of Rowe P:

> "The rule of law is that when a person pleads guilty, the learned trial judge, as the tribunal of fact, should sentence on the set of facts which are most favourable to the accused."

[24] She concluded the sentencing exercise as follows:

> "In this case although [the appellant] lays down a set of circumstances in which he said (and I use my words with caution) justified at the time his course of actions against [DC] he does not dispute the acts as alleged that were done by him in relation to the 3 charges for which he has accepted responsibility.
>
> I also note that the SIR [sic] has made certain recommendations with regards to sentencing – but I am not of the view their recommendation is sufficient for acts done by [the appellant].

> Based on all I have considered and taking into account the egregious nature of this offence, the SIR [sic], and the plea in mitigation I sentence as follows
>
> Count 2 12 months at hard labour
>
> Count 4 12 months at hard labour
>
> Count 5 $1 m and 4 months' mandatory if the fine is not paid.
>
> Count 2 and Count 4 run concurrent
>
> Count 5 – the mandatory 4 months runs consecutively to the 12 months if the fine is not paid."

The appeal

[25] In his notice and grounds of appeal filed on 23 January 2020 the single ground of appeal was that the sentence of the court was manifestly excessive. When this matter came on for hearing before us, Mrs Neita-Robertson sought and was granted permission to amend the order sought to read as follows:

> "The sentence be set aside and a non-custodial sentence be imposed and the fines be reduced."

The submissions

On behalf of the appellant

[26] In her submissions on behalf of the appellant Mrs Neita-Robertson first advanced what could be regarded as the underlying complaint regarding the sentence imposed. She submitted that, in light of his guilty plea and the considerations that ought to flow from his contrite position and his impeccable record, the sentence ought to be reduced to reflect the precedents set by the courts.

[27] Queen's Counsel appropriately referred to the well-known and oft rehearsed classical principles of sentencing, she described as having been characterised by Lawton LJ in **R v Sargeant** (1974) 60 Cr. App. R. 74 and as discussed in **Veen v The Queen** (No 2)(1988) 164 CLR 465; namely retribution, deterrence, prevention and rehabilitation. She identified the steps that a sentencing judge should follow in arriving at an appropriate sentence. She submitted that the sentencing judge must always keep in mind the character and antecedents of the individual offender. She referred to **R v Cecil Gibson** (1975) 13 JLR 207 in support of this submission.

[28] In referencing the social enquiry report, Mrs Neita-Robertson noted the community report which she described as favourable. She highlighted the recommendation of the probation officer that a non-custodial sentence be given. Queen's Counsel concluded that the social enquiry report was a mitigating factor.

[29] Mrs Neita-Robertson further noted that the point had been made during the plea in mitigation that the taking of the pictures at the centre of the charges, was not done with any premeditation. She contended that the act that was premeditated came after conflict and acts of revenge which arose on both sides.

[30] Queen's Counsel urged that as a first time offender, the sentence passed on the appellant was particularly harsh keeping in mind all the mitigating circumstances. She submitted that the aggravating factor of his age, as identified by the Parish Court Judge to have eliminated the excuse of youthful exuberance, along with any premeditation were to be balanced by the mitigating factors.

[31] It was submitted that according to the Criminal Justice Reform Act section 3(1) and 2, which was discussed in **Dwayne Strachan v R** [2016] JMCA Crim 16, in all cases where the court has an option to impose a non-custodial sentence, this option should receive the court's first consideration. This meant that in such cases imprisonment should be the last, rather than the first resort and custody should be reserved as a punishment for the most serious offences. Further Queen's Counsel noted section 6 of that Act which, in certain circumstances, permits the suspension of a term of imprisonment, which does not exceed three years.

[32] Mrs Neita-Robertson usefully shared with this court, what she described as, case law from England and Wales where disclosing intimate pictures or videos of someone without their consent and with the intent to cause distress is now a criminal offence and carries a maximum sentence of 12 months in the Magistrate Court. She shared brief case notes of decisions from various magistrate courts where offenders were sentenced for offences involving the publishing, posting on Facebook and otherwise sharing intimate photographs of their victims. None of the terms of imprisonment were for periods exceeding 18 weeks. Some of the sentences also included curfew orders, community orders, restraining orders and fines.

[33] She also referred to the summary of a decision from a Crown Court where an offender successfully appealed a sentence of 17 weeks' imprisonment for what the magistrate had found to be an offence "so serious because it was a massive breach of trust and there were repeated attempts to keep it on Facebook and WhatsApp". The court

substituted a sentence of eight weeks' imprisonment which was suspended for 24 months.

[34] Ultimately Mrs Neita-Robertson submitted the Parish Court Judge had erred in disregarding the recommendation of a non-custodial sentence and failed to strike an appropriate balance between retribution, deterrence, prevention and rehabilitation so as to arrive at a sentence which fit the offender as well as the crime. Queen's Counsel further submitted that the Parish Court Judge did not adequately take into account the fact that the appellant was a first offender and failed to acknowledge that he had denied the allegations of threatening [DC].

[35] Queen's Counsel urged that based on the case law and the sentencing guidelines, the sentence is manifestly excessive. She contended that the Parish Court Judge did not demonstrate any analysis and provided no substantive reasons for arriving at the sentence handed down. She submitted that, "based on these failings the sentence was uninformed, unfair and without application of the guiding principles and thereby was manifestly excessive".

On behalf of the Crown

[36] Mrs Johnson-O'Connor commenced her submissions in response by reminding this court of the basis on which we can interfere with the sentence imposed. She submitted that the sentence can only be altered if the Parish Court Judge erred in her application of any of the relevant principles. She referred to **Alpha Green v R** (1969) 11 JLR 283 and **R v Ball** (1951) 35 Cr. App. R. 164 in support of this submission.

[37] She submitted that in determining whether there was an error in principle by the Parish Court Judge, her approach must be analysed in light of the guidance given by this court in **Meisha Clement v R** [2016] JMCA Crim 26.

[38] Counsel contended that the Parish Court Judge properly determined a starting point and then considered the appropriate mitigating (including personal mitigation) and aggravating factors. Further Counsel contended that the Parish Court Judge did in fact consider the recommendation that a non-custodial sentence be imposed and demonstrated how she arrived at the conclusion that a custodial sentence was appropriate.

[39] Crown Counsel also pointed out that the maximum sentence in the cases from England and Wales to which Mrs Neita-Robertson had referred was 12 months whereas in our jurisdiction the maximum is four years. Ultimately, counsel concluded that the sentence of 12 months' imprisonment ought not to be disturbed.

[40] Crown Counsel submitted that the Parish Court Judge had erred in ordering that the mandatory sentence of four months to be served in default of paying the fine was to run consecutively to the 12 months' imprisonment. Counsel recognised that in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 and in a decision from this court, **Kirk Mitchell v R** [2011] JMCA Crim 1, it is stipulated that where offences are of a similar nature and were committed over a short period of time against the same complainant, sentences should normally be made to run concurrently.

Discussion

[41] In **Patrick Green v R** [2020] JMCA 17 Morrison P succinctly gave some useful points on the sentencing principles, which are sufficient to provide the necessary background against which consideration of the issues which arise in this appeal must take place. At paragraphs [21] to [23] he stated the following:

> "[21] We begin with three general observations. Firstly, it is beyond controversy that the four 'classical principles of sentencing', as this court described them in **R v Beckford & Lewis**, are retribution, deterrence, prevention and rehabilitation. Thus the possibility of rehabilitation, even in a case calling for condign punishment, must always be considered by the sentencing judge. Accordingly, in **R v Errol Brown**, the court considered that, in imposing a well-deserved deterrent sentence, the sentencing judge ought to have kept in mind 'a possible rehabilitation of the prisoner'. And similarly, in **Micheal Evans v R** the court found that counsel's criticism that the sentencing judge, whose primary focus appeared to have been on the principle of deterrence, had failed to demonstrate that he had also taken into account the need to rehabilitate the offender, was 'not at all unjustified'.
>
> [22] Secondly, the now accepted approach to sentencing is to (i) arrive at an appropriate starting point for the sentence (taking into account the seriousness of the offence, the usual range of sentences for like offences and other such factors); and (ii) adjust that figure upwards and/or downwards to allow for aggravating and/or mitigating factors. As Harrison JA explained in **R v Everald Dunkley**, once it has been determined that a sentence of imprisonment is appropriate in a particular case, the sentencing judge should 'make a determination, as an initial step, of the length of the sentence, as a starting point and then go on to consider any other factors that will serve to influence the sentence, whether in mitigation or otherwise'.
>
> [23] Thirdly, this court will not usually interfere with a sentence imposed by a judge in the court below unless it can be shown that the judge erred in principle or that the 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'."

[42] One other significant issue, for the purposes of this case, which must be borne in mind, is the proper approach the judge should take in regard to the guilty plea. The sentencing judge is required to have regard to section 42D of the Criminal Justice (Administration)(Amendment) Act, which reads as follows:

> "42D.-(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 convicted of the offence.
>
> (2) Pursuant to subsection (1), the Court may reduce the sentence that it would otherwise have imposed on the defendant in the following manner –
>
> (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.
>
> ..."

[43] From this, it is clear that a sentencing judge is obliged to first arrive at an appropriate sentence which would have been imposed if the defendant had been tried and convicted before factoring any reduction to be given for the guilty plea. In recognition of the fact that there is a need for transparency and consistency in sentencing, the sentencing judge should make apparent how the sentence ultimately arrived at was calculated and this is best achieved by expressing what percentage discount was applied and why such a discount was awarded.

[44] There is no dispute that the Parish Court Judge demonstrated an appreciation of the relevant principles that should have guided her sentencing exercise and did so in a clear manner. She identified a starting point before noting and considering the mitigating and aggravating factors which impacted the calculation of the appropriate sentence. It is however her application of the law and the principles regarding how she arrived at the starting point and credited the discount for the guilty plea, which raises a concern.

[45] It would appear from what is recorded on the informations that the matter came up for hearing for the first time on 22 July 2019. This was the date that the guilty pleas were recorded and the sentencing adjourned. Thus the appellant was entitled to a consideration of a reduction of up to 50% in the sentence which would otherwise have been imposed, had he been tried and convicted. While clearly indicating that she was aware that some discount should be given, the Parish Court Judge failed to state what discount she applied and, even more significantly, she first applied the discount in order to arrive at a starting point. Hence there was in effect no clear discernible starting point, which should have been identified before arriving at the sentence to which the unknown discount was to have been applied. The Parish Court Judge therefore erred when she did this and this court is therefore obliged to intervene.

[46] In considering the appropriate sentence, it is necessary to note section 3 of the Criminal Justice (Reform) Act which reads:

> "3(1) Subject to the provisions of subsection (2), where a person who has attained the age of eighteen years is convicted in any court for any offence, the court, instead of

> sentencing such person to imprisonment, shall deal with him in any other manner prescribed by law.
>
> 3(2) The provisions of subsection (1) shall not apply where-
>
> (a) the court is of the opinion that no other method of dealing with the offender is appropriate;
>
> ...
>
> 3(3) Where a court is of opinion that no other method of dealing with an offender mentioned in subsection (1) is appropriate, and passes a sentence of imprisonment on the offender, the court shall state the reason for so doing; and for the purpose of determining whether any other method of dealing with such person is appropriate the court shall take into account the nature of the offence and shall obtain and consider information relating to the character, home surroundings and physical and mental condition of the offender."

[47] There can be no dispute that the offences for which the appellant was charged were serious given the impact they could have on the victim. It could well be argued that the actions of sharing the nude photographs and videos with DC alone may have only been embarrassing to her; but certainly the appellant's deliberate desire to humiliate her escalated when he created a website specifically for posting the objectionable and offensive items.

[48] However, it ought not to be ignored that the appellant said that DC had given him the photographs, which then means she trusted him at some point and it was in breach of this trust that he proceeded to violate her in this way. Also to be acknowledged is the fact that the appellant claimed that DC had also done some hurtful things to him, perhaps the most grievous being exposing him to sexually transmitted diseases. His desire for revenge in the circumstances may well have explained, while not excusing, his first act

in January. But to have persisted in the manner he did culminating in the ultimate act of creating the website, made his behaviour sufficiently serious to warrant the consideration of a custodial sentence. If he had committed a single act, a suspension of a custodial sentence might have been appropriate.

[49] It ought therefore to be recognised that the Parish Court Judge is not to be faulted for concluding that in these circumstances a non-custodial sentence was inappropriate. We are unable to say that the Parish Court judge erred in principle in deciding to impose a custodial sentence.

[50] As already identified, the Parish Court Judge erred in her approach to identifying the appropriate starting point. The determination of an appropriate starting point normally involves a consideration of the normal range of sentences for the particular offence. In fairness to the Parish Court Judge, it is recognised that the legislation under which the appellant was charged is still relatively new and there is no established range for offences thereunder to assist.

[51] It is trite that a maximum sentence ought to be reserved for the most egregious offence, thus a starting point of four years would not be appropriate. We find that given the progression in the seriousness of these offences a starting point of 12 months would be reasonable. We find that the aggravating and mitigating factors identified by the Parish Court Judge were appropriate and that they balance each other in a such a way that when a calculation is done the sentence is returned to the starting point of 12 months.

[52] Given the fact that the appellant was a first time offender and pleaded guilty on the first occasion, we find that he should be given the full benefit of a 50% reduction in the sentence. Thus a term of six months' imprisonment is appropriate in the circumstances.

[53] We are compelled to comment on the fact that the fine, which can be viewed as the lesser punishment, was imposed for the most egregious act of creating the website. We considered whether this sentence ought to be disturbed to reflect the fact that the imposition of this sentence seemed not to fully reflect the serious nature of this offence when compared with the first two. However, while we recognise that we have the power to increase the sentence, having not given an indication that we would consider doing so, we accept that it would be unfair and a breach of natural justice to do so having not heard from the appellant or his counsel on this issue, (see **Earl Williams v R** [2005] 66 WIR 313). In the circumstances a reduction in the fine imposed is not warranted.

[54] Although Crown Counsel relied on the pronouncements of this court in **Kirk Mitchell v R** in submitting that the Parish Court Judge had erred in ordering that the term of imprisonment in default of payment run consecutive to the custodial sentence, it is necessary to point out that this court was not dealing then with cases where there is a mixture of custodial sentences and fines. It is readily recognised that where a mandatory sentence in default of paying a fine is the same as or less than a custodial sentence being imposed at the same time, and it is ordered that these sentences run concurrently, the offender may well find it more financially feasible to opt not to pay the fine. A sentencing court would have to consider if that is the punishment they wish to achieve by imposing

such a sentence. Given the circumstances of this case where, as we have noted, the most egregious offence was the one for which the fine was imposed, we are of the opinion that this is an appropriate matter for an order that the mandatory sentence for failure to pay the fine, is to run consecutive to the other sentences.

Disposal of the appeal

[55] The order of this court is as follows:

1. The appeal against sentence is allowed in part.

2. The sentences imposed by the Parish Court Judge in relation to the first two informations are set aside and the following sentences substituted therefor:

    a. Information number 2018 CR02462-2 — Six months' imprisonment at hard labour.

    b. Information number 2018 CR02462-4 — Six months' imprisonment at hard labour.

    These sentences are to run concurrently.

3. The sentence of the Parish Court Judge on the information number 2018 CR02462-5 of a fine of $1,000,000.00 or four months' imprisonment in default of payment is affirmed.

4. The order of the Parish Court Judge requiring that the term of imprisonment in default of payment of the fine should run consecutive to the other counts is affirmed.

[2021] JMCA Crim 11A

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS DUNBAR-GREEN JA (AG)

PARISH COURT CRIMINAL APPEAL NO COAPCCR00002

DONOVAN POWELL v R

Written submissions filed by Mrs Valerie Neita-Robertson QC for the appellant

Written submissions filed by Mrs Nickeisha Young Shand for the Crown

29 October 2021

P WILLIAMS JA

[1] On 24 March 2021, we handed down our decision in this matter in a judgment with neutral citation [2021] JMCA Crim 11. The appeal was concerned with Mr Donovan Powell, the appellant, challenging the sentence which had been imposed on him by the Judge of the Parish Court in the Parish Court for the Corporate Area (Criminal), on 22 November 2019, following his guilty pleas on three informations charging him with breaches of the Cybercrimes Act, 2015. We allowed the appeal in part, setting aside the sentences that had been imposed on two informations and substituting sentences found to be more appropriate. We affirmed the sentence which had been imposed on the other information.

[2] Subsequently, we were made aware of an error in the judgment, in that, in referring to the charges laid against the appellant, we had quoted provisions from the Cybercrimes Bill, 2015 instead of the Cybercrimes Act, 2015, specifically, section 9, which

creates the offence described in the side note as "[u]se of computer for malicious communication". The section had been substantially changed in the final legislation from what had been proposed in the Bill. The observations we made flowing from this reference may well be regarded as *obiter*, and fortunately did not have any impact on the eventual outcome of the matter. However, it was felt prudent to consider whether it was an error that we could and ought to correct, and the extent of the correction that would be made.

[3] We acknowledge the assistance given by counsel, who responded to our invitations to make submissions on the issue and did so in a timely and entirely helpful manner.

The jurisdiction of the court to correct errors in its decisions

[4] It is considered appropriate to first consider the circumstances under which this court can revisit and reopen an appeal. In **Taylor and another v Lawrence and another** [2003] QB 528, it was expressly stated that a Court of Appeal has an implicit jurisdiction to do what is necessary to achieve its two principal objectives of correcting wrong decisions and ensuring public confidence in the administration of justice. The court considered the jurisdiction of the court to reopen an appeal to achieve those objectives, and Lord Woolf CJ had this to say:

> "54 … The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will be reopened when there is a real requirement for this to happen.
>
> 55 One situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it is biased. If bias is established, there has

> been a breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy…"

[5] In **re Uddin (A Child)** [2005] 1 WLR 2398, the English Court of Appeal expanded on their reasoning and decision on this issue. Dame Butler-Sloss P, writing on behalf of the court, stated:

> "16 It is clear that whenever the residual jurisdiction established by the judgment in *Taylor v Lawrence* [2003] QB 528 is sought to be invoked, the court must be satisfied that the case falls within the exceptional category there described before it will accede to the application and reopen the case. One may without levity ask the question: how exceptional is exceptional? The language used by the court…is necessarily general: apart from the descriptive phrase 'exceptional circumstances', the requirements are that the probability of a significant…injustice must be established, and that there be no effective alternative remedy."

[6] Against this recognition of the limited and exceptional circumstances outlined whereby a Court of Appeal can reopen an appeal, it must also be acknowledged, as undisputed, that this court can, by virtue of its inherent jurisdiction to control its process, correct a clerical error arising from an accidental slip or omission in keeping with the well-known slip rule. In **Dalfel Weir v Beverly Tree** [2016] JMCA App 6, this court conducted an extensive and comprehensive discussion on the jurisdiction of this court to correct errors and omissions and confirmed the power of the court to correct errors in an order previously made, to bring the order, as drawn, into conformity with that which the court meant to pronounce, such that the court's intention was manifest and operative.

[7] The jurisdiction to re-open a judgment in a criminal matter was considered by the Caribbean Court of Justice in **R v Gilbert Henry** [2018] CCJ 21 (AJ). At para [17] Anderson J, in delivering the judgment, stated:

> "In analysing this issue, the Court begins from the widely accepted principle that there must be finality to litigation. Judicial decisions must confer certainty and stability. People who are affected need to know where they stand. They must be able to order their affairs in the sure knowledge that the word of the court is the final word on their legal rights and responsibilities. However, a second principle is equally uncontroversial. The principle of finality cannot be applied in an unyielding manner if that application results in injustice. This is particularly so in criminal proceedings where the liberty or even life of an individual may be at stake. It is thus settled law that a court has an inherent power to even reopen a criminal appeal to ensure that justice is done. Thus, both principles are required to ensure public confidence in the administration of justice."

He subsequently had this to say at para [22]:

> "… [I]n *R v Yasain* [[2015] 3 WLR 1571], the English Court of Appeal highlighted the ways in which an appeal court should exercise the power to review its own decision. The court stated that there was a power to re-open an appeal if: (i) on a proper analysis, the previous order was a nullity; or (ii) a defect in the procedure might have led to some real injustice. In so holding the court drew on principles from the civil jurisdiction particularly the case of *Taylor v Lawrence*. In the court's view, 'there was no basis for any distinction between the Civil Division and the Criminal Division as to the principles applicable to the jurisdiction under the implicit powers on an appellate court to correct procedural errors'…."

[8] There is, however, a somewhat unique feature about this case, in that, the error here is not contained in the orders made in the judgment. Also, the error did not impact the review of the sentence that we embarked on, nor the ultimate decision arrived at. Nevertheless, even if the error did not result in any injustice to the appellant, the question must be, whether the jurisdiction to correct errors ought not to exist in a case where a real possibility exists, that the citing of incorrect provisions of a legislation may negatively

affect future decisions, if persons rely on the judgment as accurately reflecting the existing law.

The error

[9] In the judgment at para [11], in reviewing the charges, we set out the following relevant provisions of section 9 of what proved to be the Cybercrimes Bill, 2015:

> "(1) A person commits an offence if that person -
>
> (a) uses a computer to send to another person any data (whether in the form of a message or otherwise) that is obscene, constitutes a threat, or is menacing in nature; and
>
> (b) intends to cause or is reckless as to whether the sending of the data causes annoyance, inconvenience, distress, or anxiety to that person or any other person.
>
> (2) An offence is committed under subsection (1) regardless of whether the actual recipient of the data is or is not the person to whom the offender intended the data to be sent.
>
> …"

[10] However, in the Cybercrimes Act, 2015, which came into, effect on 22 December 2015, section 9 provides, in part, that:

> "(1) A person commits an offence if that person uses a computer to send to another person any data (whether in the form of a message or otherwise) —
>
> (a) that is obscene, constitutes a threat or is menacing in nature; and
>
> (b) with the intention to harass any person or cause harm, or the apprehension of harm, to any person or property,
>
> but (for the avoidance of doubt) nothing in this section shall be construed as applying to any communication relating to

> industrial action, in the course of an industrial dispute, with the meaning of the *Labour Relations and Industrial Disputes Act*.
>
> (2) An offence is committed under subsection (1) regardless of whether the actual recipient of the data is or is not the person to whom the offender intended the data to be sent.
>
> …" (Italics as in original)

[11] There are two significant differences between the provisions of the Bill as opposed to the Act. Firstly, recklessness was removed as a part of the possible *mens rea* for the offence. Secondly, the descriptive words relating to the type of harm that can be caused, namely, annoyance, inconvenience, distress or anxiety were also removed. The Act requires proof of an intention to harass or cause harm or the apprehension of harm to any person for the commission of the offence.

[12] At paragraphs [12] and [13] of the judgment, we continued as follows:-

> "[12] The informations on which the appellant pleaded guilty outlined the charges as follows:
>
> "Information CA2018CR02462-2 [The appellant] on the 12th day of January 2017, in the parish of Saint Andrew, used a computer to send data to [DC], which is obscene, with the intention to cause harm or to harass [DC] contrary to section 9 of the Cybercrimes Act.
>
> Information # CA2018CR02462-4 [The appellant] on the 2nd day of March 2017, in the parish of Saint Andrew, used a computer to send data to [DC], which is obscene with the intention to cause harm or to harass [DC] contrary to section 9 of the Cybercrimes Act.
>
> Information # CA2018CR02462-5 [The appellant] on a day unknown between 2nd day of March 2017 and 9th day of March 2017 in the parish of Saint Andrew used a computer to send obscene data to [DC] and persons unknown via website [DirtyD.com], with the intention to cause harm or to harass [DC]."

> [13] It is readily apparent that the intention alleged in the informations did not strictly conform to those as given in the legislation. The appellant had not raised this matter before the Parish Court Judge, at the time he accepted responsibility and pleaded guilty, thus avoiding any discussions as to whether he had been deceived or misled by this possible defect (see section 2 of the Justices of the Peace Jurisdiction Act). He also did not pursue the matter during the appeal when the court noted the defect. It was recognised that, in any event, no appeal could be allowed for any error or defect in form or substance appearing in any information unless raised at the trial or unless the court was of the opinion that there may have been injustice to the appellant (see section 303 of the Judicature (Parish Court) Act). Nonetheless, it is necessary that we encourage that **care be exercised such that the form and substance in informations comply substantially with the provisions in the charging legislation."** (Emphasis supplied.)

[13] Having been inadvertently supplied, by counsel for the Crown, with the Cybercrimes Bill, 2015, from which we quoted (at para [11] of the judgment); our concern was that the intention and type of harm alleged did not strictly conform to those given in the Bill. We felt compelled to make the comment that "care be exercised such that the form and substance in informations comply substantially with the provisions in the charging legislation" (at para [13] of the judgment). The comment, although generally true, was unnecessary and unfounded in this instance since the charges proffered in the informations did, in fact, comply with the provisions of the Act.

Discussion and conclusion

[14] It was therefore of concern that the original judgment would not be accurate in its portrayal of what is required to establish a breach of section 9 of the Cybercrimes Act. This, to our minds, presented a real possibility that public confidence in the administration of justice could be adversely affected. In these circumstances, we are satisfied that such an error needs to be remedied and justifies this court revisiting the decision to safeguard the administration of justice and the confidence reposed in it.

[15] Although our reference was limited to subsections (1) and (2) of section 9, it is important to indicate that there are several other differences between the Bill and the Act, but it is not necessary for the purposes of dealing with the error made in the judgment, to detail those here.

[16] Mrs Valerie Neita-Robertson QC, in her written submissions, posited that the appellant had full knowledge of the nature of the offences and sentence ranges, and that he was not ignorant of the ramifications of his guilty pleas before the Parish Court. Therefore, he properly subjected himself to the law, and, at this stage, he still has no issue with the wording of section 9(1). She accepted that the major amendment of subsection 9(1)(b) which affects the scope of the offence, did not affect the appellant, as the issue of recklessness did not arise due to the particular set of facts in this case. She submitted that the issue was that of intention, which the appellant categorically understood and acknowledged and sought to take responsibility for, and by pleading guilty, publicly stated that he had the requisite intention to commit the offences. She however contended that, having regard to the error in the judgment, and in an attempt to preserve the proper administration of justice, the judgment ought to be withdrawn and substituted with another judgment in keeping with the correct reference to the law.

[17] In her written submissions, Mrs Nickeisha Young Shand apologised on behalf of the Crown, for the inadvertent supply of the incorrect legislation. One of the things she urged this court to consider was whether the error occasioned may impact the due administration of justice going forward, given that this is the first judgment that concerns the Cybercrimes Act, 2015, and will serve as a guide for practitioners. It was submitted that even though the effect of the error, in this case, may be negligible, as far as it does not change the result of the appeal for the appellant, the judgment may result in practitioners' failure to have a correct appreciation of the law, as the pronouncements regarding the *mens rea* are incorrect. However, there was no suggestion as to the type of correction the court ought to make.

[18] We recognised that although there was no indication that the error caused any significant injustice to the appellant warranting a re-opening of the appeal and/or a withdrawal of the court's judgment, it could, nonetheless, lead to significant injustice in the future if left uncorrected. This is so particularly since the *mens rea* required for the commission of the offence in section 9 of the Bill, which was erroneously quoted, is less than that required pursuant to the Act in force. Thus, it is feared that if the reference to section 9 of the Bill is accepted as an accurate rehearsal of the law, persons could be accused, deprived of their liberty on remand and even convicted, in circumstances where those outcomes would not be achieved if the correct law was applied.

[19] We are, therefore, satisfied that to ensure public confidence in the administration of justice, it is to be noted that paras [11] and [13] of our judgment in this matter, with neutral citation [2021] JMCA Crim 11, in so far as they contain an incorrect reference to the Cybercrimes Act 2015, are inaccurate, and ought not to be relied on. Para [11] of the judgment should be amended to reflect the correct provisions of section 9 of the Cybercrimes Act. Para [13] ought to be eliminated entirely.

[20] In the result, in respect of the judgment **Donovan Powell v R** with neutral citation [2021] JMCA Crim 11, we make the following orders:

(a) Para [11] is hereby amended to read as follows:

> "It is useful to note the charges as laid in the informations to which the appellant pleaded guilty. He was charged for breaches of section 9 of the Cybercrimes Act, which provides:
>
> > '(1) A person commits an offence if that person uses a computer to send to another person any data (whether in the form of a message or otherwise) —
> >
> > (b) that is obscene, constitutes a threat or is menacing in nature; and
> >
> > (c) with the intention to harass any person or cause harm, or the apprehension of harm, to any person or property,

but (for the avoidance of doubt) nothing in this section shall be construed as applying to any communication relating to industrial action, in the course of an industrial dispute, with the meaning of the *Labour Relations and Industrial Disputes Act*.

(2) An offence is committed under subsection (1) regardless of whether the actual recipient of the data is or is not the person to whom the offender intended the data to be sent.

…'"

2. Para [13] is removed in its entirety.