[2017] JMCA Crim 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 99/2011

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

LEIGHTON ROWE v R

Miss Jacqueline Cummings for the appellant

Mrs Karen Seymour-Johnson for the Crown

20, 22 July 2016 and 22 May 2017

MORRISON P

[1] On 28 September 2011, the appellant appeared before Evan Brown J ('the judge') in the Home Circuit Court, on an indictment which charged him with one count of carnal abuse, contrary to section 48 of the Offences Against the Person Act. The prosecution's case against the appellant was that, on a day unknown between 1 and 31 August 2010, he carnally knew and abused BR ('the complainant'), she being a girl under 12 years of age.

[2] The appellant pleaded guilty to this indictment and, at the request of his counsel, the court ordered that a Social Enquiry Report ('SER') be prepared. That having been done, the appellant again appeared before the court on 25 November 2011. On that date, after consideration of a report on the appellant's antecedents and the SER, and after hearing a plea in mitigation made on his behalf, the judge sentenced the appellant to 12 years' imprisonment.

[3] The appellant applied for leave to appeal against his sentence on the ground that the judge had "failed to temper Justice with mercy, taking into consideration [his] guilty plea". Accordingly, the appellant contended, the sentence imposed by the judge was "harsh and excessive". On 26 February 2016, a single judge of this court granted the application for leave to appeal on the ground put forward by the appellant. In granting leave, the single judge observed as follows:

> "Although each matter has to be dealt with according to its own particular facts and circumstances; and the facts and circumstances in this case are disturbing and egregious, it is arguable that the sentence imposed might be more appropriate for a conviction that came after a trial."

[4] At the conclusion of the hearing of the appeal on 22 July 2016, the court agreed with the single judge's assessment. The appeal against sentence was accordingly allowed and the sentence of 12 years' imprisonment was set aside. In its stead, the court imposed a sentence of eight years' imprisonment and ordered that the sentence should run from 25 November 2011. These are the reasons which were at that time promised for this decision.

[5] The facts as outlined to the court after the appellant's plea of guilty were these. The complainant, who is the appellant's stepdaughter, was born on 20 November 1998. The complainant said that the appellant had been having sexual intercourse with her for some time before 2010, the last such occasion being in August 2010. The complainant was at that time 11 years of age. Sometime in October 2010, the complainant complained of feeling ill. When questioned by her mother, she confided in her what had occurred. As it turned out, the complainant was pregnant and was obliged to seek medical intervention, leading to the termination of the pregnancy. After a report had been made to the police, the appellant was in due course arrested and charged with carnal abuse, at which time he made no statement.

[6] The appellant was born on 17 June 1977. He was therefore 33 years of age in August 2010. As at the date of his arrest, he was gainfully employed. He was married, but separated from his wife (the complainant's mother), and was the father of two infant daughters who were dependent upon him for support. While the officer who produced the appellant's antecedent report to the court was hardly definitive on the point ("I am not able to say at this time, m'Lord."), it appeared that the appellant had no previous convictions.

[7] When interviewed by the probation officer who prepared the SER, the appellant denied having had sexual intercourse with the complainant. Despite his having pleaded guilty, he maintained to the probation officer that the complainant's allegations were "all made up". Largely because of this, the probation officer was of the view that the appellant "showed no sign of remorse as he reported that he is not guilty".

[8] Based on her interview with the complainant, the probation officer noted the following in the SER:

> "Currently, [BR] is experiencing the third stage of abuse (process stage). She is now flooded with depression, flashbacks, headaches and loss of memory and needs to be assured of the benefit of professional intervention. This is an issue that involves the whole family and therefore all members should be recommended to counselling."

[9] The appellant called a witness as to his character; a church sister, who subsequently became a friend. The witness told the court that she had known the appellant for about 12 years. She described him as –

> "… somebody you could talk to. He was a man of God. I truly believe he loves the Lord. He is just that kind of person, always want to help."

[10] This witness went on to say that the appellant had in fact admitted to her that the allegations made against him by the complainant were true. She said that she was beside herself at that revelation and that, although the appellant had told her so himself, she "really didn't believe", because she did not see him as that kind of person. She urged the judge to give him "a second chance".

[11] In a spirited plea in mitigation on the appellant's behalf, Miss Cummings, who also appeared for him in the court below, related to the court, based on her instructions, an unusual history, which was to the following effect. The appellant, after being confronted by his wife with the complainant's allegations against him, which he did not deny, was ordered by his wife to leave the home which they occupied together.

Having complied, he resigned his job and travelled overseas. He remained there for some months, before "… he was jolted by moral and other obligations to return to Jamaica to face the music and to admit and deal with what had happened".

[12] Upon his return to Jamaica, Miss Cummings told the court, the appellant went directly to her office and gave her instructions. As a result, Miss Cummings made immediate contact with the Centre for Investigation of Sexual Offences and Child Abuse (CISOCA) and made arrangements for the appellant to be turned over to the police. Miss Cummings then wrote to the Director of Public Prosecutions to apprise her of the situation and the appellant was eventually brought to the Home Circuit Court on a voluntary bill of indictment.

[13] Against this background, Miss Cummings urged upon the court the steps taken by the appellant to shorten the proceedings; the fact that he had always been gainfully employed; his previous "unblemished record"; the fact that he was "someone faith based"; and the fact that "he himself knew what he did was wrong and why he has saved the Court and saved having anyone to give evidence in this matter". On the basis of all of this, Miss Cummings submitted for "a short period" of imprisonment.

[14] At the outset of his sentencing remarks, the judge acknowledged the appellant's plea of guilty as a factor to be taken into consideration in his favour:

> "Let us start at the beginning which is that you entered an unequivocal plea of guilty, let's start there and as I understand the principles governing sentence … your unequivocal plea of guilty is demonstrative - may be demonstrative of your remorse and your contrition …

> … there could have been and certainly was a substantial body of evidence against you, but having said that, you are to receive a discount for having pleaded guilty and I bear that in mind."

[15] The judge accepted for the purposes of sentencing that the appellant had no previous convictions and was a man of previously good character. But he observed that the appellant had abused the position of trust and authority which he occupied in relation to the complainant, adding that "the Court finds [this] nothing short of abhorrent". Taking into account the appellant's appearance of remorse, his excellent background, his Christian upbringing, the observations and recommendations made in the SER and the fact that he did not appear to be beyond remorse, the judge sentenced the appellant to 12 years' imprisonment.

[16] The appellant appealed against the sentence on the ground that it was manifestly excessive. In her submissions before us, Miss Cummings relied heavily on, among other things, the fact that the appellant had pleaded guilty at the earliest reasonable opportunity, and was therefore entitled to a substantial discount on the term of imprisonment that would otherwise have been imposed; and the appellant's previous unblemished character. In all the circumstances, Miss Cummings submitted, a sentence in the range of five to seven years' imprisonment would have been appropriate.

[17] Mrs Seymour-Johnson for the prosecution accepted that the usual range of sentences for offences such as the one to which the appellant pleaded guilty was in the region of six to seven years' imprisonment, but contended that there were several aggravating factors in this case. Principal among these, it was submitted, were the

appellant's relationship to the complainant and the fact that he violated the position of trust and authority which he had held towards her.

[18] No citation of authority is needed for the proposition that, at common law, a plea of guilty will ordinarily entitle the offender to a discount in the sentence that would otherwise have been imposed and that, the earlier the plea, the more substantial will be the level of discount. The relevant authorities were recently fully reviewed by this court in the case of **Meisha Clement v R** [2016] JMCA Crim 26, paragraphs [36]-[39]. The level of discount to be offered will vary from case to case, but examples can be found in the cases ranging from 25%-50% (see **Meisha Clement v R**, paragraph [39]). We would only add that the whole matter of discounts for guilty pleas has now been put on statutory footing by the Criminal Justice (Administration) (Amendment) Act, 2015, sections 42D and 42E. However, because this measure was passed subsequent to the commission of the offence and the sentencing hearing in the instant case, it has no application to this discussion.

[19] There is therefore no question that, as the judge accepted, the appellant in this case was entitled to a discount on account of his early plea of guilty. The only question is therefore whether, in all the circumstances outlined to the court by Miss Cummings, the judge made a suitable allowance for the plea. Unfortunately, we can derive no assistance on this point from the record of the sentencing hearing, since, beyond stating the appellant's entitlement to a discount, the judge did not indicate (i) what sentence he would have considered appropriate after a trial; and (ii) what level of discount he in fact applied to arrive at the sentence of 12 years' imprisonment. We

would again commend to sentencing judges the guidance set out in **Meisha Clement v R** (at paragraph [41]), which makes it clear that the giving of reasons is an integral part of the sentencing process.

[20] Sentences sanctioned by this court in appeals from convictions for carnal abuse range from 12 years' imprisonment after a trial (in **Dwayne Drummond v R** [2010] JMCA Crim 5), through 10 years' imprisonment after a trial (in **Erron Hall v R** [2014] JMCA Crim 42), to five years' imprisonment after a trial (in **Richard Pearce v R** [2013] JMCA Crim 54).

[21] On the basis of this selective sample alone, it appeared to us that the sentence of 12 years' imprisonment imposed by the judge in this case, taking into account all the circumstances and hardly least of all his plea of guilty, was in fact manifestly excessive. On this basis, we accordingly considered that it was appropriate to reduce the sentence imposed by the judge by 30%, principally to give effect to his early plea. As is now the court's usual practice, the sentence was ordered to run from the date upon which it was imposed by the judge, that is, 25 November 2011.