[2017] JMCA Crim 7

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 8/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA

CLAYTON SMITH v R

Norman Godfrey for the appellant

Mrs Andrea Martin-Swaby for the Crown

23 February 2017

ORAL JUDGMENT

F WILLIAMS JA

[1] By this appeal, the appellant seeks to set aside the sentence of 18 months' imprisonment at hard labour that was imposed on him on 6 May 2016 for the offence of housebreaking and larceny contrary to section 40(1) of the Larceny Act.

[2] He had pleaded guilty to the offence in the Parish Court for the parish of Manchester, held at Cottage on 11 April 2016 – his first appearance in court on the charge. The matter was adjourned on that date to 6 May 2016 for a community report to be prepared and for checks to be made as to whether he had a criminal record.

[3] The facts to which he pleaded guilty were that on 22 March 2016, he broke and entered the dwelling house of the virtual complainant with intent to steal, and did steal a television set and other items together valued at $36,000.00 On 31 March 2016 the appellant's house was searched and the television set was found therein.

The community report

[4] The community report was mixed. Some residents who were interviewed spoke of the appellant as an honest and hardworking person. The community report also stated, however, that "the majority of community members" were of the view that the appellant, although hardworking, was dishonest.

The reasons for sentencing

[5] In the reasons for sentencing, the learned Parish Judge recognized the goals of sentencing which were listed as: (a) retribution; (b) deterrence; (c) rehabilitation; and (d) the protection of society. Also considered were the nature of the offence and its prevalence.

[6] In favour of the appellant, the court mentioned his age (23 years at the time of sentencing); the fact that he had pleaded guilty at the first opportunity; that the offence to which he had pleaded guilty was a non-violent one; and that he had no previous convictions.

[7] On the other hand, the court considered as negative factors: (i) the fact that the community report contained negative aspects; (ii) the finding of the virtual

complainant's television set in the appellant's home, thus, in the court's view, making the case strong against him (and so, perhaps, in the court's mind, diminishing to some extent the effect of the guilty plea).

[8] The court below gave consideration to section 3(3) of the Criminal Justice (Reform) Act and found that in the instant case no other method of dealing with the appellant was appropriate. It considered as well section 42D of the Criminal Justice (Administration) Act which permits a discount of up to fifty per centum (50%) of a sentence in respect of a guilty plea entered on the first occasion an accused appears before the court. The court considered as well the fact that the maximum sentence for the offence is three years' imprisonment. The court was of the view that section 3(3) of the Criminal Justice (Reform) Act did not require a non-custodial sentence in every case. In relation to the duration of the sentence imposed, the court considered the case of **Bernal and Moore v R** (1996) 50 WIR 296 in which a sentence of 12 months' imprisonment imposed on a 22-year-old accused was upheld in respect of conviction for a drug-related and non-violent offence, where the accused had no previous convictions. At the end of the day, the court saw it fit to emphasize the deterrent aspect of the goals of sentencing. (In passing, it is to be noted that **Bernal and Moore v R** also went on appeal to the Privy Council and that judgment is reported at (1997) 51 WIR 241).

The grounds of appeal

[9] In his notice and grounds of appeal filed on 18 May 2016, the appellant listed these grounds:

> "1. The sentence is harsh and manifestly excessive in all circumstances, and cannot be justified.
>
> 2. The Appellant at the time of the commission of the offence was under the age of twenty-three and had no prior conviction.
>
> 3. The Appellant entered a Plea of Guilty on the 11th April 2016, it being his first appearance before the Court.
>
> 4. The Learned Parish Judge did not extend to the Appellant the benefits afforded him by The Criminal Justice (Administration) Act, and thereby depriving him of an appropriate Sentence.
>
> 5. The circumstances of the case does [sic] not demonstrate that a term of imprisonment is the inevitable sentence that had to be imposed upon the Appellant."

Discussion

[10] The appellant's complaint in this case may be encapsulated in the following summary: that the sentence imposed was manifestly excessive, having regard to his age; his plea of guilty at the first opportunity and the provisions of the Criminal Justice (Administration) Act, which together suggest that a sentence of imprisonment ought not to have been regarded as automatic.

[11] If what is being said in ground 4 is that the learned Parish Judge had had no regard to the Criminal Justice (Administration) Act, that might not be entirely correct. Section 42D of that Act 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 tried and 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 *per cent*;"

[12] The possibility of this reduction that is referred to in section 42D, was mentioned by the learned Parish Judge in the reasons for sentencing. The maximum sentence that can be imposed by a Parish Judge for this particular offence was stated to be three years, so that the sentence of 18 months' imprisonment would have been exactly fifty per centum (50%) of that maximum. Another aspect of that section will be addressed shortly.

[13] We may consider as well the Criminal Justice (Reform) Act, section 3 of which (so far as is relevant), reads as follows:

"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.

(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) 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 any 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."

[14] The "community report" on which the learned Parish Judge relied might be seen to be somewhat deficient in the area of information on the physical and mental condition of the offender. It is not as comprehensive as the social enquiry report to which we are accustomed. That apart, however, the learned Parish Judge appears to have been acting in general compliance with the relevant section in stating the reasons for imposing a custodial sentence. The reasons for sentencing also demonstrate a general awareness of the goals of sentencing that have been recognised in, for example, the case of **R v Everald Dunkley** RMCA No 55/2001, judgment delivered 5 July 2002, page 4; and more recently re-stated in the case of **Meisha Clement v R** [2016] JMCA Crim 26 at paragraph [26].

[15] In **Meisha Clement v R**, Morrison P identified a number of considerations to be addressed by sentencing judges and gave the following guidance at paragraph [41] of the judgment:

> "[41] As far as we are aware, there is no decision of this court explicitly prescribing the order in which the various considerations identified in the foregoing paragraphs of this judgment should be addressed by sentencing judges. However, it seems to us that the following sequence of decisions to be taken in each case, which we have adapted from the SGC"s definitive guidelines[42] , derives clear support from the authorities to which we have referred:
>
> (i) identify the appropriate starting point;

(ii) consider any relevant aggravating features;

(iii) consider any relevant mitigating features (including personal mitigation);

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

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

[16] In this case, there is no clear indication that the learned Parish Judge started from any discernible "starting point". That is not reflected in the reasons for judgment at all. What those reasons show, if anything, is that the starting point is likely to have been the maximum sentence of three years' imprisonment. The mention of section 42D of the Criminal Justice (Administration) Act suggests that what the learned Parish Judge did, as the next step from that starting point, was to have halved that maximum in accordance with what, on the face of it, is permitted under section 42D(2)(a). However, if that was the approach taken, a closer look at section 42D(1) indicates that the learned Parish Judge must have overlooked an important phrase in that subsection: that is, the phrase "...the sentence it would otherwise have imposed on the defendant, had the defendant been tried and convicted of the offence". That sentence (as pointed out in the cases of **Meisha Clement v R** and that of **Kurt Taylor v R** [2016] JMCA Crim 23, the latter of which was cited by Mr Godfrey and also mentioned by Mrs Martin-Swaby) could not properly have been the maximum, as apparently was the learned Parish Judge's starting point in this case. The starting point in this matter ought to have been a sentence that fell within the range of sentences appropriate for this type of matter; and that should have been adjusted, taking into account aggravating and

mitigating factors. Taking that approach, the court would thereby have arrived at a sentence that was appropriate for this offence and this offender. For the sentencing court, that would have been, in the words of the Act, "the sentence it would otherwise have imposed". And it is that sentence that the said subsection permits a sentencing court to reduce by as much as fifty per centum (50%).

[17] We acknowledge that sentencing is always a difficult process - even when it follows on a guilty plea. In this case, however, regrettably, in spite of rehearsing and showing a general awareness of the principles relating to sentencing, the learned Parish Judge failed to demonstrate a proper application of the various principles to the particular facts and circumstances of this case. This failure opens the door for this court to intervene.

[18] The conclusion that this court is entitled to intervene in this matter, is fortified by a consideration of what has been recognized to be the court's general approach in dealing with appeals of this nature. That approach is set out in the judgment of Hilbery J in the case of **R v Ball** (1951) 35 Cr App R 164, in which he observed at page 165:

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

[19] In this appeal, the learned Parish Judge proceeded by omitting to identify a starting point to which to apply the aggravating and mitigating circumstances in trying to arrive at the appropriate sentence. We are not satisfied that the sentence was one that was appropriate for this offence and to this offender. We are therefore minded to allow the appeal. In respect of the gravamen of the appellant's complaint to this court – that is, that the sentence is "manifestly excessive", we were not referred to any sentences in similar cases with which to make a comparison. In the court's experience, however, given these particular facts; and, having regard to the maximum possible sentence, the value of the items involved, the fact that the television set was recovered, as well as the age of the appellant we are of the view that the sentence is manifestly excessive. The community report, although mentioning in a general way an impression held by some community members of dishonesty on the part of the appellant, is relatively cursory and that impression seems to have had no independent confirmation. That general impression was the only feature that might have been regarded as something in the nature of a blemish against the appellant in the community report.

[20] We have learnt through Mr Godfrey that the appellant was without legal representation on both his appearances in court. There are no notes of evidence and so there is no note in the record of appeal of anything said to the court by the appellant himself by way of mitigation. So the court would not have had the benefit of some of these matters being drawn to its attention.

[21] In relation to the learned Parish Judge's reliance on the case of **Bernal and Moore v R**, which dealt with an attempt to export drugs, that case might not have

been the best case on which to rely, given the long-standing policy approach to sentencing for that type of offence. For example, in that case, Downer JA commented on the organizational skills and financial resources that had been necessary to hatch that particular scheme; and the possibility for the scheme to have provoked an international incident (see page 376 h). He further observed at page 377 b:

> "Unless there are exceptional circumstances, this court expects resident magistrates to impose custodial sentences for drug traffickers."

[22] Wolfe JA (as he then was), as well, at page 379 f, observed that it was "...customary within this jurisdiction to impose the custodial sentence in respect of the exporting offence...". He further observed at 379 j:

> "Persons who embark upon this type of scheme to export ganja and in the process enrich themselves, unmindful of the consequences to the lives of other persons as well as to the likely punishment if caught, must expect to receive a custodial sentence."

[23] It seems to us (drawing on our experience with sentences for this type of offence), that a sentence in the region of 18 months' imprisonment would have been a reasonable starting point in this case and that it could have been reduced to, say, nine months and suspended, given, in particular, the plea of guilty on the very first occasion that the matter went to court; the age of the appellant and the fact that he had no previous convictions.

[24] In the result the appeal is allowed. The sentence of 18 months' imprisonment at hard labour is set aside. Substituted therefor is a sentence of nine months'

imprisonment at hard labour, suspended for a period of two years, with a supervision order for the same period. This sentence is to be treated as having taken effect on 6 May 2016.

[25] Parish Judges are being reminded once again of their duty to take notes of the sentencing process, whether in the case of a plea of guilty or sentencing after a trial. The importance of this duty where a plea of guilty has been entered has been underscored in several authorities from this court beginning with the case of **R v Cecil Green** (1965) 9 JLR 254, per Duffus P; and with several reminders thereafter, including that given in the case of **Marc Wilson v R** [2014] JMCA Crim 41, per McDonald-Bishop JA. So that, while the reasons for sentencing that are now being produced are always helpful, notes of the process (which, as the authorities show, it is incumbent on Parish Judges to provide), would shed more light on matters such as mitigation; the fairness of the process itself and would assist us greatly in reviewing sentences.