[2021] JMCA Crim 29

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE FRASER JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CRIMINAL APPEAL NO 38/2016

IAN WILSON v R

Trevor Ho-Lyn for the appellant

Miss Judi-Ann Edwards for the Crown

20 July 2021

V HARRIS JA

[1] The appellant, Mr Ian Wilson, was convicted on 17 February 2016 in the Westmoreland Circuit Court for the offence of rape before G Fraser J ('the learned trial judge') sitting with a jury. On 15 April 2016, he was sentenced to life imprisonment with the stipulation that he should serve 15 years' imprisonment before becoming eligible for parole.

[2] On 14 January 2020, a single judge of this court considered his application for leave to appeal his conviction and sentence. She refused his application in respect of his conviction but granted permission for him to appeal the sentence imposed by the learned trial judge. This was on the bases that was no clear demonstration of how the learned trial judge arrived at the sentence and that there was an absence of the structured approach and well-settled methodology now employed in the sentencing process.

Background

[3] The complainant, MH, the prosecution's sole witness of fact, testified that, on 29 December 2012 at around 7:00 pm, she was at a party at the Whitehouse Police Station

in the parish of Westmoreland. She saw her friend, who was also a police officer, speaking with the appellant. Shortly thereafter her friend left and the appellant approached her. He offered to sell her a pearl, which she purchased for $1,000.00.

[4] The complainant received a phone call and decided to walk across the street to respond to the call because of the loud music in the background. As she was walking, she noticed that the appellant was walking behind her. She, nonetheless, proceeded to cross the street while observing that the appellant continued to follow her. As she approached some bushes, the appellant grabbed her by the "drawstring bag" that was on her back. The strap of the bag squeezed the complainant around her neck as the appellant pulled her into the bushes. He took a knife from his waist and intimated that he would find out whether she had a penis or vagina. She was scared and so she offered to have sex with him if he would put the knife down. The appellant stabbed the knife towards the ground three times and pushed it into the dirt. He then pushed the complainant onto her back on the ground. The knife was close to them at this time. The complainant, being fearful, pleaded with the appellant not to hurt her. Thereafter, the appellant had sexual intercourse with the complainant.

[5] During the ordeal (which lasted approximately 15 minutes), the complainant began crying and continued to plea for her life. At this point, the appellant hit her in the face. She then poked him in his eyes and got the opportunity to escape. She ran to the police station where she made a report of the incident. The complainant's evidence was that while she had seen the appellant in the Whitehouse area selling fish in the market, she had never spoken to him before and did not know his name.

[6] The appellant gave an unsworn statement from the dock in which he denied having sex with the complainant on the night in question. He stated that she had agreed to sell a pearl for him in exchange for half of the proceeds of the sale and sexual intercourse. On his account, they went into the bushes to have sex where she pulled down her pants, and as he took off his clothes, she ran away with the pearl.

The application for leave to appeal conviction

[7] At the commencement of the hearing, counsel Mr Ho-Lyn indicated that having assessed the learned trial judge's summation, he could find no basis on which to successfully challenge the conviction. He sought and was granted leave of the court to withdraw the application for leave to appeal conviction, to abandon the original grounds of appeal, and to argue one supplementary ground of appeal relating to sentence. The court accepted the position of counsel that the summation was impeccable and the conviction safe.

The appeal against sentence

[8] The solitary ground of appeal argued by Mr Ho-Lyn was in these terms:

> "The Learned Trial Judge (LTJ) failed in her determination of the appropriate sentence to be served by the Appellant to demonstrate the basis upon which she arrived at the sentence imposed and the reasons as to why that sentence was the only one applicable in the circumstances of the case. Although the sentence was imposed before the case of [**Meisha Clement v R** [2016] JMCA Crim 26 **('Meisha Clement**')] and [the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines')] the factors specified by Clement and the Sentencing Guidelines showing the required analysis of factors was absent, this resulted in a sentence which had no specified basis and was *therefore manifestly excessive*. In addition it appears from the sentencing remarks that the LTJ considered the statutory minimum to be Life imprisonment with eligibility for parole to be after 15 years, this is contrary to the provisions of the statute and again cause the sentence imposed to be manifestly excessive."
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> (Italics as in the original)

Discussion

[9] The crux of the appellant's argument is that the sentence imposed by the learned trial judge is manifestly excessive. Upon the appellant being found guilty, the learned trial judge had the benefit of antecedent and social enquiry reports, which she utilised during

the sentencing hearing. The antecedent report stated that the appellant was gainfully employed as a fisherman. He was single and had no children. He was previously convicted on two separate occasions for unlawful wounding and possession of cocaine. However, those convictions were dated. The report referred to him as a hardworking man and a good member of the community until he became a drug addict.

[10] The appellant's social enquiry report stated that he was 47 years old (there seems to be some variance in terms of his date of birth which was not verified) and had been gainfully employed since he was an adolescent. He attended primary school and up to the ninth grade in high school. Notwithstanding, he was illiterate but numerate. The report revealed that the appellant supported his mother financially and was her main caregiver. The appellant's mother disclosed in her interview with the probation officer that she had seen the appellant and the complainant together in the community. The community members also reported that they were seen together. This fact, however, was denied by the complainant. The community report was both favourable and unfavourable to the appellant, and he was assessed by the probation officer as being likely to re-offend.

[11] In his plea in mitigation, counsel for the appellant at trial emphasised that the appellant was gainfully employed, neither of his two previous convictions was for a similar offence and he was not beyond redemption.

[12] The learned trial judge, in her assessment, did not consider the appellant's two previous convictions as aggravating factors because they were antiquated. Therefore, she treated him as a first time offender. She considered as a mitigating factor the fact that he was a hardworking individual. On the other hand, she found that the aggravating factors were that the appellant dragged the complainant into bushes causing the strap of her bag to squeeze her neck, the use of an offensive weapon and physical violence during the offence. The learned trial judge referred to section 6(1) of the Sexual Offences Act and imposed the sentence stated at para. [1] above.

[13] Mr Ho-Lyn, on behalf of the appellant, argued in his written submissions that the learned judge failed to clearly demonstrate the basis upon which she determined the sentence. He relied on the case of **Roy Neil v R** [2019] JMCA Crim 41, in which McDonald-Bishop JA found that the learned judge, in that case, erred in principle by failing to disclose the methodology employed to determine the sentence that was arrived at. Counsel further argued that since the learned trial judge did not have the benefit of the case of **Meisha Clement** and the Sentencing Guidelines, this court is in a better position to properly assess the appropriate sentence.

[14] Mr Ho-Lyn, in his oral submissions, correctly identified that the usual range of sentences for an offence of this nature would be between 15 to 25 years. He then went on to outline the aggravating factors that would determine the appropriate starting point. He considered those factors to be the use of an offensive weapon and personal violence to the complainant (grabbing her bag which caused the straps to almost strangle her and hitting her in the face). He further submitted that, since the weapon was not a firearm, and it was not used to inflict any injury to the complainant, the appropriate starting point, in all the circumstances, would be in the region of 20 years. In answer to a query posed by the court, counsel accepted that the fact that the incident occurred in close proximity to the Whitehouse Police Station showed a wanton disregard for law and order, which would also be an aggravating feature that would move the starting point upwards in the region of 22 years.

[15] The mitigating factors indicated by counsel included the appellant's age and his hardworking and generous nature, especially towards his mother. Mr Ho-Lyn pointed out that the social enquiry report stated that it was not normal for the appellant to interfere with persons, he was mentally unstable and abused drugs, as well as alcohol. He indicated that the court, in those circumstances, could have benefitted from a psychiatric evaluation report to arrive at the appropriate sentence.

[16] Those mitigating factors, counsel submitted, would offset any increase on account of the aggravating factors. Accordingly, he suggested that when the aggravating and

mitigating factors were balanced the determinative sentence would be 21 years. Mr Ho-Lyn pointed out that the appellant had spent two months in custody awaiting sentence following conviction. He requested that the time credited be applied to the sentence that the court stipulates as the minimum period for parole. Additionally, counsel submitted that although the court could go up to a period of 18 years' imprisonment before eligibility for parole, he advanced that the court not exceed the 15 years' that had been set by the learned trial judge.

[17] Crown Counsel appropriately conceded that the sentence of life imprisonment for the offence of rape, committed in these circumstances, was manifestly excessive. She also agreed that the learned trial judge erred by not outlining the process and analysis she employed in arriving at that sentence.

[18] It was submitted by Crown Counsel that the appropriate sentence, in light of the circumstances of the case, was one of 20 to 23 years' imprisonment, with eligibility for parole after serving 15 years. The appellant's use of a weapon and physical violence upon the complainant, as well as the prevalence of gender-based violence in the society, were cited as the aggravating factors justifying the imposition of the suggested sentence. It was further argued that there were no notable mitigating factors, as there were mixed reports about the appellant's character.

[19] Three cases were relied upon by counsel for the Crown in support of her submissions. In **Paul Allen v R** [2010] JMCA Crim 79, the appellant used a firearm to abduct the complainant and brought her to a house where he raped her, among other things. This court found that a sentence of 20 years was not inappropriate. In **David Gray v R** [2020] JMCA Crim 4, the appellant and two others led the complainant to an isolated area, where the appellant used a firearm to intimidate her into removing her clothes. In the company of the two other men, he raped her. This court found that the sentence of 25 years' imprisonment with the requirement that he serve 15 years before being eligible for parole was appropriate. Finally, in **Carl Campbell v R** [2019] JMCA Crim 22, the complainant, a 13-year-old girl, was taken into bushes by the appellant who

was armed with a machete and raped. The sentence of 25 years' imprisonment was considered appropriate by this court.

[20] We agree with counsel for the appellant and the Crown that the learned judge erred when she imposed the maximum sentence of life imprisonment without providing cogent reasons for doing so, particularly in circumstances where she treated the appellant as a first time offender. It has been repeatedly stated by this court that the maximum penalty for offences of this nature is to be reserved for the most egregious cases. We endorse the views of the single judge of this court expressed at para. [2] above, that, the learned trial judge erred in principle in arriving at the sentence of life imprisonment. We find, therefore, that this sentence is manifestly excessive. As a result, it is open to this court to interfere with the sentence imposed by the learned trial judge and to determine the appropriate sentence by applying the relevant principles.

[21] In determining the appropriate sentence to be substituted, we have paid due regard to the cases relied on by counsel for the Crown. However, while being helpful, those cases are distinguishable from the present case because they involve the use of firearms, a machete and in **David Gray v R**, more than one assailant.

[22] In arriving at an appropriate sentence, we have considered that the case of **Paul Maitland v R** [2013] JMCA Crim 7, while not being perfectly on point with the present case, is instructive. In that case, the complainant was walking along a major thoroughfare when the appellant and another man approached her and held ratchet knives at her sides. They ordered her to walk with them to an isolated area, where the appellant forced her to perform oral sex on him and then he raped her. Thereafter, the other man sexually assaulted her. The court found that the sentence of 30 years was manifestly excessive. In deciding to reduce the sentence to 23 years, this court considered the age of the appellant (35 years old), the fact that he did not use a firearm and his previous conviction for robbery with aggravation.

[23] It is recognised that the distinguishing features in the present case are that the appellant was 47 years old at the time of the commission of the offence, he acted alone and was treated as having no previous conviction by the learned trial judge. Therefore, a sentence that is below 23 years would be proper in the circumstances.

[24] Therefore, we accept Mr Ho-Lyn's submissions that the usual range of sentences for an offence of this nature is 15 to 25 years. We also have no difficulty accepting that the appropriate starting point is 20 years. In addition to the aggravating features that determined the starting point, we are of the view that the location of the incident, which was in close proximity to a police station, is also an aggravating factor. The court views the conduct of the appellant in this regard as a wanton disregard for law and order, as well as the security of the complainant. In our view, this would be sufficient to safely move the starting point upwards by two years. However, the court must have regard to the mitigating factors.

[25] We note the unfortunate history of the appellant with substance abuse and purported mental instability. We take into account, as mitigating factors his age of 43 years at the time of the commission of the offence (we are prepared to act on the age stated in the social enquiry report having regard to the reported ages of his siblings), that he had no previous conviction, was gainfully employed, his generous and caring nature especially to his mother, and that he generally kept the peace in the community. Accordingly, allowing for the mitigating factors, the term of 22 years would be reduced to a term of 20 years' imprisonment.

[26] The law prescribes a minimum of 10 years' imprisonment before eligibility for parole and we recognise that the learned trial judge had imposed a term of 15 years' imprisonment before parole. We consider a pre-parole period of 15 years' imprisonment to be reasonable in all the circumstances. In any event, it would not have been appropriate or fair for this court to increase the period for eligibility for parole without having first notified the appellant of its intention to do so (see **Linford McIntosh v R** [2015] JMCA Crim 26).

[27] Finally, the court considers the two months that the appellant has spent on pre-sentence remand as indicated by counsel. We have made an allowance for the absence of the benefit of a psychiatric report and, therefore, deduct the two months from the period specified by the learned judge before the appellant becomes eligible for parole. We would, therefore, fix this period at 14 years and 10 months. We also recommend that he obtains psychiatric evaluation (and treatment, if necessary) while incarcerated.

[28] For the reasons stated above, the appeal against sentence is allowed. The sentence of life imprisonment with eligibility for parole after serving 15 years is set aside. Substituted therefor, is a sentence of 20 years' imprisonment at hard labour with the stipulation that the appellant serves 14 years and 10 months (with two months already credited for pre-sentence remand) before being eligible for parole. The sentence is to be reckoned as having commenced on 15 April 2016.

Order

1. With the leave of the court, the application for leave to appeal conviction is withdrawn.

2. The appeal against sentence is allowed.

3. The sentence of life imprisonment with eligibility for parole after serving 15 years' imprisonment is set aside and a sentence of 20 years' imprisonment at hard labour with the stipulation that the appellant serves a period of 14 years and 10 months (with two months on pre-sentence remand having been credited) before becoming eligible for parole is substituted therefor.

4. The sentence is to be reckoned as having commenced on 15 April 2016.

5. The court recommends that the appellant obtains psychiatric evaluation (and treatment, if necessary) while incarcerated.