

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 51/2015

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA**

DONALD GREGORY v R

Applicant absent and unrepresented

Mrs S Sahai Whittingham-Maxwell for the Crown

4 April 2017

BROOKS JA

[1] Mr Donald Gregory was convicted on 17 June 2015 in the Circuit Court for the parish of Saint Elizabeth for the offences of abduction and robbery with aggravation. He was sentenced on 26 June 2015 to seven years' imprisonment on each count. The sentences were ordered to run concurrently.

[2] His application for leave to appeal against conviction and sentence first came before a single judge of this court. The learned single judge granted him leave to appeal against sentence only and refused permission to appeal against conviction. The learned single judge was of the view that the sentencing judge, although he mentioned

that he had taken into the account the time that Mr Gregory had spent in custody before trial, did not show, by a mathematical approach, how he had arrived at the sentence which he imposed.

[3] Mr Gregory has not only pursued the grant of leave to appeal, but has also renewed his application for leave to appeal against his conviction.

[4] The evidence, on which the Crown relied, and which the jury must have accepted, was that on 27 April 2010 between 9:00 am and 10:00 am, the virtual complainant took a taxi at Lacovia in the parish of Saint Elizabeth. The driver and a male passenger were on the front seats of the vehicle and so she sat on the rear seat. During the course of the drive to Black River she became uneasy, as the passenger wanted to be taken off the route, and the driver, in order to accommodate that request, started turning back from the expected journey to Black River.

[5] The complainant tried to get out of the vehicle but without success. Eventually the passenger produced a knife and also threatened to shoot her and the driver. He took her bag and took money out of it. The driver drove the vehicle, on the passenger's instructions, into the hills. After the vehicle had been brought to a halt the passenger locked the driver in the trunk of the vehicle and led the complainant into bushes at knife point, where he ordered her to take off her clothes. Based on the words that he used, she understood him as intending to have sexual intercourse with her. She ran but he did not chase her. She went to the police station at Black River and made a report there. By then, it was about 11:00 o'clock that very morning.

[6] Some three months later, on 16 July 2010, she pointed out Mr Donald Gregory on an identification parade as the person who had perpetrated the offences against her on 27 April 2010. Mr Gregory was eventually arrested and charged.

[7] His defence at his trial was that he had had nothing to do with the incident. In an unsworn statement, he said that he was in the Negril area of Westmoreland when he was given certain information. As a result of receiving that information, he went to the police station and he was taken into custody. Thereafter, an identification parade was held and he was pointed out. He spoke of his good character in that statement.

[8] The learned trial judge instructed the jury on the issues which arose out of the evidence. He gave comprehensive directions on the matter of inferences, abduction robbery with aggravation, inconsistencies and discrepancies, good character and the all important issue of identification. The learned trial judge gave the usual Turnbull directions (**R v Turnbull** [1973] 3 All ER 549) and the matter was left to the jury. After a deliberation of less than half an hour, the jury returned with the verdict of guilty on both counts of the indictment on which Mr Gregory was charged. There is nothing recorded in the transcript to support any complaint against Mr Gregory's conviction.

[9] In passing sentence, the learned trial judge averted to the principles of sentencing: deterrence, restitution, rehabilitation and retribution and, after hearing the antecedents of Mr Gregory, passed the sentence of seven years imprisonment in respect of both counts. The learned trial judge, as mentioned before, did speak to the issue of the period spent in custody prior to the trial and having considered all those

issues which were brought before him, as well as the nature of the offences, he passed the sentences mentioned above.

[10] We have looked at the case **Joel Deer v R** [2014] JMCA Crim 33, which is a decision of this court. In that case, Phillips JA did a comprehensive review of cases in which sentences were imposed for the offence of robbery with aggravation. The learned judge of appeal found that the range of sentences for this offence was 10-15 years imprisonment.

[11] The offence of forcible abduction is created by section 17 of the Sexual Offences Act. It was formerly an offence contrary to section 56 of the Offences Against the Person Act. Section 56 was repealed when the Sexual Offences Act was passed. The sections are not identically worded but create the same offence of taking away a woman, against her will, with the intent of having sexual intercourse with her. The indictment in this case, incorrectly stated that the offence was contrary to section 56 of the Offences Against the Person Act. That error is not fatal to the conviction as an amendment would have been permissible, even at this stage, to correct the error. This is not an error of substance but of form, and there would be no prejudice to Mr Gregory.

[12] The maximum sentence stipulated for abduction under section 17 of the Sexual Offences Act is 15 years imprisonment. Fourteen years was the maximum stipulated for the offence under section 56 of the Offences Against the Person Act. The seven years

imposed by the learned judge would not be manifestly excessive especially in the context of the sentence imposed for the offence of robbery with aggravation.

[13] Based on that review, we are confident that the sentences passed on Mr Gregory did not result from an error by the learned sentencing judge. Mr Gregory's sentence is below the minimum of that usual range identified by Phillips JA, for robbery with aggravation, and therefore, it does appear that the learned sentencing judge did give Mr Gregory credit for the time that he had spent in custody prior to trial. Based on those factors the appeal must be dismissed. The convictions and sentences are affirmed and the sentences shall be reckoned as having commenced on 26 June 2015.