[2018] JMCA Crim 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 99/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE PUSEY JA (AG)

EWIN HARRIOTT v R

Delano Harrison QC for the appellant

Mrs Andrea Martin-Swaby and Miss Yanique Henry for the Crown

16, 19 April and 28 May 2018

PUSEY JA (AG)

[1] Mr Harriott was convicted along with another person in the Saint Elizabeth Circuit Court on 9 November 2015, following a trial before Campbell J ('the judge') and a jury on a 12 count indictment. He was convicted on nine counts where counts 1, 4 and 7 were for sexual intercourse with a person under the age of 16 years; counts 2, 5 and 8 for buggery; and counts 3, 6 and 9 for grievous sexual assault.

[2] The complainant resided with her aunt since she was an infant. Her mother expressed concerns about her education and subsequently, the complainant's residence

was changed to that of her mother. Some two years after this change, she visited her aunt and began behaving strangely and begged not to return to her mother. However, her aunt sent her back to her mother.

[3] Sometime later, the complainant was sent by her mother to her aunt based on an assertion that she was not behaving properly. Her aunt made observations about the complainant's behaviour and based on those observations, she examined the complainant's vagina.

[4] Based on what the aunt saw, a report was made to the police. At the trial, the complainant gave evidence that when she resided with her mother, the appellant would visit that house and it was during those visits that he sexually assaulted her.

[5] During sentencing, the question of the length of the sentence being imposed had the rather helpful intervention of counsel for the Crown. The judge had originally contemplated a sentence of 10 years on each count. Counsel for the Crown, however, pointed to the fact that the mandatory minimum sentence under the Sexual Offences Act for grievous sexual assault is 15 years and cited the case of **Linford McIntosh v R** [2015] JMCA Crim 26, in which this court pointed out a similar error and provided guidance for the courts.

[6] The learned trial judge accepted this guidance and on counts 3, 6 and 9 imposed a sentence of 15 years in compliance with section 6(1)(b) of the Sexual Offences Act which states that:

"6 (1) A person who –

(a) ...

(b) commits the offence of grievous sexual assault is liable-

(i) on summary conviction in a Resident Magistrate's Court, to imprisonment for a term not exceeding three years;

(ii) on conviction in a Circuit court, to imprisonment for life or such other terms as the court considers appropriate not being less than fifteen years."

[7] The single judge on 9 November 2017 considered this matter and refused the application for leave to appeal against conviction but granted leave to appeal against sentence to allow for consideration to be given to the question of whether the accused ought to be given credit for time served in custody, notwithstanding the mandatory minimum sentence that the legislation imposes. The application for leave to appeal against conviction was originally pursued but was withdrawn before this court.

[8] The court heard this matter on 16 April 2018 and on 19 April 2018 we indicated that the application for leave to appeal against conviction was refused and the appeal against sentence was dismissed. We indicated that the sentences would commence from 26 November 2015. We have put our reasons in writing as promised.

[9] We felt that this matter highlighted a lacuna in the law that ought to be addressed. The application of credit for time served is now an established principle of Jamaican jurisprudence. Originally, this was something that was considered a factor to

be taken into consideration by the sentencing judge. There was at that time no requirement that it should be anything more than a rough calculation or that the judge needed to do more than refer to this factor in his reasons for sentence.

[10] Some common law jurisdictions enacted statutes that enforced that the actual amount of time spent on remand ought to be deducted from any sentence passed by the court at sentencing. At this time there is no such legislation in this jurisdiction.

[11] However, the law has moved forward through judicial precedent. In **Meisha Clement v R** [2016] JMCA Crim 26, Morrison P in paragraph [34] encapsulated the progression of the law by stating:

> "… However, in relation to time spent in custody before trial, we would add that it is now accepted that an offender should **generally receive full credit**, and not some lesser discretionary discount, for time spent in custody pending trial. ..." (Emphasis applied)

Morrison P cited the cases of **Callachand & Anor v The State** [2008] UKPC 49, a decision of the Privy Council and **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ), a decision of the Caribbean Court of Justice. Therefore, both of the final courts of appeal for this region are aligned on this point.

[12] In fact, in **Richard Brown v R** [2016] JMCA Crim 29, a case remitted to this court by the Privy Council to establish how much credit, if any, was to be given for time spent in custody pending trial, F Williams JA helpfully summarised the progression of the law.

[13] The position on credit for time served has germinated in the Sentencing Guidelines for Use By Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017, where it is expressed that:

> "**11. Time spent on remand**
>
> 11.1 In sentencing an offender, full credit should generally be given for time spent by him or her in custody pending trial. This should as far as possible be done by way of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing.
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> 11.2 The sentencing judge should therefore ensure that accurate information relating to the time spent in custody is made available to the court.
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> 11.3 In pronouncing sentence arrived at in this way, the sentencing judge should state clearly what he or she considers to be the appropriate sentence, taking into account the gravity of the offence and all mitigating and aggravating factors, before deducting the time spent on remand.
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> 11.4 Despite the general rule, the sentencing judge retains a residual discretion to depart from it in exceptional cases, such as, for example:
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> (i) where the offender has deliberately contrived to enlarge the amount of time spent on remand;
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> (ii) where the offender is or was on remand for some other offence unconnected with the one for which he or she is being sentenced;
>
> (iii) where the offender was serving a sentence of imprisonment during the whole or part of the period spent on remand; and
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> (iv) generally where the offender has been in custody for more than one offence and cannot

therefore expect to be able to take advantage of time spent on remand more than once.

11.5 This is not intended to be an exhaustive list of instances in which the sentencing judge may depart from the usual rule, and other examples may arise in actual practice from time to time.

11.6 However, because the primary rule is that substantially full credit should be granted for the time spent on remand, the sentencing judge must give reasons for not doing so in any case in which it is decided to depart from the rule in any way."

[14] The appellant indicated by way of the social enquiry report that he had remained in custody for two years prior to trial. This is a customary problem in this jurisdiction, where persons may on occasion be in custody for long periods before trial.

[15] The difficulty in the case of this appellant is that he has been sentenced as a result of a mandatory minimum sentence. It is our view that the terms of section (6)(1)(b)(ii) of the Sexual Offences Act removes the discretion to give credit. The judge's sentencing discretion is curtailed by the statutory imposition of a mandatory minimum sentence.

[16] This contrasts with the provision for a person who pleads guilty to an offence which has a statutory mandatory minimum sentence. Section 42D of the Criminal Justice (Administration) (Amendment) Act, 2015, allows for sentences to be reduced when guilty pleas are entered. Subsection (3) of this section states that:

"Subject to section 42E, and notwithstanding the provisions of any law to the contrary, where the offence to which the

> defendant pleads guilty is punishable by a prescribed minimum penalty the Court may –
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> (a) reduce the sentence pursuant to the provisions of this section without regard to the prescribed minimum penalty; and
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> (b) specify the period, not being less than the two-thirds of the sentence imposed, which the defendant shall serve before becoming eligible for parole."

[17] In order to facilitate guilty pleas, this legislation makes provision for prescribed minimum penalties to be reduced in relation to guilty pleas. There is no such legislative provision for the sentencing judge in enforcing a mandatory minimum sentence to take into consideration credit for time served.

[18] The practical effect of the mandatory minimum requirement without the allowance for credit for time served is that this appellant may serve a total of 17 years in custody consisting two years on remand and 15 years after conviction.

[19] Mrs Martin-Swaby, who appeared before this court for the Crown, indicated that the solution to this unsavoury result would be to lower the time set for the appellant to serve before being eligible for parole. This option is not available to the court. The Sexual Offences Act has also set a mandatory minimum time before parole is considered. That time period is 10 years. Therefore, the appellant cannot be considered for parole until he has served a total of 12 years in custody, namely his two years on remand and 10 years of his sentence.

[20] In our view, this is an unintended consequence of the mandatory minimum provision of the legislation which will unwittingly lengthen the mandatory minimum sentence, contrary to the intention of Parliament. It may be that legislative intervention is necessary to ameliorate this apparent oversight.

[21] One option open to a defendant who faces this problem is to seek recourse through the application of sections 42K and 42L of the Criminal Justice (Administration) (Amendment) Act, 2015, which state:-

> "42K. – (1) Where a defendant has been tried and convicted of an offence that is punishable by a prescribed minimum penalty and the court determines that, having regard to the circumstances of the particular case, it would be manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty for which the offence is punishable, the court shall-
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> (a) sentence the defendant to the prescribed minimum penalty; and
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> (b) issue to the defendant a certificate so as to allow the defendant to seek leave to appeal to a Judge of the Court of Appeal against his sentence.
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> (2) A certificate issued to a defendant under subsection (1) shall outline the following namely-
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> (a) that the defendant has been sentenced to the prescribed minimum penalty for the offence;
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> (b) that the court decides that, having regard to the circumstances of the particular case, it would be manifestly unjust for the defendant to be sentenced to the prescribed minimum penalty for which the offence is punishable and stating the reasons therefor; and
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> (c) the sentence that the court would have imposed on the defendant had there been no prescribed minimum penalty in relation to the offence.

(3) Where a certificate has been issued by the Court pursuant to subsection (2) and the Judge of the Court of Appeal agrees with the decision of the court and determines that there are compelling reasons that would render it manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty, the judge of the Court of Appeal may-

(a) impose on the defendant a sentence that is below the prescribed penalty; and

(b) notwithstanding the provisions of the *Parole Act,* specify the period, not being less than two-thirds of the sentence imposed by him, which the defendant shall serve before becoming eligible for parole.

42L. –(1) Subject to subsection (4), a person who-

(a) has been convicted before the appointed day of an offence that is punishable by a prescribed minimum penalty; and

(b) upon conviction of the person, the trial judge imposed a term of imprisonment that was equal to the prescribed minimum penalty for the offence,

may apply to a Judge of the Court to Appeal to review the sentence passed on his conviction on the ground that, having regard to the circumstances of his particular case, the sentence imposed was manifestly excessive and unjust.

(2) An application under subsection (1) shall-

(a) be made within six months after the appointed day or such longer period as the Minister may by order prescribe;

(b) outline the circumstances of the particular case which, in the opinion of the person, rendered the sentence imposed on him manifestly excessive and unjust; and

(c) contain such other particulars (if any) as may be prescribed.

(3) Where the Judge of the Court of Appeal reviews an application made pursuant to subsection (1) and determines that, having regard to the circumstances of the particular case, there are

compelling reasons for which render the sentence imposed on the defendant manifestly excessive and unjust, the Judge may-

(a) impose a sentence on the person that is below the prescribed minimum penalty; and

(b) notwithstanding the provisions of the *Parole Act,* specify the period, not being less than two thirds of the sentence imposed by him, which the person shall serve before becoming eligible for parole.

(4) Subsection (1) shall not apply to a person who is serving a term of imprisonment for the offence of murder."

[22] Section 42K allows the judge in sentencing a defendant to the mandatory minimum sentence, to refer that sentence to the appellate court if he believes that in the circumstances of the case, the mandatory minimum sentence may be manifestly excessive and unjust. In a case similar to this one, we believe that the trial judge could make this referral by way of a certificate to the defendant setting out that he would have imposed a sentence less than the mandatory minimum if he were allowed to give credit for the time served.

[23] Section 42L permits a defendant to apply to this court for the reduction of a mandatory minimum sentence in an appeal against conviction, in the circumstances set out in the section.

[24] The options set out in sections 42K and 42L are not open to this appellant. A section 42K certificate could not have been granted as this legislation came into effect a few days after the sentence was passed by the court. The judge was not yet clothed with the authority set out in 42K.

[25] A defendant may invoke section 42L by making the application within six months of the sentence. Although this appellant filed his appeal within six months of sentence, he did not then seek to rely on section 42L. Had it been raised, the court could properly have faced a dilemma because the circumstances of Mr Harriott's case suggest that on merit, a reduction in his sentence would be unlikely. The appellant was someone that the complainant ought to have been able to trust and he exploited that trust to sexually abuse a child.

[26] In summary, the court emphasises that credit for time spent in custody before trial is now an established principle of the Jamaican jurisprudence. The Sexual Offences Act in imposing mandatory minimum sentences does not make allowance for this principle to be taken into consideration by a judge when passing sentence. The 2015 amendments to the Criminal Justice (Administration) Act do not in any way assist this appellant, although it may be of assistance to other appellants in the future.

[27] The court was therefore unable to adjust the sentence of this appellant.

[28] It is for the foregoing reasons that we ordered that the appeal against sentence is dismissed and that the sentences run from 26 November 2015.