[2018] JMCA Crim 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 34/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

DANIEL ROULSTON v R

Hugh Wilson and Miss Janett Levy for the appellant

Mrs Nateisha Fairclough-Hylton for the Crown

29 and 31 January 2018

MCDONALD-BISHOP JA

[1] During the silence of the night on 20 May 2013, the complainant was awakened by the intrusion of a male voice in the sanctity of her bedroom. The voice was telling her to wake up. She opened her eyes to find a man whom she knew before as "Rat" in her bedroom. The appellant was the man. He instructed her to get off the bed and held on to her hands. She started fighting him but he managed to overpower her. He pushed something down her throat and then inserted his penis in her vagina and proceeded to have sexual intercourse with her, against her will.

[2] On 28 April 2015, the appellant appeared in the Saint Catherine Circuit Court charged on an indictment containing two counts. The first count charged him with the

offence of rape and the second count, with grievous sexual assault. He indicated his intention to plead guilty and upon his arraignment on the same date, pleaded guilty to both counts on the indictment. On 6 May 2015, he was sentenced to 20 and 10 years imprisonment at hard labour on counts one and two, respectively. The sentences were ordered to run concurrently.

[3] The appellant applied for leave to appeal his sentence on a single ground, that is, that the sentence is manifestly excessive. He was granted leave by a single judge of this court to appeal the sentence in relation to the offence of rape. The single judge opined, among other things, that the sentence imposed for grievous sexual assault was not manifestly excessive but that the question as to whether the learned judge may have erred, in principle, in imposing the sentence of 20 years for the offence of rape was a live one for enquiry.

[4] Evidently influenced by the ruling of the single judge, the appellant, before this court, and through his counsel, Mr Wilson, sought and was granted leave to abandon the original ground of appeal and to argue one supplemental ground of appeal. The solitary ground of appeal reads:

> "1. The sentencing judge erred in law in sentencing the appellant to 20 years imprisonment for the offence of rape, which was harsh, unjust and manifestly excessive in the circumstances of the case."

[5] Mr Wilson has asked this court to set aside the sentence of 20 years and to impose a sentence of 15 years in substitution therefor. The core contention of counsel

on the appellant's behalf is that the learned judge employed "a flawed methodology of sentencing" that resulted in the appellant receiving an "excessive, unjust and harsh sentence".

[6] Mrs Fairclough-Hylton, counsel appearing on behalf of the Crown, at the invitation of the court, submitted that while the sentence imposed by the learned judge was within the limit the law allows, she would concede that the sentence could be seen as being manifestly excessive, having regard to the fact that the appellant, by pleading guilty, did not waste judicial time.

[7] Upon a perusal of the transcript of the proceedings, and having regard to the helpful submissions of counsel and the relevant law governing the process of sentencing, we agree with the views expressed by them and do find that the learned judge erred in principle when she imposed the sentence of 20 years imprisonment for the offence of rape. We conclude that there is merit in the ground of appeal that the sentence is manifestly excessive, having regard to the circumstances of the case and the principles of law governing the sentencing of an offender, particularly, following a plea of guilty. The interference of this court with the sentence of 20 years imposed by the learned judge for the offence of rape would therefore be justified. We have arrived at this conclusion for the reasons we will now outline.

The statutory framework

[8] The appellant was charged with the offence of rape, contrary to section 3(1) of the Sexual Offences Act ("the Act"). The penalty for the offence is prescribed by section 6(1) of the Act, which reads:

> "6. (1) A person who-
>
> (a) commits the offence of rape (whether against section 3 or 5) is liable on conviction in a circuit court to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years; or
>
> (b) ..."

[9] Section 6(2) then provides that, where a person has been sentenced pursuant to section 6(1)(a), the court should specify a period of not less than 10 years which that person should serve before becoming eligible for parole.

[10] The learned judge, in sentencing the appellant to 20 years, failed to comply with the provisions of section 6(2) to specify a period that the appellant should serve before becoming eligible for parole. In this regard, she would have erred, as matter of law.

[11] Similarly, it is apparent from the sentencing remarks of the learned judge, that she arrived at the sentence imposed, by selecting the maximum sentence of life imprisonment as the preferred sentencing option provided under section 6(1)(a). Having indicated that the appellant "should be given the ultimate sentence for life", she then arrived at the sentence of 20 years, after taking into account the fact that he had pleaded guilty.

[12] Although section 6(1)(a) prescribes life imprisonment as the maximum penalty, such sentence ought to be reserved for the most serious cases. The offence for which the appellant is charged could not properly be categorized as an aggravated form of rape, given the absence of the following features as enumerated by Mr Wilson:

(a) violence or threat of violence (beyond that which is inherent in the offence);

(b) the use of weapon to threaten, frighten, subdue or injure;

(c) abduction of the complainant from her home; and

(d) subjection of the complainant to humiliation or degradation beyond that which is inherent in the offence.

On no account could it be said then, that the circumstances of this case, and of the particular offender, merit the maximum penalty of life imprisonment.

[13] It is also observed that the learned judge, in concluding that a sentence of life imprisonment should have been imposed, had it not been for the guilty plea, seemingly, focused primarily on the previous convictions of the appellant. There is nothing to indicate that she paid any or sufficient regard to the circumstances of the commission of the particular offence for which he was being sentenced. The previous convictions of the appellant, albeit a relevant consideration in the determination of an appropriate

sentence, was not the overriding consideration or sole consideration in determining the type of sentence that should be imposed on him. She ought to have had regard to the nature and degree of seriousness of the offence to ensure that the sentence fits not only the offender but also the crime. Therefore, in invoking life imprisonment as the starting point in her determination of the sentence to be imposed, she would have erred in principle.

[14] The more appropriate option, given the circumstances of this case, would have been a fixed term of imprisonment rather than life imprisonment. In the end, however, the learned judge did impose a fixed term, albeit that she may have taken an approach that is not in keeping with the established legal principles.

[15] In arriving at that fixed term, the learned judge ought to have had regard to the established principles of sentencing and, particularly, those that treat with sentencing following a guilty plea. This court is mindful that the most comprehensive exposition on sentencing in recent times from this court in **Meisha Clement v R** [2016] JMCA Crim 26, would have been after the sentencing of the appellant. So, unfortunately, the learned judge was without the guidance afforded in that case as well as those set out in the Sentencing Guidelines for use by judges of the Supreme Court of Jamaica and the Parish Courts ("the Sentencing Guidelines"), which were officially released in December 2017.

[16] Although the learned judge did not have the benefit of the methodology set out in **Meisha Clement v R** and the Sentencing Guidelines, she was, however, not without

guidance, as this court has, over the years, laid down, in various cases, some fundamental principles of law and a basic methodology that should be used by judges to assist them in the sentencing process. In **Meisha Clement v R**, Morrison P, after a thorough examination of several relevant authorities from this court as well as from outside the jurisdiction, provided an amalgam of those principles that should be employed by judges in the sentencing process.

[17] Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:

a. identify the sentence range;

b. identify the appropriate starting point within the range;

c. consider any relevant aggravating factors;

d. consider any relevant mitigating features (including personal mitigation);

e. consider, where appropriate, any reduction for a guilty plea;

f. decide on the appropriate sentence (giving reasons); and

g. give credit for time spent in custody, awaiting trial for the offence (where applicable.

The sentence range

[18] The learned judge did not identify a sentence range, having formed the view that life imprisonment was warranted. Mr Wilson submitted that the sentence range has

been established by authorities from this court to be between 15 to 25 years. He pointed to the following cases as representing the sample of cases from which he has determined the range: **Linford McIntosh v R** [2015] JMCA Crim 26; **Jimmy Murray v R** [2015] JMCA Crim 19; **Stephen Collins v R** [2016] JMCA Crim 17; **Percival Campbell v R** [2013] JMCA Crim 48 and **Oneil Murray v R** [2014] JMCA Crim 25.

[19] We accept those submissions and therefore hold that the sentence range would be between 15 to 25 years.

The starting point

[20] Given that the learned judge had failed to identify a range within which the sentence should have fallen, it follows that she also failed to identify the starting point that she would have had utilized within that range. In this regard, she would have erred in principle.

[21] Under the statute, a sentence of 15 years is the minimum that may be imposed. The Sentencing Guidelines have approved this as the usual starting point. Of course, the starting point may be higher, depending on the nature and seriousness of the offence. In this case, given the absence of the features that could have aggravated the offence, as noted at paragraph [12] above, the statutory minimum of 15 years seems to be an apt starting point. The selection of the statutory minimum as the starting point takes into account the fact that the appellant was charged, convicted and sentenced for another offence committed within the course of the same transaction, which was sexual grievous assault. There is therefore no need to take into consideration, as an

aggravating factor in sentencing him for the offence of rape, any other act done that would be inherent in the offence of sexual grievous assault for which he has been separately punished. So, there was nothing done by him to the complainant in committing the offence of rape, which went over and beyond the commission of that offence or which was not inherent in its commission that would justify a higher starting point.

Aggravating factors

[22] The starting point, having been identified as 15 years, the next step in the analysis would be to identify the aggravating factors, which would lead to an upward adjustment in the starting point.

[23] It is accepted that previous convictions, especially relevant convictions, are to be viewed as aggravating factors. The antecedent report revealed that the applicant had six previous convictions recorded against him. Two of those convictions were for rape and one for attempted rape, which were offences committed by him while he resided in the United Kingdom (UK). He was sentenced in 2001 to consecutive terms of five years imprisonment for those offences.

[24] The learned judge, in sentencing the appellant, stated that she agreed with his counsel that he had served his time and paid his debt in relation to those offences committed in the UK and so, "time [would] not be added because of those previous convictions". That seems to suggest that the learned judge did not view the previous convictions as an aggravating factor. We note, however, that despite her declaration

that time would not be added because of those convictions, they, nevertheless, factored quite prominently in her consideration of the appropriate sentence. They led her to opine that he should have received the ultimate sentence but was only spared because of the guilty plea. This is how she put it (pages 37 – 38 of the transcript):

> "You know, what bothers me, Mr. Roulston, is that it didn't even skip a beat, so to speak, having been convicted out of the jurisdiction for two counts of rape and attempted rape, you had barely returned to the jurisdiction, barely returned to the jurisdiction, before you would have committed this offence. So that period that you had, you were given 15 years, taking into account the concurrent, and you would have served about 11 of it, you didn't learn anything. In just over ten years you did not learn anything.
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> So, when I consider whether you are someone who can be rehabilitate [sic], the evidence would suggest that you aren't, which means that you are a serious threat, and should be given the ultimate sentence of life imprisonment for an offence of this nature.
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> As your lawyer has said the redeeming feature that you have, you pleaded guilty and you didn't put the complainant through the indignity of having to repeat in front of a courtroom, probably not full of people but certainly of strangers, the things that was meted upon her and I take that into account in not giving you the ultimate sentence. Taking all of this into account, Mr. Roulston it is my view that a reasonable sentence for the offence of rape for which you pleaded guilty is 20 years imprisonment at hard labour."

[25] We are of the view that the learned judge would have been unduly generous to the appellant in ignoring the previous convictions. The previous convictions were in relation to relevant offences and therefore represent a crucial aggravating factor that ought properly to have been taken into account. The fact that the appellant was

sentenced to terms of imprisonment was a material one in considering his likelihood to re-offend and the threat he is likely to pose to society, particularly, to women. The antecedent report reveals that it was after his deportation to Jamaica in 2011, having been released from prison in the UK, that he struck again with his offending behavior in 2013. The learned judge cannot be faulted, therefore, in ultimately paying regard to the antecedents of the appellant in determining an appropriate punishment, although she had indicated that time would not have been added for those offences.

[26] Two other aggravating factors, which were not expressly identified by the learned judge, but which ought not to have been ignored, were the timing and location of the commission of the offence. The appellant invaded the privacy and sanctity of the complainant's home in the night while she slept. She was most vulnerable, having retired to bed, and would not have been alert to detect danger in her surroundings. She was in the privacy of her home, where she ought to have felt safe and secure. The invasion of her privacy and security, in the night, must be met with some measure of punishment, in and of itself. This would lead also to further upward movement of the starting point.

Mitigating factors

[27] Mr Wilson noted, as going to mitigation, the factors previously considered in determining the range and starting point. The absence of the features he has indicated have already been used to the credit of the appellant in the determination of the nature and seriousness of the offence in settling the starting point at the statutory minimum and so will not be treated as mitigating factors. To take the same factors into account

in mitigation of the sentence after the starting point has been selected would lead to double counting.

[28] That having been said, we could find no discernible mitigating factor to bring about a downward movement in the starting point, except for the plea of guilty, which demands separate consideration, as it falls to be taken into account after the provisional sentence has been determined, that is, the sentence that would have been imposed had there been a trial.

[29] In the circumstances, having taken into account the aggravating factors and the lack of any that would operate in mitigation of the sentence, we form the view that an appropriate sentence that could have been imposed on this offender, had he gone to trial, would have been close to the top of the range, somewhere in the region of 22 years.

Reduction for guilty plea

[30] It is established by law, that a guilty plea merits a specific consideration by the court as a mitigating factor and is, therefore, a legitimate consideration for discounting or reducing a sentence that would have otherwise been imposed after a trial. The learned judge had correctly taken account of the fact that the appellant had pleaded guilty and was mindful that he ought to have been credited for doing so. The only issue is that the degree of reduction, or the extent of the discount in the sentence as a result of the guilty plea, was not indicated and it is not evident from the sentencing remarks. What is clear from the learned judge's sentencing remarks is that the plea had caused

her to move from life imprisonment to a fixed term of 20 years as a reasonable sentence. That methodology, as indicated before, cannot be validated.

[31] The Criminal Justice (Administration) (Amendment) Act, 2015 has made provisions regarding the discounts that are allowable upon a plea of guilty. The discount ranges from a low of 15% to a high of 50%, depending on the time of the plea. The Act, however, does not apply to this case as the sentencing of the appellant predated the amendment of the Act, and so the discount that should have been allowed was governed by the common law.

[32] At common law, there was no fixed discount for a guilty plea and all would depend on the circumstances of the particular case. It was, therefore, a matter for the discretion of the sentencing judge: see **Meisha Clement v R** and **Joel Deer v R** [2014] JMCA Crim 11. It is acknowledged that at common law, anywhere between one-fifth and one-third of the sentence that would be imposed after trial was the acceptable discount.

[33] In this case, it would seem, from the record, that the appellant pleaded guilty at a relatively early stage in the proceedings in the circuit court. The prosecution was about to set a trial date when his counsel indicated that he wished to be pleaded. The record does not give much information about the circumstances prevailing at the time and the appellant had asked the court to forego a social enquiry report, which perhaps could have assisted us in identifying his motivation for offering the plea and his attitude towards the offence. Be that as it may, the authorities are clear (including the statute,

although it does not apply) that a plea offered at an early opportunity, which presented itself, merits a higher discount than one offered at a later stage of the proceedings: **Meisha Clement v R**, paragraph [38]. The court must, however, have regard to the strength of the case against the offender. In this case, the paucity of facts outlined by the prosecution does not allow for this court to assess the strength of the case against him and the availability or unavailability to him of a possible or viable defence.

[34] It seems, in keeping with the dictates of the relevant authorities, that in such circumstances, a discount of one-fourth would be reasonable. That would reduce the sentence to be imposed, following the plea of guilty, to, roughly, 17 years.

Credit for time spent in custody

[35] The record reveals that the appellant was in custody for roughly two years, prior to the date of sentencing. It is accepted that an accused person must be credited the time spent in custody immediately before sentencing. The learned judge failed to give effect to this principle and by so doing, fell in error. The appellant was entitled to a further reduction of roughly two years. In the circumstances, he would have been entitled, on a proper application of the law, to a term of about 15 years. In the light of this, the sentence of 20 years imprisonment that was imposed on him could properly be regarded as being manifestly excessive.

Conclusion

[36] The sentence of the court should, therefore, be 15 years. A period before the appellant may become eligible for parole should be stipulated in accordance with

section 6(2) of the Act. We believe that the appellant should serve no less than 13 years before becoming eligible for parole. We have taken into consideration that the appellant is now about 51 years old and so the time in custody should give him the opportunity for reasoned reflection in the light of his maturity. We hope that with time and maturity, he will be sufficiently rehabilitated and so no longer pose a threat to society.

Order

[37] This is the order of the court:

1. The appeal is allowed.

2. The sentence of 20 years imprisonment at hard labour, imposed on 6 May 2015 for the offence of rape on count one of the indictment, is set aside and the sentence of 15 years imprisonment at hard labour is imposed in its stead, with a stipulation that the appellant shall serve 13 years imprisonment before becoming eligible for parole.

3. The sentence of 10 years on count two for grievous sexual assault and all other aspects of the sentence of the learned judge are affirmed.

4. The sentences are to be reckoned as having commenced on 6 May 2015 and are to run concurrently.