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NOTICE TO PARTIES OF THE COURT'S MEMORANDUM OF REASONS FOR DECISION

SUPREME COURT CRIMINAL APPEAL NO 86/2018

DARREN HUDSON v R

TAKE NOTICE that this matter was heard by the Hon Mr Justice F Williams JA, the Hon Mrs Justice Dunbar Green JA and the Hon Mrs Justice G Fraser JA (Ag) on 13 and 15 December 2023, with Ms Zara Lewis for the applicant and Mrs Christine E Johnson Spence and Ms Ruth-Anne Robinson for the respondent.

TAKE FURTHER NOTICE that the court's memorandum of reasons, as delivered orally in open court by the Hon Mrs Justice Dunbar Green JA, is as follows:

[1] On 22 March 2017, the applicant, Darren Hudson, was found guilty of the offences of incest (count one) and grievous sexual assault (count two) by a jury in the Circuit Court for the parish of Saint James. On 6 April 2017, Harris J (as she then was) sentenced him to 20 years' imprisonment at hard labour on count one and 20 years' imprisonment at hard labour with a minimum pre-parole period of 15 years on count two. The sentences were ordered to run concurrently.

[2] The facts of the case can be briefly summarised as follows. At night time, on a date unknown, between 1 September 2012 and 31 December 2012, the complainant, who was nine or 10 years old at the time, fell asleep in her father's (the applicant's) bed, in the home at which she lived with her brother and the applicant. She was awakened by the applicant who was pulling down her "tights" (shorts). He told her to "lie back" after which he inserted his finger, then his penis, in her vagina. After the sexual intercourse,

the complainant went into the bathroom and vomited. The following day, the applicant warned her that she should tell no one about what had happened.

[3] A single judge of this court refused the applicant's application for permission to appeal. This is, therefore, a renewed application for permission to appeal his sentence.

[4] Counsel appearing for the applicant, Ms Lewis, argued as the sole ground of appeal, that the sentences are manifestly excessive, having regard to the following:

> "a. The learned trial judge in handing down her sentence erred by not inquiring and taking into account the Applicant's time spent in remand, if any; [and]
>
> b. Failure to identify the correct range and choose a starting point that was not the maximum prescribed by law."

[5] It is logical to begin with Ground 1(b).

Ground 1(b)

[6] During oral submissions, Ms Lewis conceded that the learned judge was substantially correct in how she treated with the offence of grievous sexual assault. Her conclusion was that, other than the issue of credit for any time spent in pre-sentence remand, there was no basis for arguing that the sentence was manifestly excessive. Counsel was of a different view in respect of the sentence for incest. She argued that the learned judge had failed to demonstrate how she arrived at the sentence, and it was manifestly excessive.

[7] In the written submissions, counsel pointed to the methodology outlined in part 6 of the Sentencing Guidelines for Use by Judges of the Supreme Court and the Parish Courts, December 2017 ('the sentencing guidelines'), as expanded, by this court, in **Daniel Roulston v R** [2018] JMCA Crim 20. She took the position that if those authorities had been followed, the applicant's sentence for the offence of Incest would have been lower. She proposed a sentence of 12 years' imprisonment, calculated as follows:

a. The usual starting point of seven years should be adopted. The starting point should then be increased by six years, on account of the aggravating factors, which include trauma to the complainant occasioned by the incident itself beyond that inherent in the offence (such as the complainant vomiting upon being sexually violated, and the psychological harm which continued beyond the sexual violation); breach of the complainant's trust; and the disparity in the ages of the applicant and the complainant. The result is 13 years.

b. The figure of 13 years should then be decreased by one year on account of the mitigating circumstances, including evidence that the applicant was hardworking and gainfully employed, and the sole caregiver and provider for the complainant.

[8] Mrs Johnson Spence, appearing for the Crown, conceded that the learned judge did not express the methodology that she used in arriving at the sentence for the offence of Incest. Therefore, this court should adopt the approach outlined in **Lincoln McKoy v R** [2019] JMCA Crim 35; but the sentence should not be disturbed as it was not manifestly excessive.

[9] The following calculation was proposed for our consideration:

a. A starting point of 10 years, for the sole reason that there was a trial.

b. 12 years to be added because of the aggravating features: (i) the complainant was a vulnerable victim by virtue of her age (nine or 10 years old) at the time; disparity in the ages (the applicant was 31 years old at the time of the incident); the effect of the incident on the complainant (vomiting after the

sexual encounter); continued psychological harm suffered by the complainant; breach of trust by the complainant's sole guardian; negative comments by the community to include the applicant being known to have had relationships with underage girls (including the complainant's mother).

c. The resulting 22 years to be decreased by two years, on account of the character evidence that the applicant was employed and had been reliable when it came to his work.

d. The provisional sentence would be 20 years' imprisonment.

[10] We agree, regarding the offence of grievous sexual assault, that the learned judge had correctly applied the sentencing methodology which was available to her in April 2017. See **Meisha Clement v R** [2016] JMCA Crim 26, which was decided prior, and **Daniel Roulton v R**, which was decided in 2018, applying the sentencing guidelines which were promulgated in December 2017. Accordingly, there is no reason to disturb that sentence.

[11] We also agree that the learned judge erred in failing to demonstrate how she had arrived at the sentence of 20 years' imprisonment for the offence of incest. In the circumstances, it befell us to consider the applicant's sentence afresh. Section 14(3) of the Judicature (Appellate Jurisdiction) Act gives this court the power to quash a sentence and pass such other sentence as warranted in law by the verdict. See also **Meisha Clement v R**, in which this court reaffirmed the principle enunciated in **R v Ball** (1952) 35 Cr App Rep 164 as to the circumstances in which the appellate court will intervene in sentencing.

[12] Following the sentencing guidelines and the approach outlined in **Daniel Roulston v R,** the sentence for the offence of Incest is calculated as follows:

1. The range of sentences for this offence is five-25 years, the usual starting point being seven years. However, this was not the only serious offence committed by the applicant at the time. The fact of the multiple offences would have made the circumstances much more severe. We, therefore, believe that a starting point of 15 years is appropriate. It also reflects the breach of trust, by the applicant, as a person in authority, and as the sole guardian of the complainant.

2. The following aggravating factors will result in an upward adjustment to the starting point, resulting in a sentence close to the upper limit of the sentencing range of 25 years:

    i. the complainant was a child of tender years and, therefore, a vulnerable victim;

    ii. the psychological impact of the offence on the victim (the evidence was that up to the date of sentencing she had to be counselled);

    iii. the prevalence of sexual offences in the society; and

    iv. the community report detailing the applicant's history of preying on underage girls (including the complainant's mother).

3. The character evidence that the applicant was hardworking, gainfully employed, and had no previous conviction, will result in a downward adjustment to the starting point.

4. However, the mitigating factors are far outweighed by the aggravating factors, resulting in a provisional sentence of 20 years' imprisonment. This sentence is commensurate with the nature of the offence and, therefore, proportionate.

Ground 1(a)

[13] Ms Lewis indicated to the court that the applicant had spent two to three weeks on remand prior to the trial, and another month for the period during trial and before sentencing. This should have been applied as credit to his sentence, she submitted.

[14] Counsel for the Crown indicated that, from their records, the applicant was in pre-trial and pre-sentence custody for the periods: (i) 7 April to 21 April 2016 (14 days); and (ii) 22 March to 6 April 2017 (15 days).

[15] Several authorities from the Privy Council and this court, including **Callachand & Anor v The State** [2008] UKPC 49, **Meisha Clement v R** and **Daniel Roulston v R**, make it plain that the sentencing judge must give full credit for time spent on remand, and this must be clearly shown as an arithmetical deduction. This was not done by the learned judge.

[16] Taking into account the information supplied by counsel, the applicant would have spent 29 days on remand. When full credit for time spent on remand is applied to each of the sentences of 20 years' imprisonment, the result is 19 years, 11 months and one day imprisonment at hard labour.

[17] Accordingly, the orders of the court are as follows:

1. The application for permission to appeal is granted.
2. The appeal against sentence is allowed.
3. The sentence of 20 years' imprisonment with the stipulation that the applicant serves 15 years before becoming eligible for parole, for the

offence of grievous sexual assault, is set aside. Substituted therefor is a sentence of 19 years, 11 months, and one day imprisonment with the stipulation that the applicant serves 15 years before becoming eligible for parole (after a credit of 29 days for time spent on pre-trial and pre-sentence remand).

4. The sentence of 20 years' imprisonment at hard labour, for the offence of Incest, is set aside. Substituted therefor is a sentence of 19 years, 11 months and one day imprisonment at hard labour (after a credit of 29 days for time spent on pre-trial and pre-sentence remand).

5. The sentences are reckoned as having commenced on the date on which they were imposed, that is 6 April 2017.

6. The sentences are to run concurrently.