[2020] JMCA Crim 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 16/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

DOSANE JACKSON v R

No appearance for the appellant

Mrs Lenster Lewis-Meade and Ms Shauna Kaye James for the Crown

22 and 24 January 2020

F WILLIAMS JA

Introduction

[1] By this appeal, the appellant seeks to challenge the sentence of five years' imprisonment that was imposed on him on 23 February 2018, in the Circuit Court for the parish of Saint Ann. The appellant was granted leave to appeal against sentence on 22 March 2019, by a single judge of this court. That sentence followed his plea of guilty to one count of possession of identity information, contrary to section 10(1) of the Law Reform (Fraudulent Transactions)(Special Provisions) Act. The sentence of five years was also ordered to run consecutively to a sentence of 15 years' imprisonment for the offence of manslaughter that had been imposed on him on 18 February 2016.

Background

[2] The brief background facts to the appellant's being charged are that on 14 January 2015, the police conducted a raid at the appellant's residence, where a password-protected mobile telephone was seized. The appellant gave the police access to the phone by supplying the password. When examined, the telephone was found to contain identity information of persons living abroad. The appellant pleaded guilty to the charge on 21 February 2018.

[3] By way of Criminal Form B1 – Notice of Appeal or Application for Permission to Appeal against Conviction or Sentence - the appellant has sought to challenge his sentence on two grounds: namely :

> "**Unfair Trial**: That based on the facts as presented the sentence is harsh and excessive and cannot be justified when taken into consideration.
>
> **Unfair Trial**: That the learned trial judge did not temper justice with mercy as my guilty plead [sic] was not taken into consideration."

The sentencing process

[4] In her sentencing remarks, the learned judge referred to the social enquiry report and noted that the offence was committed whilst the appellant was on bail for another offence – that of manslaughter. Among the other matters commented on by the learned judge, the following comments are worthy of being highlighted as being the nub of what she considered:

> "You are a young man 27 years old which shows remorse by entering this plea. The law says if you do

> so you are entitled to certain discount, but those are with the discretion of the Court. It says up to 50%, but the Court's hands are not bound or tied by any law and so there is a discretion in applying no discount at all, or up to 50%." (Page 10, lines 3-10)

> "The propensity has been, and experience has shown that the victims are elderly persons. There is also a high prevalence of this in society. It is not getting any better despite the best efforts of the police." (Page 13, lines 7-12)

> "So the court will start at 3 years, range between 1 to 5. Aggravating factor outweighs the mitigating factor. So the sentence of the Court is 5 years imprisonment at hard labour…I had omitted to say and I wish to indicate what has been written of the indictment, but not indicated to you, this offence was committed while you were on bail, meaning that it is going to run consecutively with the sentence that you are now serving.
>
> MR D JACKSON: What do you mean?
>
> HER LADYSHIP: The 15 years, meaning that you will serve that, and then this sentence will start." (Page 14, lines 5-20)

[5] Although at the hearing of this appeal the appellant was not represented by counsel, the court itself perused the transcript and was also greatly assisted by counsel for the Crown. In essence, the Crown agreed with the appellant's contention that the sentence is manifestly excessive. This was put forward on three bases: (i) that there was no application of the provisions of the Criminal Justice (Administration) (Amendment) Act 2015 ("the Act"), specifically, section 42D, which entitles him to a discount of a particular percentage on account of his guilty plea; (ii) on account of the imposition of the sentence consecutively to that which the appellant was already serving for a different type of

offence; and (iii) the fact that no account seems to have been taken of the time that the appellant had spent in custody before entering his guilty plea.

The Criminal Justice (Administration) (Amendment) Act 2015

[6] The Act came into effect on 30 November 2015. It is intituled:

> "An Act to amend the Criminal Justice(Administration) Act to make provision for sentence reduction on guilty pleas…and to provide for other related matters."

[7] Its purpose is similarly described in the memorandum of objects and reasons of the bill from which it was enacted, which, so far as relevant, reads as follows:

> "MEMORANDUM OF OBJECTS AND REASONS
>
> This Bill seeks to amend the Criminal Justice (Administration) Act by making provisions for sentence reduction on guilty pleas. The Bill also seeks to provide for the review by the Court of Appeal, in limited circumstances of a prescribed minimum penalty imposed by the Court, on conviction of a defendant for an offence…"

[8] For the purposes of this judgment, the most important sections are sections 42D and 42H. The relevant provisions of section 42D read as follows:

> "42D (1) Subject to the provisions of this Part, where a defendant pleads guilty to an offence with which he has been charged, the Court may, in accordance with subsection (2), reduce the sentence that it would otherwise have imposed on the defendant, had the defendant been tried and convicted of the offence.
>
> (2) Pursuant to subsection (1), the Court may reduce the sentence that it would otherwise have imposed on the defendant in the following manner –
>
> > (a) where the defendant indicates to the Court, on the first relevant date, that he wishes to plead guilty to the

offence, the sentence may be reduced by up to fifty percent;

(b) where the defendant indicates to the Court, after the first relevant date but before the trial commences, that he wishes to plead guilty to the offence, the sentence may be reduced by up to thirty-five percent;

(c) where the defendant pleads guilty to the offence after the trial has commenced, but before the verdict is given, the sentence may be reduced by up to fifteen percent;

(3) 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-

(a) reduce the sentence pursuant to the provisions of this section without regard to the prescribed minimum penalty; and

(b) specify the period, not being less than two-thirds of the sentence being imposed, which the defendant shall serve before becoming eligible for parole.

(4) In determining the percentage by which the sentence for an offence is to be reduced pursuant to subsection (2), the Court shall have regard to the factors outlined under section 42H, as may be relevant."

[9] Section 42H provides as follows:

"42H Pursuant to the provisions of this Part, in determining the percentage by which a sentence for an offence is to be reduced, in respect of a guilty plea made by a defendant within a particular period referred to in 42D(2) and 42E(2), the Court shall have regard to the following factors namely-

(a) whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;

(b) the circumstances of the offence, including its impact on the victims;

(c) any factors that are relevant to the defendant;

(d) the circumstances surrounding the plea;

(e) where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;

(f) whether the defendant has any previous convictions;

(g) any other factors or principles the Court considers relevant."

Discussion

[10] The learned judge apparently was of the view that (perhaps because of the use of the word "may" in section 42D) she had a discretion whether or not to give a discount on the appellant's guilty plea. True it is that the word "may" is often regarded as permissive (as opposed to mandatory) in many instances; and, to that extent, it might be discerned what approach the learned judge was taking. However, it seems to us that, where Parliament has enacted legislation which, in this case, is designed to encourage guilty pleas by the provision of the inducement of a discounted sentence, then the natural expectation should be for such legislation to be utilized by judges as a matter of standard procedure. Of course, the use of the word "may" in the relevant section does give the judge a discretion; but we would expect any departure from its application to be justified or explained in the sentencing remarks of the particular judge. It seems to us that the concepts of fairness and transparency require no less. In this case, from all indications, no discount of any percentage was applied; and no reason was given for its non-

application. We find, in this regard, that the learned judge fell into error, thus entitling this court to intervene and review the exercise of her sentencing discretion.

[11] That we are entitled to do so might be seen in the case of **R v Ball** (1951) 35 Cr App Rep 164 at page 165, where it was observed by Hilbery J as follows:

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to the character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then the Court will intervene." (Emphasis added)

[12] The learned judge used a starting point of three years, considered that the aggravating factors were more than the mitigating factors, and so increased the sentence to five years' imprisonment. We have reviewed the considerations for determining the amount of the discount that should be applied in a particular case that are set out in section 42H of the Act. First, we do not believe that (as set out in section 42H(a), it could fairly be said of this case that:

> "(a) …the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;"

We therefore see no reason why a discount (and a significant discount) should not be applied.

[13] We note that the learned judge might be regarded as having given consideration to "the circumstances of the offence, including its impact on the victims"; and to "factors that are relevant to the defendant" (as required by 42H(b) and (c), even though she did not do so as part of a process of deciding on a percentage reduction, but just as part of the general sentencing process.

[14] In relation to the requirement of section 42H(d) to consider "the circumstances surrounding the plea"; although some consideration was given to this, again that was not done with a view to determining the percentage discount. The learned judge accepted that there "would not have been any premeditation on [the appellant's] part…" (page 11, lines 11-12 of the transcript). The explanation that was put forward by his counsel in his mitigation plea was that the incriminating documents were sent to him by someone in his WhatsApp group. In keeping with the case of **R v Baltimore Walker** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 95/1987, judgment delivered 22 September 1987, a sentencing judge is required to sentence a defendant on that defendant's version of the events concerning the crime as far as possible, when passing sentence. There was no challenge from the Crown to the appellant's contention as to the circumstances of his possession of the material. Additionally, we note the co-operation of the appellant with the police, as the appellant, on the Crown's case, provided the police with the password to the telephone in question, thus giving the police access to the information therein, which, as it turned out, contained incriminating material.

[15] We have considered these and the other matters mentioned in section 42H. The appellant would be entitled to a discount of "up to 50%" because, as we were informed

by Mrs Lewis-Meade, from all indications he pleaded guilty on "the first relevant date" (defined in section 42A as "…the first date on which a defendant who is represented by an attorney-at-law…is brought before the Court…". We are of the view that a discount of 40% would be reasonable in all the circumstances. That results in a sentence of three years' imprisonment.

[16] The question that remains is whether the sentence of three years should be imposed concurrently with or consecutively to the sentence for manslaughter that the appellant had already begun to serve at the time of his sentencing for this offence.

[17] In continuing her assistance to us, Mrs Lewis-Meade referred us to the case of **Kirk Mitchell v R** [2011] JMCA Crim 1; and, of particular relevance to this discussion, to paragraph [57](e), which reads as follows:

> "e. In all cases, but especially if consecutive sentences are to be applied, the 'totality principle' must be considered, in application of which, the aggregate of the sentences should not substantially exceed the normal level of sentences for the most serious of the offences involved - (**Delroy Scott, DPP v Stewart**, D.A. Thomas – **Principles of Sentencing** – cited above)."

[18] Careful consideration must, we accept, be given to the totality principle; and whether the aggregate of sentences in this case substantially exceeds the normal level of sentences for the most serious of the offences involved.

[19] We have for guidance in relation to the range of sentences for manslaughter, the case of **Bertell Myers v R** [2013] JMCA Crim 58, in which Morrison JA (as he then was), on behalf of the court, reviewed a number of sentences for manslaughter in different

circumstances. In one of them – the case of **Daniel Robinson v R** [2010] JMCA Crim 75 - this court imposed a sentence of 15 years' imprisonment (in substitution for one of 20 years), on the appellant, in circumstances in which the appellant had pleaded guilty to manslaughter on an indictment which charged him with murder. In imposing the sentence of 15 years, this court considered that "the evidence revealed a significant element of premeditation in the applicant's early morning attack on the deceased" (paragraph [19]) in which the appellant, in that case, had broken into a home, taken the deceased therefrom and strangled her.

[20] Reviewing the case of **Bertell Myers v R**, it seems to us that 15 years' imprisonment would be nearer to the top of the range for a manslaughter sentence. Adding the sentence imposed on the appellant in this case of 15 years to the sentence of five years that was imposed by the learned judge, would make an aggregate sentence of 20 years, one that "substantially exceed[s] the normal level of sentence for the [more] serious of the offences involved" (paragraph [57](e) of **Kirk Mitchell v R**). In the circumstances, we must, therefore, agree with the Crown's position that the learned judge erred in principle in having no regard to the totality principle, resulting in her ordering the sentence of five years' imprisonment to run consecutively to that of 15 years for manslaughter. While we recognize that there is some authority for the learned judge's decision to make the sentences run consecutively on the basis that the latter had been committed whilst the appellant was on bail for the former, we think that consideration of the totality principle might have produced a different outcome as indicated in the case of **R v Gerald Hugh Millen** (1980) 2 Cr App Rep (S) 357, at page 360:

> "Those who commit offences while they are on bail must expect to have their sentences on the second occasion made consecutive to the previous sentences. But, having said all that, and looking at the question of the totality, we think that the learned judge should have reduced the sentence from three years to 12 months consecutive….The total sentence will therefore be reduced from 10 to seven years."

[21] Even though a consecutive sentence was imposed in that case, it is our view that, applying the general principle from that case to the circumstances of this case permits the imposition of a concurrent sentence. It seems to us that, adding three years to the 15 years previously imposed (thus making an aggregate of 18 years), in relation to the particular facts of this case and the particular brief facts outlined in respect of the manslaughter (suggesting the use of excessive force against a friend in a defence of self-defence), might still possibly be regarded as one that "substantially exceed[s] the normal level of sentence for the [more] serious of the offences involved" (paragraph [57](e)). Our discussion revolves around the particular and peculiar circumstances of this case; and so we are not saying that a sentence of 18 year's imprisonment for manslaughter would be excessive in every case. In any event, however, even if we are wrong in that assessment, the learned judge's error in principle entitles us to address the sentencing of the appellant afresh.

[22] We have no information on the period of time that the appellant spent in custody in relation to this matter. We are therefore, regrettably, unable to accord him credit for any time spent in custody before his plea of guilty.

[23] Before parting with the matter, it bears repeating to say that the Act was passed into law by the legislature for use in our courts. It is to be utilized as a matter of course.

Where there are reasons for a judge not to use it, those reasons should be stated and the position that has been adopted, explained in order to avoid unintentionally conveying any impression of arbitrariness.

[24] We also wish to record our gratitude to the Crown for the entirely proper stance that it took in this matter and for the assistance that it provided to the court in resolving the issues.

[25] In the result, the following orders are made:

i. The appeal is allowed.

ii. The sentence is set aside.

iii. Substituted therefor is a sentence of three years' imprisonment at hard labour.

iv. (By a majority – Edwards JA dissenting), the sentence is to run concurrently with that for manslaughter imposed on 18 February 2016.