[2020] JMCA Crim 43

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 1/2017

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE FRASER JA
THE HON MISS JUSTICE SIMMONS JA

CANIERE LAPLANTE v R

Ms Melrose Reid for the applicant

Ms Kathy-Ann Pyke and Okeeto DaSilva for the Crown

3, 6 and 13 November, 2020

FRASER JA

Background

[1] On 14 October 2016, the applicant, Caniere LaPlante, was convicted in the Saint James Circuit Court, for the rape of the complainant, CL, on 26 March 2016. He was sentenced on 18 November 2016 to serve 15 years' imprisonment. His application for leave to appeal his conviction and sentence was refused by a single judge of appeal on 24 December 2018. He renewed his application before the court.

The renewed application and grounds of appeal

[2] At the hearing of the renewed application, counsel for the applicant was granted leave to abandon three of the original six grounds of appeal filed and to add two supplemental grounds to the remaining three. Counsel was then granted permission to argue those five grounds of appeal namely:

> "i) The learned trial judge erred in not requesting an amendment to the indictment of Rape to that of Incest.
>
> ii) The learned trial judge failed to adequately sum up the case in such a manner to show the jury the full picture of the Defendant's case, so that the jury could analyse the case and see that the Complainant used personal vendetta/revenge to remove the Applicant out of her life, resulting in his conviction.
>
> iii) Personal vendetta
>
> iv) Miscarriage of justice
>
> v) The sentence was manifestly excessive."

The disposition of the application

[3] On 6 November 2020 we made the following orders:

> "i) The application for leave to appeal conviction is refused.
>
> ii) The application for leave to appeal against sentence is granted.
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> iii) The hearing of the application is treated as the hearing of the appeal.
>
> iv) The sentence of 15 years' imprisonment is set aside. Substituted therefor is a sentence of 15 years' imprisonment, with a specification that the appellant should serve a period of 10 years before becoming eligible to be considered for parole.
>
> v) The sentence shall be reckoned to run from 18 November 2016."

[4] We promised then to put our reasons in writing. We now do so.

The trial

The prosecution's case

[5] The prosecution's case was that the complainant had been living in Jamaica with the applicant, who was accepted to be her father, since sometime in 2015. On 26 March 2016, at about 5:00 pm, she was at their home when he arrived there. At his request, she let him in through the back door. He said he came to kill her. She asked if she did something wrong. He said he did not want to talk to her. He showed her a plastic bag and said it contained a gun. He then asked her for sex and began trying to take off her clothes and fight her. She resisted him and he left and called three men to come help him. Three men, none of whom she had ever seen before, came and held her down on a bed in the front room. The applicant then inserted his penis into her vagina without her consent. He ejaculated on her leg. He told the men, "thank you very much, next time". The men left. The next morning the applicant asked his daughter for sex again. She refused. She said she was going to church. He asked her to buy condoms.

[6] She took a taxi to the home of a male friend of the applicant in Montego Bay. He was not there, but his girlfriend Ava Kelly was. She told Ms Kelly that she had been raped. Ms Kelly took her to the Anchovy Police Station and eventually to the Mount Salem Police Station, where she made a report to the Centre for the Investigation of Sexual Offences and Child Abuse (CISOCA) office there. Following this report, investigations commenced into a case of incest and illegal possession of firearm against the applicant.

[7] On 3 April 2016, a CISOCA officer went to the Montego Bay Police Station Lock Up and charged the applicant, who was in custody there, with the offences of incest and illegal possession of firearm. However, the applicant was subsequently arraigned for the sole offence of rape.

The defence case

[8] Mr LaPlante gave sworn evidence that he was Haitian, but had lived in Jamaica for years. He said the complainant, who is his daughter, was born in Jamaica in 1999 to a Haitian mother. The complainant left Jamaica when she was one year old to live in Haiti with her mother. She returned to Jamaica in 2015. He had taken her from Haiti to break up a relationship she had with a married man, of which he disapproved. He had told her to stop talking to the man and encouraged her to fast for 21 days to break up the relationship, but it continued.

[9] He got married in Jamaica on 13 March 2016 and his wife returned to the United States on 24 March 2016. He said that, on 26 March 2016, when he realised the complainant was still communicating with the married man, he told her he was going to send her back to Haiti. He asked her to pack her clothes and on the same day she left with her clothes and did not return. He denied having sexual intercourse with the complainant and maintained that the reason for her report was that he had said he intended to send her back to Haiti. He indicated he went to report her absence to the police on 7 April 2016, but was arrested, based on the report she had made.

Ground (i) –The learned trial Judge erred in not requesting an amendment to the indictment of rape to that of incest

[10] In written submissions, counsel for the applicant advanced that the learned trial judge (LTJ), having heard the evidence that the complainant is the daughter of the applicant, should have had the indictment amended to the offence of incest instead of rape. She having failed so to do, the submission contended that this court should so amend it. Counsel cited section 6(1) of the Indictments Act; sections 20 and 21 of the Criminal Justice Administration Act; section 24 (1) and (2) of the Judicature (Appellate Jurisdiction) Act; sections 3(1), 3(2), 6(1), 7(1) and 7(4) of the Sexual Offences Act (SOA); The Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017; and the case of **Leonard Warren v R** [2015] JMCA Crim 10. The main reason for this submission was that, unlike rape, incest does not carry a mandatory minimum sentence. Therefore, counsel was of the view that the defendant could benefit from a reduction in sentence, in the event the charge was amended and the conviction was sustained.

[11] After contemplating certain queries raised by the court at the start of her oral submissions, counsel quite rightly did not pursue this ground and counsel for the Crown was not called upon to respond to it. As a result, this court will briefly outline the bases on which the court agrees that there is no merit in this ground.

Analysis

[12] As outlined in the written submissions of the Crown, section 94 of the Constitution of Jamaica (the Constitution) vests power in the Director of Public Prosecutions to institute

charges and protects the office holder from control by any authority in the exercise of that power (see **Desmond Grant and Others v Director of Public Prosecutions and Another** [1981] 3 WLR 352 cited by the Crown in written submissions).

[13] Pursuant to section 6(1) of the Indictments Act and section 20 of the Criminal Justice Administration Act the court has power to amend a defective indictment (see **Melanie Tapper and Winston McKenzie**, (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 28/2007, judgment delivered 27 February 2009, and **R v Hugh O'Connor** (1978) 16 JLR 269 cited by the Crown in its written submissions). There is, however, no basis to amend an indictment which is not defective. Even if the indictment in this case was defective, which it was not, the course proposed by counsel for the applicant should not be countenanced. While in an appropriate case a court may inquire whether an amendment to an indictment should be contemplated, and if necessary invite submissions on the point, it is not for the court as impartial arbiter to "request an amendment".

[14] Of vital importance is the fact that, except in rare cases of private prosecutions, under the Constitution and at common law, it is the Crown which has the responsibility to indict for offences made out on the facts as alleged. Under section 2(2) of the Incest (Punishment) Act, now repealed by the SOA, it was immaterial if the carnal knowledge was had with the consent of the female person. However, pursuant to section 7(1) of the SOA, the willingness of the parties to the act of sexual intercourse, is now an ingredient of the offence. The allegation that significant force was used in the commission of the

offence without the consent of the complainant, would have clearly taken this offence outside the contemplation of section 7(1) of the SOA. The allegation was manifestly one of forcible rape.

[15] Finally, the relationship between the complainant and the applicant could not have been proven through the evidence of either party, as that would have offended the rule against hearsay. There is no indication that the Crown was in a position to proffer, at the trial, admissible evidence of the paternity of the applicant in relation to the complainant. Considering all of these factors, it is manifest that the appropriate charge was laid against the applicant, which was proven to the satisfaction of the jury. It was for these reasons that this court was satisfied that there was no merit to this ground of appeal.

Grounds (ii), (iii) and (iv) - The learned trial judge failed to adequately sum up the case in such a manner to show the jury the full picture of the Defendant's case, so that the jury could analyse the case and see that the Complainant used personal vendetta/revenge to remove the Applicant out of her life, resulting in his conviction; The Personal Vendetta; Miscarriage of Justice

[16] After the concession of counsel for the applicant on ground (i), given the nature of the remaining complaints that run through grounds (ii) - (iv), it is convenient to consider them together.

[17] In relation to these grounds, Ms Reid submitted that the LTJ had not sufficiently dealt with the personal vendetta alleged by the defendant, nor adequately stated the defence case, to show the jury that the complainant could have made a false allegation against the defendant actuated by revenge. Counsel outlined a combination of 16 facts and comments that she maintained the LTJ should have included in her summation, to

better assist the jury to have a more open, rational and balanced view. She contended that the LTJ's attempt to assist the jury was inadequate. Some examples of the directions that counsel submitted the LTJ should have given to the jury include telling the jury to ask themselves questions such as:

> "a) Could it be that it is because she continued to call the married man (Mr. Joseph), why she and her father had disagreements?
>
> b) Could it be because she was persistent in communicating with the married man in Haiti, and in spite of her father's persistent warning to break up with the married man, to the point of going on 21 days of fasting, to [him] threatening to send her back to Haiti, why she said he had sexually abused her?
>
> c) Is it that she is so strong that her father could not manage her and so called three men to assist him?
>
> d) Does it sound rational and reasonable and believable, that a father could call three men to 'hold down' his daughter, and in their presence, have sexual intercourse with her?
>
> e) Was it pre-arranged that the father had arranged with three men to come at his house, at a specific time so that they could help him hold his daughter, so he could, in their presence have sexual intercourse with her, as the Complainant said she did not know the men?"

[18] She argued that, had the LTJ adequately shown the jury that the complainant's evidence could be based on revenge or personal vendetta, there is a strong possibility that the jury would not have convicted the applicant. Counsel therefore maintained that the failure of the LTJ resulted in a miscarriage of justice. In support of her submissions, she cited the case of **Mears v Regina** (1993) 42 WIR 284, article 3.9-Judge's Summing Up on Issues and Evidence from a Mauritius Practice Direction, the case of **R v Yousefi** [2020] EWCA Crim 791 and an article "#Men Too: Law used for vendetta in many break-

ups, say HCs - TNN /Update 09 May 2019, 0120 PM IST", in The Economic Times Politics in India.

[19] In his response, Mr DaSilva for the Crown submitted that the LTJ, in her summation, fully placed before the jury the defence's contention that the complainant made a report against the defendant out of malice, because she was being sent back to Haiti. He cited the cases of **R v Lawrence (Stephen)** [1982] AC 510, **Adrian Forrester v R** [2020] JMCA Crim 39 and **McGreevy v DPP** [1973] 1 All ER 503, in support of his submissions. He maintained that the LTJ gave adequate directions both in terms of the specific aspects of the defence as well as in respect of general directions to the jury on how to treat discrepancies, the burden and standard of proof, and how to assess the evidence, having regard to the ingredients of the offence charged. He also took the court through aspects of the summation seeking to demonstrate the adequacy of the LTJ's directions. He argued that the summation was balanced and fair and that the applicant's complaints were unsubstantiated.

Analysis

[20] In **McGreevy v DPP**, Lord Morris of Borth-Y-Gest, who gave the leading judgment in the House of Lords, at page 507 cited with approval Lowry LCJ's statement, when the case was considered by the Court of Appeal, that:

> "It is not essential for the Judge to make every point that can be made for the defence. If he were to do so and were to follow each such point with the Crown's rebutting argument, he would run the risk of breaking up the defence case in such a way as to destroy its effect. There is no set formula for doing justice to the defence in the course of the charge: the fundamental

> requirements are correct directions in point of law, an accurate review of the main facts and alleged facts, and a general impression of fairness."

[21] Later, in **R v Lawrence (Stephen)**, Lord Hailsham at page 519 stated that, "A direction to a jury should be custom built to make the jury understand their task in relation to a particular case".

[22] In a similar but more expansive vein, Edwards JA recently stated in **Adrian Forrester v R**, at paragraph **[**23], that:

> "The ultimate aim of the trial judge must be to give directions that will assist and guide the jury based on the issues in the case. The judge's approach should ensure that the appellant gets a fair trial, inclusive of a balanced and fair summation. Whereas there is no obligation to rehearse all the evidence in a case, where a trial judge decides to recount the evidence, he should remind the jury of the evidence for the defence. The defence must be adequately put to the jury, including evidence relied on to support it. The failure to refer to a piece of evidence, however, is not generally fatal as there is no obligation to rehash all of the evidence. In summing up a case, a fair balance should be struck between the prosecution's case and the defendant's case by the trial judge."

[23] These authorities emphasise that no particular form of words is required in a summation and that neither is the judge required to rehearse all the evidence, allegations and arguments put forward in the case. There is a duty to adequately put the defence and any evidence that supports it to the jury for their contemplation. There is, however, no duty to make extensive comments or to pose numerous questions containing the defence theory of the case, for the jury to consider. The judge's responsibility is to craft a "custom built" summation for the particular case: that is, one that provides correct directions in law and places the competing prosecution and defence cases before the jury in a balanced fashion, for their determination of what they accept and what they reject.

[24] It should also be noted at this point that, in the case of **Mears v Regina** relied on by counsel for the applicant, the reason why the conviction was overturned was not that the trial judge gave the jury inadequate assistance, but that he "went beyond the proper bounds of judicial comment", and neutralised "perhaps the most important point in the defence case" (see pages 288-289). The summation was, therefore, unfairly weighted against the appellant and unbalanced in that case.

[25] The question for this court is, therefore, did the LTJ in her summation adequately leave the applicant's defence for the consideration of the jury in a balanced and fair manner? To answer that question, it is necessary to look to the transcript. At page 21, lines 6 to 13 of the transcript the LTJ directed the jury that:

> "Now you should consider whether a witness has any reason or motive for lying. In this case counsel for the defence, Mr. Morgan, is claiming that the complainant is in fact lying about the rape because her father had said to her that she is to return to Haiti. You are to consider any explanation [sic] that are given by the witnesses to any variations of the accounts"

[26] The LTJ also conducted a full and extensive review of the sworn evidence of the defendant, from page 42 to page 51 of the transcript. In that review, all the contentions of the defendant that the complainant was lying and her motive for lying, were squarely placed before the jury. Additionally, the LTJ was fair and balanced throughout in treating with comments made by counsel. Two examples will suffice to demonstrate this. In relation to comments made by counsel for the Crown and the defence concerning the defendant's evidence that he had left the house and stayed away for a week, after finding

out that the complainant had lied to him that she had stopped calling the married man, the LTJ had this to say at page 44 lines 12 -21 of the transcript:

> "…Crown Counsel's address indicates that this is not typical behaviour of a father, it is actually an indication of a person who was jealous, almost he's behaving like a boyfriend, not a father. Mr. Morgan's address is indicating it is actually the typical behaviour of a father, he was just being very caring and concerned about his daughter, these are matter [sic] you can take into consideration."

[27] On the question of the length of time it took the defendant to report his daughter missing, at page 48 lines 5 -15 of the transcript, the LTJ directed the jury as follows:

> "Now, you recall, Mr. Foreman and members of the jury, the Crown had submitted to you on this, as to why did it take twelve days for Mr. LaPlante to make a report that his daughter was missing. Mr. Morgan also submitted in relation to this, indicating that this, in fact, was the behaviour of a father in relation to reacting to what his daughter had done. He indicated that he did not have anything in the plastic bag, did not have a gun, did not hold it at her ear, did not call anyone over. He did not have any sex with her."

[28] Then, this is how, at page 53 line 4 to page 54 line 11 of the transcript, the LTJ, admirably, finally left the matter to the jury for their consideration:

> "Now Mr. Foreman and your members of the Jury **if you believe the accused man, then you must acquit.** Your belief of the accused is not the result of him satisfying any legal duty to prove his innocence. It is simply the result of having heard him you believe him. If his account puts you in doubt about the Prosecution's case, that is, you do not believe him completely, that is you are sure [sic] he raped [the complainant], then you must acquit. If his evidence produces this state of mind to you then clearly you are not sure of the accused man's guilt. In order to convict you must do two things, reject the defence and believe the Prosecution, if you take the approach of simply saying the defence is lying, does as a matter of logic does [sic] mean the Prosecution's case is the truth. If you listen to two persons, not believing one, does not mean you must believe the other. It may mean you don't believe either of them. Not believing the accused does not

> mean you believe the complainant. If you do not believe the accused, then it is open to you to reject his evidence, but you must then go on to do a thorough examination of the Prosecution's case and say whether they have proven the guilt of the accused. You ask yourselves, am I convinced that I feel sure the accused had raped the complainant? If your answer is yes, if this is the state of mind after examining all the evidence that [sic] you are convinced." (Emphasis supplied).

[29] We therefore find that the LTJ adequately assisted the jury. The summation was balanced. The issues for determination and the full thrust of the defence alleging a motive of revenge by the complainant, were fully and fairly left for the jury's consideration, with a clear direction on the burden and standard of proof in their route to verdict. There was accordingly no miscarriage of justice occasioned by the manner in which the LTJ summed up the case to the jury. The applicant's challenges on these three grounds therefore fail.

Ground v – The sentence was manifestly excessive

[30] Having conceded on ground (i), counsel for the applicant did not pursue her written submissions that, had the defendant been convicted of incest, the LTJ would not have been limited in sentencing options by a mandatory minimum sentence. Rather, counsel acknowledged that under section 6 of the SOA, the sentence of 15 years imprisonment imposed on the defendant by the LTJ was the mandatory minimum sentence that can be imposed for the offence of rape.

[31] In oral submissions, counsel recognised that based on that fact, no mitigating factor in favour of the applicant, nor the fact of any pre-trial detention to which he was subject, could be considered by the LTJ, as bases for discounting the sentence below the mandatory minimum. Accordingly, counsel was unable to place reliance on those factors

as occurred in cases such as **Callachand and another v The State** [2008] UKPC 49 and **Meisha Clement v R** [2016] JMCA Crim 26. Counsel, therefore, confined her complaint to the fact that the LTJ erred by failing to specify a period the applicant must serve before he would become eligible for parole, as required by section 6(2) of the SOA. Counsel submitted that the LTJ not having specified that period, if the conviction is sustained, this court should specify the minimum period of 10 years allowable by the section before the applicant will become eligible for parole. Counsel supported this submission by pointing to the applicant's previous unblemished good character, no previous conviction, and positive reports from his community and work places. Counsel invited the court to consider the discussion in the cases of **Jermaine McKenzie v R** [2020] JMCA Crim 9 and **Dwayne Brown v R** [2020] JMCA Crim 31.

[32] In his response, counsel for the Crown, Mr DaSilva, submitted that the sentence of the court was not manifestly excessive, as the LTJ was bound by the provisions of the SOA, which specifies a minimum sentence of 15 years for the offence of rape at a trial. He agreed that the LTJ did not consider the time the applicant spent in custody, which she was unable to because of the mandatory minimum sentence (see **Linford McIntosh v R** [2015] JMCA Crim 26 and **Ewin Harriott v R** [2018] JMCA Crim 22).

[33] He submitted that the Court of Appeal can only reduce a mandatory minimum sentence where the judge issues a certificate to the defendant under section 42K of the Criminal Justice Administration Act, or if the defendant had applied to the Court of Appeal

within six months of his sentence pursuant to section 42L of that Act. He noted that none of these options is available to the applicant.

[34] Counsel, however, advanced that the applicant was not prejudiced by the failure of the LTJ to specify the minimum period the applicant must serve before becoming eligible for parole, as the minimum period of 10 years as provided for in the legislation would apply.

Analysis

[35] Section 6(1)(a) and (2) of the Sexual Offences Act provides as follows:

> "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:
>
> …
>
> (2) Where a person has been sentenced pursuant to subsection (1) (a) or (b) (ii), then in substitution for the provisions of section 6 (1) to (4) of the Parole Act, the person's eligibility for parole shall be determined in the following manner: the court shall specify a period of not less than ten years, which that person shall serve before becoming eligible for parole."

[36] In **Linford McIntosh v R**, the court confirmed that the mandatory minimum sentence for rape under the SOA is 15 years and that the minimum period that the trial judge shall specify that the defendant should serve before becoming eligible for parole is 10 years. However, in the peculiar circumstances of that case, the court chose not to interfere with the erroneous sentence of eight years for rape by the trial judge, with no

stipulation before eligibility for parole. Those circumstances were that the applicant in that case had been given a long sentence on the other count on the indictment charging grievous sexual assault, and also because the court treated the applicant's indication that he was not seeking to advance his application for leave to appeal at the hearing, as an application to withdraw his application for leave to appeal, to which the court would accede.

[37] In **Ewin Harriott v R** [2018] JMCA Crim 22, Pusey JA (Ag) found that the offence of rape, which carries a mandatory minimum sentence of 15 years imprisonment, does not permit a judge to give credit for time served, as that would amount to imposing a lesser sentence than that stipulated by the SOA. The learned acting judge of appeal also pointed out that the Court of Appeal can only reduce a mandatory minimum sentence if the trial judge had issued a certificate to a defendant under section 42K of the Criminal Justice (Administration) Act, or if pursuant to section 42L a defendant had applied to the Court of Appeal within six months of the Criminal Justice (Administration) (Amendment) Act 2015 coming into force. Neither scenario would apply to the applicant in this case as no certificate was granted by the LTJ and the six-month transitional period referenced in section 42L has long since expired, after the Criminal Justice (Administration) (Amendment) Act 2015 came into force on 27 November 2015.

[38] As noted in the cases reviewed, section 6(1)(a) of the SOA stipulates that there is a mandatory minimum sentence of 15 years imprisonment for a person convicted of rape. Further, section 6(2) of the SOA provides that the trial judge "…shall specify a period of

not less than ten years, which that person shall serve before becoming eligible for parole." We agree with counsel for the applicant that the LTJ erred by not having specified the period the applicant should serve before becoming eligible for parole. The legislation says "shall specify". A mandatory duty is placed on a trial judge to make a specification. We also agree with the applicant's counsel that this court should then make a stipulation to correct the error of the LTJ.

[39] We do not agree with counsel for the Crown that, in the absence of a specification, the applicant would automatically become eligible for parole after serving 10 years. That is not the scheme of the legislation. There is no default position. As contemplated by the legislation, the specification has to be made to provide a court order that will no doubt guide the deliberations of the Parole Board at the appropriate time.

[40] In all the circumstances, considering the applicant's previous good character, no previous conviction, positive social enquiry report and seven months pre-trial detention, we think it appropriate to specify that the applicant should serve the minimum period of 10 years, before becoming eligible for parole.

[41] It was therefore for these reasons that we made the orders set out in paragraph [3].