[2018] JMCA Crim 33

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 92/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE PUSEY JA (AG)

ALPHEUS WADE v REGINA

Raoul Lindo for the appellant

Miss Kathy-Ann Pyke and Miss Nicole Kellier for the Crown

23, 25 April and 31 July 2018

MORRISON P

[1] On 6 October 2015, after a trial in the Home Circuit Court before Straw J ('the judge') and a jury, the appellant was convicted of the offence of kidnapping, contrary to section 70(1)(a) of the Offences Against the Person Act ('the OAPA'). On 27 November 2015, the judge sentenced him to 15 years' imprisonment at hard labour.

[2] On 31 July 2017, the appellant's application for leave to appeal against his conviction and sentence was considered on paper by a single judge of this court. The single judge refused the application for leave to appeal against conviction, but granted the application for leave to appeal against the sentence.

[3] The appellant renewed his application for leave to appeal against conviction and the renewed application and the appeal against sentence came on for hearing before us on 23 April 2018. On that date, Mr Raoul Lindo for the appellant advised us that the application for leave to appeal against conviction would not be pursued. Accordingly, the only issues which arose at the hearing were whether (i) the judge applied the correct principles in passing sentence on the appellant; and (ii) the sentence of 15 years' imprisonment was manifestly excessive in all the circumstances of the case.

[4] After hearing submissions from Mr Lindo for the appellant and Miss Kathy-Ann Pyke for the Crown, we made the following orders on 25 April 2018:

> "1. Application for leave to appeal against conviction dismissed.
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> 2. Appeal against sentence allowed and the sentence of 15 years' imprisonment set aside.
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> 3. In its stead, the court imposes a sentence of 10 years' imprisonment at hard labour, to be reckoned as having commenced on 27 November 2015."

[5] These are the reasons which were then promised for the court's decision.

[6] The factual background to the appeal is as follows. The complainant, Mr Marc Frankson, lived in Norbrook in the parish of Saint Andrew. He left home in his motor vehicle at about 9:00-9:15 on the morning of 15 June 2011 and stopped at a nearby traffic intersection. While there, he felt an impact to his vehicle from behind. The impact was caused by another vehicle colliding with his vehicle. The complainant came out of

his vehicle to investigate and spoke to a person whom he saw on the scene. As he turned back towards his car to take out his vehicle registration papers, he felt an "object" in his back and, when he turned around again, he realised that it was a gun. At gunpoint, he was forced into the other vehicle against his will, pushed into the back seat and placed in the middle between two persons. His hands were taped together, his head was pushed into a black bag, and he was driven away.

[7] After some time, the car in which the complainant was being driven came to a stop. He was pulled out of the car and taken on foot into a building, where he was put to sit in a room. He remained there for a couple of hours, after which he was taken into another vehicle and driven further away. At some point, this vehicle came to a stop, but then the complainant heard the sound of gunshots, and the vehicle sped off. Eventually, he somehow managed to open the door of the vehicle and rolled himself out of it and onto the roadway. Realising that he was in the Portmore area, he made his way on foot to the Waterford Police Station, arriving there at around 1:00 o'clock the following morning. From there, he was taken to the office of the Organised Crime Investigation Division ('OCID').

[8] The complainant's mother was a businesswoman. Not long after the complainant was taken away on the morning of 15 June 2011, and at various times throughout the day, she received several telephone calls from persons unknown to her. These persons demanded the large amount of US$500,000.00 as the price of the complainant's release. Over the course of the day, she was able to raise about J$30,000,000.00 and,

eventually, by early evening on 15 June 2011, she managed to convert this sum to United States currency. This money was given to a trained hostage negotiator ('the negotiator') who had been called in to assist.

[9] At about 8:00 o'clock that evening, the negotiator went to the Portmore area and, pretending to be the complainant's stepfather, began communicating with the kidnappers by telephone. Arrangements were made to drop off the money in exchange for the negotiator being allowed sight of the complainant. After several unsuccessful attempts to do so, spanning a period of over two hours, the negotiator went in the vicinity of the Portmore HEART Academy. He inserted five US$100 bills into a Gatorade bottle and threw it out of the window of his car onto the roadway, towards the men (about three) who stood there. These were the men to whom he had been instructed to deliver the money. The men picked up the bottle and, acting on instructions received by telephone, the negotiator continued driving around awaiting further instructions. But, sometime later that same night, the negotiator received certain information, as a result of which he went to the OCID, where he saw the complainant.

[10] In the early hours of 16 June 2011, after a chase by the police during which shots were exchanged, a Honda Ridgeline motor vehicle owned by the appellant crashed into a wall in the Portmore area. Several items belonging to the appellant were found in the vehicle, including a wallet with identification and credit cards, a firearm licence and a chrome 9mm Beretta pistol with 13 rounds of ammunition in the magazine. The police also found two spent shells in the front passenger seat of the

vehicle and four marked US$100 notes in the centre console of the vehicle. At the trial, the ballistics expert testified that the spent shells had been fired from the 9mm Beretta pistol which was found in the vehicle owned by the appellant. And, when the serial numbers of the marked US$100 notes were checked, they corresponded with the serial numbers of the marked notes which had been given to the negotiator.

[11] It turned out that the complainant was well known to the appellant, as they were neighbours in the Norbrook area. The appellant had previously been a visitor in the complainant's home and was also familiar with the complainant's workplace. He was taken into custody after having himself made a report to the police that he had been kidnapped and his vehicle stolen.

[12] In addition to the items of circumstantial evidence summarised above, the prosecution relied on certain lies told by the appellant in two statements to the police (not under caution); and on a statement under caution given by him, in which he admitted having played a role in the kidnapping of the complainant.

[13] But at trial the appellant disavowed the caution statement, saying he had given it because of threats from the police. He gave evidence that on 15 June 2011 he was kidnapped in the Manor Park area, masked and his hands taped behind him. His vehicle and his firearm were stolen from him and he was taken away and only let out after close to two hours of driving. He began walking until he discovered that he was at Bernard Lodge, after which he went to the Spanish Town Police Station. He did not participate in the kidnapping of the complainant.

[14] On this evidence, after a comprehensive summing-up from the judge about which no complaint is made, the jury returned a unanimous verdict of guilty. In considering what sentence to impose, the judge took into account that the appellant, who once served as a member of the Jamaica Constabulary Force, had a previously unblemished criminal record, was a family man and a good father to his three children, and that, in his caution statement, he had said that he wanted the complainant to be returned to his (the complainant's) mother alive. The judge also had the benefit of the evidence of a character witness called on the appellant's behalf, who spoke of his interest and involvement in community programmes aimed at the empowerment of children. It was also pointed out to the judge during counsel's plea in mitigation on the appellant's behalf that he had already spent some four and a half years in custody pending trial.

[15] In sentencing the appellant, the judge rehearsed, unobjectionably, the basic objectives of sentencing, *viz*, retribution, prevention, deterrence and rehabilitation. She then set out the process of thought by which she arrived at her conclusion, in a passage which we reproduce in full below (pages 166-169):

> "Now, these are the four factors that I will therefore have to weigh. Are there any – is there anything else I can look at and weigh in your favour? It is said that you are a family man and that came out quite clearly through the trial that you appeared to be a good father, you have an interest in bringing them up, you are a family man but against that also, I have to bear in mind the circumstances of this offence, the trauma that [the complainant] and his family had to endure during this horrendous action. He himself expressed that he never

thought that he would have made it alive and one can understand both himself and his family would have wondered if he would come out of this alive. So the family themselves experienced severe trauma and what makes it worst [sic] … is that … I can look at it as almost a breach of trust case. It is not technically a case that you had any argument with them, you could say that [the complainant] was your neighbour because you certainly met him, you visited premises that was near to his. You had met him, you had been introduced to him, you had gone to the factory, you had been to a social event at his house. So you had almost been embraced as a friend of a family friend and you breached that trust by plotting and planning this man's kidnapping in order to gain funds. So the circumstances are egregious. I have to bear that in mind to pass sentence.

Now your attorney has asked me to give you what is called a short sentence. A short sentence can be relative and a short sentence would be really more appropriate for someone who had thrown in the towel and pleaded guilty but as I said before, you didn't throw in the towel, in spite of the preponderance of the evidence, you fought this case tooth and nail which is your right, your constitutional right but I have to bear in mind the type of evidence. Is there anything else in your favour for me to consider? Well, I will say one other thing in your favour sir that I consider, is that based on the caution statement you gave, it seems to have been your intention that [the complainant] not be harmed. That is all I can say. Based on the caution statement, that you wanted him to return to his mother alive.

Now as I said, the statutory maximum is life imprisonment. So what I have to do, is to start at a figure that I think is an appropriate starting point. The law now is that the time that you have spent in custody, I ought to compute that as time already served and so that is supposed to be subtracted from the sentence that I am going to impose on you. That is now the law, that is now the understanding from the case authorities. You have spent four and a half years in custody, unless I have a very very good reason, I am supposed to compute that against your sentence. So sir, I am starting from a figure

> of 20 years, I will take off the four and a half for the time you have already spent in custody, I will add the six months just because you, based on your caution statement wanted to see this young man returned to his family.
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> So the sentence of this court is 15 years imprisonment."

[16] Mr Lindo sought and was granted leave to argue the following supplemental grounds of appeal:

> (a) In sentencing the appellant, the trial judge departed from the imperative principles of sentencing to an extent that amounted to an error in law and a miscarriage of justice.
>
> (b) The sentence imposed by the judge is unjust and manifestly excessive in all the circumstances.

[17] In a meticulously prepared and thoughtfully presented argument, Mr Lindo submitted on the first ground that the judge erred in failing to follow the approach to sentencing sanctioned by previous decisions of this court, such as **R v Evrald Dunkley** ((unreported) Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered 5 July 2002). Mr Lindo submitted that, applying that approach, the judge should, first, have determined what type of sentence was appropriate (that is, custodial or non-custodial) in this case; second, chosen a suitable starting point; and third, considered the factors in the case that would either increase or decrease the sentence from that starting point.

[18] As regards the starting point of 20 years chosen by the judge in this case, Mr Lindo submitted that it was "much too high with the result that [the appellant] was in fact given the same length of sentence as persons whose case of kidnapping was far more heinous" (Appellant's Skeleton Submission, paragraph 10(m)). He pointed out that the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017, which were issued in January 2018 ('the Sentencing Guidelines'), recommends 10-20 years as the normal range for the offence of kidnapping, with a usual starting point of 12 years. While acknowledging that the sentencing exercise in this case pre-dated the issuance of the Sentencing Guidelines, Mr Lindo nevertheless submitted that they ought to be accorded significant weight, representing as they did "a codification of years of accepted good practices and just principles" (Appellant's Skeleton Submission, paragraph 11(m)).

[19] As regards the mitigating and aggravating factors, Mr Lindo submitted that, on the one hand, the judge had failed to give sufficient effect to the fact that the appellant had no previous convictions, was a man of good repute, a family man with three minor children, and was gainfully employed at the time of his arrest. On the other hand, Mr Lindo submitted, the judge accorded too much weight to the fact that the appellant showed no remorse and had failed to plead guilty.

[20] On this basis, Mr Lindo submitted on the second ground that the sentence of 15 years' imprisonment in this case was manifestly excessive in all the circumstances and should be reduced, notwithstanding this court's traditional reluctance to disturb the

result of a sentencing judge's exercise of discretion. In support of these submissions, Mr Lindo referred us to several authorities and we will in due course refer to some of them.

[21] Responding for the prosecution, Miss Pyke submitted that the sentence imposed by the judge was appropriate and should not be disturbed. She pointed out that the offence in which the appellant played a part was premeditated and was, as the judge had suggested, quite analogous to a breach of trust. She drew our attention to, among others, the case of **R v Omar Walters** ((unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 173/2005, judgment delivered 9 October 2007), in which this court declined to disturb a sentence of 14 years' imprisonment on a 20 year old defendant with no previous convictions.

[22] In considering these submissions, we start from the position, realistically acknowledged by Mr Lindo at the outset, that "[i]t is only when a sentence appears to err in principle that this Court will alter it" (**R v Ball** (1951) 35 Cr App R 164, per Hilbery J at page 165; see also **Kurt Taylor v R** [2016] JMCA Crim 23, paragraph [23]).

[23] In order to demonstrate that the judge erred in principle in this case, Mr Lindo relied heavily on the decision of this court in **R v Evrald Dunkley** and the following statement of principle by P Harrison JA (as he then was), at pages 3-4:

> "The sentencer commences the process after conviction by determining, at the initial stage, the type of sentence suitable for the offence being dealt with. He or she first

> considers whether a non-custodial sentence is appropriate, including a community service order. If so, it is imposed. If not, consideration is given to the other options, ranging from the suspended sentence to a short term of imprisonment …
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> If … the sentencer considers that the 'best possible sentence' is a term of imprisonment, he should again make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise. The factors to be considered in mitigation of a sentence of imprisonment are, whether or not the offender has:
>
> (a) pleaded guilty;
>
> (b) made restitution or
>
> (c) has any previous conviction.
>
> These factors must be considered by the sentencer in every case before a sentence of imprisonment is imposed."

[24] This approach was expressly endorsed by this court in **Kurt Taylor v R** (at paragraph [29]) and in **Meisha Clement v R** [2016] JMCA Crim 26 (at paragraphs [25]-[26]). It also now forms part of the 'best practices' in sentencing captured in the Sentencing Guidelines (paragraphs 6.1-6.4).

[25] So, to the extent that the transcript of the judge's sentencing remarks suggests that she gave no consideration to the possibility of a non-custodial sentence, it is clear that she omitted the first of the accepted steps in sentencing an offender. But it seems to us that, given the seriousness of and the circumstances of the offence for which the appellant was convicted, this would have been a purely theoretical consideration in this

case. Significantly, despite submitting that the judge erred in this regard, Mr Lindo himself did not feel able to suggest that a non-custodial sentence would have been an appropriate form of punishment for the role which the appellant played in the kidnapping of the complainant. In our view, even if the judge had considered the matter, as she should have, if only for the record, she would inevitably have concluded that a non-custodial sentence was completely out of the question in this case.

[26] Having decided that a custodial sentence was appropriate, the judge's next step was to identify a suitable starting point. In the Sentencing Guidelines, reflecting the learning set out in **R v Evrald Dunkley**, the starting point is described (at paragraph 7.1) as "a notional point within the normal range, from which the sentence may be increased or decreased to allow for aggravating or mitigating factors of the case". As Mr Lindo correctly pointed out, the normal range stated in Appendix A to the Sentencing Guidelines for the offence of kidnapping contrary to section 70(1) of the OAPA is 10-20 years, while the usual starting point is 12 years. Mr Lindo's further point that the Sentencing Guidelines are to be regarded as a "codification of years of accepted good practices and just principles" achieves express validation from the guidelines themselves, which indicate (at paragraph 7.5) that "[t]he suggested usual starting points reflect experience gathered over time as well as previous sentencing decisions of the Court of Appeal".

[27] We therefore considered it appropriate to have regard to the Sentencing Guidelines as a reliable indicator of what would not only have been a suitable starting

point in this case, but also the normal range of sentences for the offence of kidnapping. On this basis, it appeared to us that the starting point of 20 years, which was right at the top of the normal range, in a case in which the appellant was but one of several others sharing culpability for kidnapping the complainant, was too high in the circumstances, sufficiently so to justify this court's intervention.

[28] In fixing an appropriate starting point, we considered that there was no reason to depart from the usual starting point of 12 years' imprisonment. But we also considered that this figure should be increased to 18 years, to reflect the various aggravating factors referred to by the judge, such as the severe trauma caused by the offence to the complainant and members of his family, the "breach of trust" implicit in the appellant's having chosen to participate in the kidnapping of the complainant, and all the other attendant circumstances rightly described by the judge as egregious.

[29] For completeness on this point, we should indicate that we did not read the judge's sentencing remarks as, in effect, penalising the appellant for not having pleaded guilty, as Mr Lindo contended that she did. In our view, in her remarks on the effect of the failure of the appellant to plead guilty, the judge was doing no more than making the entirely accurate point that the "short sentence" which the appellant was asking for at the sentencing stage might well have been an option for him had he entered a plea of guilty and obviated the need for a trial.

[30] On the other side of the balance sheet, so to speak, we considered, firstly, the appellant's status as a family man and father. In our view, neither of these facts could

properly be considered as a truly mitigating factor in the circumstances of this case. We were fortified in this view by the decision of the Court of Appeal of England and Wales in **R v Boakye and others** [2012] EWCA Crim 838, in which one of bases on which it was argued that the sentences imposed on six defendants convicted of importing sizeable quantities of cocaine into the United Kingdom was the fact that they were mothers of children. In this regard, reliance was placed on Article 3(1) of the United Nations Convention on the Rights of the Child, which provides that, "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

[31] In discussing this submission, the court (Hughes LJ) made a distinction between crimes "at the lower end of the criminal calendar" and "very serious criminal offences" (at paragraphs 29-32):

> "29. We agree that the interests of affected children may frequently be of relevance to the sentencing process. That will especially be so where the crime is at the lower end of the criminal calendar, and especially where the sentencing decision is for that reason on the cusp of custody or non-custody.
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> 30. R v Bishop [2012] EWCA Crim 1446 is a decision of a two judge court which lays down no point of general principle and is not appropriate for citation as authority; but it is a good example of what we have just said. There the appellant was convicted of one offence of commercial burglary in which some chocolate was stolen and of dangerous driving in the course of attempting to escape. He was the carer for five children aged between 5 and 13. The sentences were consecutive terms of four months' imprisonment. This court, comprising two very experienced

> judges, felt able to order that those sentences, which it held were proper, could be suspended. It did so in part because the sentencing judge had not put into the equation the effect of an immediate custodial sentence on the children.
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> 31. Such decisions are undoubtedly proper if the facts justify them. They are made regularly by Crown Courts up and down the country. So to say is a very long way indeed from the proposition that in considering the sentence on a parent or other carer the interests of the children are a primary consideration, and thus in some manner take priority over the necessity properly and consistently to punish different offenders who commit criminal offences -- and especially very serious criminal offences -- such as those with which we are, unfortunately, here concerned. Sadly, a very large proportion of sentences of imprisonment which simply have to be imposed will have an injurious knock-on effect on the children for whom the defendant is breadwinner, parent or carer ...
>
> 32. The position of children in a defendant's family may indeed be relevant, but it will be rare that their interests can prevail against society's plain interest in the proper enforcement of the criminal law. The more serious the offence, generally the less likely it is that they can possibly do so."

[32] In the instant case, the appellant was convicted of the very serious offence of kidnapping for the purpose of extracting a ransom, involving the use of a firearm. In these circumstances, we considered that his position as a family man and father could not possibly prevail against society's interest in upholding the criminal law by showing its abhorrence for such conduct.

[33] However, we took into account as mitigating factors the appellant's previously unblemished record and his express desire, which so attracted the judge's attention, that no harm should be done to the complainant. In our judgment, these factors

operated to reduce the appellant's sentence by three and a half years, from 18 to 14½ years' imprisonment.

[34] And from this figure, we made a final further deduction of four and a half years, to reflect the time spent by the appellant in custody pending trial, thus resulting in a sentence of 10 years' imprisonment.

[35] It is for these reasons that we considered that the appellant had made good his contention that the sentence of 15 years' imprisonment imposed by the judge was manifestly excessive and should be set aside, with the result which we have indicated at paragraph [4] above.