[2012] JMCA Crim 41

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 120/2004

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BRYAN BARTLEY v R

Mr Hopeton Clarke for the applicant

Mrs Ann-Marie Feurtado-Richards for the Crown

30 January 2012

ORAL JUDGMENT

MORRISON JA

[1] The applicant in this matter was tried before McIntosh J (as she then was) and a jury in the Manchester Circuit Court on an indictment containing three counts, charging him with the offences of rape, indecent assault and unlawful wounding. On 4 June 2004, the jury found him guilty on all counts and the learned trial judge sentenced him to 20 years imprisonment on count one; three years imprisonment on count two, and three years imprisonment on count three. The judge also ordered that these sentences should run concurrently.

[2] The applicant's application for leave to appeal was considered by a learned single judge of this court on 18 July 2008 and refused. As a result, the applicant has renewed his application for leave to appeal before this court, as he is entitled to do.

[3] This morning before us Mr Clarke very helpfully indicated that he would narrow his complaint against the conviction to three grounds: firstly, that the identification of the applicant was suspect; secondly, that the learned trial judge should have upheld the no case submission made at trial; and thirdly, that the sentence of 20 years imprisonment on count one was manifestly excessive, bearing in mind the applicant's age and antecedents.

[4] This was a case in which the complainant, who was 70 years old at the time of the trial, did not know the applicant before. Mr Clarke's submission as regards the first two grounds, both of which concern identification, is based on the circumstances in which the applicant was identified, the contention being that there was an impermissible confrontation.

[5] In the afternoon of 14 September 2003, the complainant was on her way on foot to an area called Hibiscus Gardens, passing through a Common in Marshall Pen in the parish of Manchester. While on that journey, she came upon the applicant who, she said, attacked her, subdued her finally, and subjected her to a most degrading attack, assaulting her and having sexual intercourse with her against her will. While she did not know the applicant before, the complainant said she had ample opportunity to observe him and, by her account, the entire incident lasted for about two hours.

[6] After her ordeal had ended, the complainant was assisted by a good Samaritan, who took her to the police station. There she made a report and she was subsequently taken for medical treatment at the public hospital. The following morning, on her account, she went with the police officers as part of the investigation to show them the place at which the incident had occurred. While she was in the process of doing this, on the investigating officer's account, some information was received that citizens were assaulting and beating a man at a house in the vicinity. The investigating officer went to rescue this man and, during that incident, the complainant, who was there standing by the police car, actually saw the applicant and pointed him out as the man who had raped her.

[7] Not surprisingly, Mr Clarke submitted that this was an improper confrontation, and, in those circumstances, the identification was suspect and the learned trial judge ought to have allowed the no case submission on that basis.

[8] At the end of the Crown's case, the trial judge would have heard the evidence coming from the police, which on the one hand presented an innocent, certainly spontaneous, incident in which the identification took place. On the other hand, lacking in any real detail, the assertion which was put to the investigating officer in cross examination was that the whole incident had been engineered. Naturally, if it was a fact that the incident had been engineered by the police, it would have been improper and it would have been the judge's duty at that stage, if the evidence was clearly pointing in that direction, to have stopped the case. However, it seems to us, that there

were two versions of what actually happened, the resolution of which depended on which view the jury took of the facts. It was therefore clearly a case fit to be left to the jury, with proper directions from the learned trial judge. In our view, the first ground must fail.

[9] As regards the learned trial judge's directions to the jury, Mr Clarke made no complaint and it seems to us that no complaint could possibly be made. The learned judge was careful to direct the jury fully in every respect on the law relating to identification, and the law relating to corroboration. Everything that could possibly be told to the jury was told to them. So, in those circumstances, it seems to us that Mr Clarke's challenge to the conviction must fail.

[10] Mr Clarke argued lastly that the sentence of the learned trial judge was manifestly excessive. The judge obviously took a strong view, as this court does, about the circumstances of this case, in particular, the fact that this was an attack by a young man of 20 years on an elderly woman who could easily have been his grandmother (his own mother was, the evidence revealed, 55 years of age). We think that the judge quite properly felt that it was required of her that she demonstrate society's disapproval of that kind of conduct.

[11] The learned and very experienced judge reviewed the evidence, remarking on the relative ages of the applicant and the complainant, and considered that in those circumstances, 20 years was an appropriate period for the applicant to think about his actions and to see what he could learn from them.

[12] Although we cannot fault the learned trial judge for her approach, we have had some concerns about the length of the sentence, that is, whether it was manifestly excessive. We have to balance this court's own view of what might be an appropriate sentence in a case such as this, against the reality and the dynamics of the case below as it unfolded before the learned trial judge. If we take the view that the judge erred in principle, and the sentence was manifestly excessive, then it would be our duty to reduce it. However, if we take the view that the sentence, even if on the high side in our estimation, is a sentence which cannot be said to be manifestly excessive, then it would be our duty to defer to the learned trial judge's consideration of the matter. After anxious consideration, we do not think that in all the circumstances, taking into account the nature of the offence, the age of the applicant, the fact that he had no previous conviction and all other relevant factors, we can say that the sentence was manifestly excessive, in the sense that it was wholly out of range with what might be an appropriate sentence in a case such as this.

[13] Having said that, we are however concerned about one further aspect of the matter. The applicant was convicted in June 2004, that is, almost eight years ago. For reasons which do not appear from the papers, his application for leave to appeal took fully four years to come to this court, finally arriving in the Court of Appeal Registry in August 2008. The application was considered and refused by a single judge in 2008 and it then came before the court for the first time on 1 December 2008, at which time it was taken out of the list for a full transcript of the evidence to be obtained. Thereafter, it took a further two years, until January 2011, for the transcript to arrive in

this court. In our view, it is very unusual that a matter such as this should take seven to eight years to be heard in this court, particularly since it is clear that the applicant himself had indicated his desire to apply for leave to appeal sometime ago. So, taking that into consideration, we propose to, unusually and exceptionally, adjust the sentence to reflect the court's disapproval of this unexplained delay and we will accordingly reduce the sentence from 20 years on count one to a sentence of 17 years.

[14] The application for leave to appeal against conviction is refused. The application for leave to appeal against sentence is granted; the hearing of the application is treated as the appeal and the appeal is allowed in part. The sentence on count one is hereby reduced to 17 years imprisonment, to commence on 4 June 2004, which was the date of the original conviction.