[2013] JMCA Crim 48

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 35/2010

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

PERCIVAL CAMPBELL v R

Linton Gordon and Miss Tamiko Smith for the appellant

Mrs Karen Seymour-Johnson for the Crown

23, 25 September and 10 October 2013

MORRISON JA

[1] On 25 September 2013, the court announced that the appeal against sentence in this matter would be allowed and the sentence of 21 years' imprisonment imposed by the learned trial judge set aside. In its stead, the court substituted a sentence of 18 years' imprisonment at hard labour and stipulated that it should commence from 26 February 2010. These are the reasons for this decision.

[2] On 11 February 2010, the appellant was convicted after a trial before DO McIntosh J and a jury of the offence of rape. On 26 February 2010, the learned trial judge sentenced him to imprisonment at hard labour for a period of 21 years.

[3] On 16 June 2011, the appellant having applied for leave to appeal against his conviction and sentence, a single judge of this court refused the application in respect of the conviction, but granted it in respect of the sentence imposed by the learned trial judge.

[4] On 13 January 2013, pursuant to the leave thus granted, the appellant filed supplemental grounds of appeal in the following terms:

> "1. That the sentence of imprisonment at hard labour for twenty one (21) years imposed on the appellant by the Learned Trial Judge is excessive given all the circumstance [sic] of the case and should therefore be reduced.
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> 2. That the circumstances under which the offence was committed and the conduct of the Defendant in committing the offence do not justify a period of twenty-one (21) years imprisonment of [sic] hard labour, that the period of twenty-one (21) years is in excess of the usual sentence given for a Rape in these circumstances and should be reduced.
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> 3. That the Learned Trial Judge fell into error and imposed an excessive sentence when he went on to ridicule the antecedents of the Appellant when he should have used it to guide and assist him in arriving at an appropriate sentence given the circumstances of this case."

[5] This is therefore an appeal against sentence only. Before turning to Mr Gordon's submissions in support of these grounds, it is first necessary to outline briefly the circumstances of the case. On 27 July 2007, which is the date on which the offence

was committed, the appellant was 47 years of age. The complainant, who was then 11 years of age, was the granddaughter of the appellant's wife. On the day in question, the complainant, who was told by the appellant that her grandmother was calling her, went to the house at which the appellant and her grandmother lived. When she got there, the complainant was dragged by her blouse by the appellant into the house and, in answer to her question, was told by him that her grandmother was not home. Once inside the house, the appellant pushed her to the floor in the back room of the house and there had sexual intercourse with her without her consent. While he was in the act, she told him to leave her alone and bit him, to which he responded by hitting her on the head. When he was done, the appellant gave the complainant a $500.00 bill and, after telling her that she "must be his little girlfriend", sent her away. On her way home, the complainant tore up the $500.00 bill into pieces. Some two weeks later, the complainant made a report to her mother and in due course the appellant was arrested and charged with rape.

[6] The appellant now makes no complaint about the verdict of guilt, at which the jury arrived after retiring for just over 10 minutes. The report on the appellant's antecedents revealed that he had two previous convictions, the first for shop breaking and larceny in 1989 and the second for larceny of a cow in 2006. In mitigation, the appellant's counsel offered the appellant's age (49 years at the date of trial); that he had been married to the same woman for 17 years; that they had two young children in high school; that he was responsible financially for his family, including his 71 year old mother; and that he was recognised by members of his community as "not being a

troublemaker and...[was] a hard worker and a jovial person". Counsel also pointed out that his two previous convictions were for offences dissimilar to the one for which he had been found guilty in the instant case and asked that they not be taken into consideration.

[7] In pronouncing sentence on the appellant, the learned trial judge said this:

> "Now sir, your attorney has said, reading from the antecedents, that you are such a nice, jovial person that the community admires you and reports that you are not a troublemaker and that you are a hard-working person. So, obviously the community does not know that you are a thief because I cannot see that they can be admiring you as a jovial, hard working and no trouble person when you are a thief. But, what is worst [sic] is the offence which you committed to the little child who is your wife's granddaughter and, you know, everybody expects the Court to condone this type of behaviour and to say, 'Oh, well, first time being caught, give you a warning; tell you not to do it again.' And then your family and your friends all gather together and support you and condone your behaviour and expect the Court to do likewise. And when we send you to prison, they weep and wail and gnash their teeth because, no doubt, they are supportive of you. I am happy that you are smiling. I am happy that you are smiling because it means that you understand perfectly where I am going. Well, I don't condone your behaviour. The law does not condone your behaviour and the sentence of this Court is that you be imprisoned and kept at hard labour for 21 years."

[8] Before us, Mr Gordon submitted that the sentence of 21 years' imprisonment at hard labour is excessive and out of line with that which is usually imposed upon a conviction for rape in circumstances similar to those in the instant case. He pointed out the absence in this case of any evidence of the use of a weapon or what he described as "any wanton act of violence" and the fact that the complainant had suffered no serious injuries, "apart from what might have been associated with the act of penetration". As regards the remarks of the judge quoted in the

foregoing paragraph, Mr Gordon complained that, instead of using the comments favourable to the appellant in the antecedent report as a guide to sentencing him, the judge had ridiculed them, as he had the submission that the offences for which the appellant had been convicted in the past bore no similarity to the offence of rape. And finally, Mr Gordon complained that it does not appear from the transcript of the trial that a Social Enquiry Report had been produced, notwithstanding the fact that defence counsel appeared to have canvassed the possibility of one after the jury had returned its verdict.

[9] In support of these submissions, Mr Gordon referred us to a number of cases, the first of which is **R v Roberts** [1982] 1 All ER 609, a decision of the English Court of Appeal. In that case, Lord Lane CJ said this (at page 610):

> "Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Second, to emphasise public disapproval. Third, to serve as a warning to others. Fourth, to punish the offender, and last, but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but these in cases of rape vary widely from case to case.
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> Some of the features which may aggravate the crime are as follows. Where a gun or a knife or some other weapon has been used to frighten or injure the victim. Where the victim sustains serious injury (whether that is mental or physical). Where violence is used over and above the violence necessarily involved in the act itself. Where there are threats of a brutal kind. Where the victim has been subjected to further sexual indignities or perversions. Where the victim is very young or elderly. Where the offender is in a position of trust. Where the offender has intruded into the victim's home. Where the victim has been deprived of her

> liberty for a period of time. Where the rape, or succession of rapes, is carried out by a group of men. Where the offender has committed a series of rapes on different women, or indeed on the same woman."

[10] In **R v Billiam** [1986] 1 All ER 985, Lord Lane CJ reiterated the relevant considerations identified in **Roberts**. While observing (at page 987) that "[t]he variable factors in cases of rape are so numerous that it is difficult to lay down guidelines as to the proper length of sentence in terms of rape", Lord Lane went on to summarise in general terms the then current practice of the courts in sentencing for rape. In a contested case without any aggravating or mitigating factors, five years' imprisonment would be taken as the starting point. At the other end of the scale would be "the defendant who has carried out what might be described as a campaign of rape, committing the crime on a number of different women or girls", in which case "a sentence of 15 years or more may be appropriate" (per Lord Lane CJ, at page 987).

[11] **Billiam** was applied in **R v Trevor Michael Harvey** (1987) 9 Cr App R 124 (in which Lord Lane CJ again presided). In that case, in which the only aggravating factor was that the defendant had been convicted in the past for sexual offences, the court reduced the sentence given by the judge after a trial from seven to six years' imprisonment.

[12] Closer home, in **R v Camillus Paris** (BVIHCR2010/0014, judgment delivered 29 August 2011), a decision of the Eastern Caribbean Supreme Court, the defendant was found guilty of two counts of indecent assault and one count of rape committed on a seven year old girl. The defendant, who was over 50 years of age, was the complainant's cousin and they lived in the same house. The learned trial judge considered the respective ages of the complainant and the

defendant, as well as the familial relationship between them, to be "particularly aggravating factors" (per Hariprashad-Charles J, at para. [45]). On the other side of the coin, so to speak, the defendant had no previous convictions. The court sentenced him to 10 years' imprisonment for rape. (See also **R v Raymond Mark Rowlett** (1990) 12 Cr App R (S) 294, to which Mr Gordon also referred us, in which "…very serious aggravating factors…[including]…the extreme youth of the victim, the violence used and the threat after, the perverted behavior and the possible long term effects on the victim" were held to justify a sentence of 10 years imprisonment, notwithstanding the mitigating factor of the defendant's guilty plea – see per Auld J, at page 296.)

[13] Encouraged by these decisions, **Billiam** in particular, Mr Gordon submitted that, there being "no sufficient or serious aggravating factors" to justify the sentence imposed on the appellant by the learned trial judge, a sentence in the range of five to seven years would be more appropriate in the instant case.

[14] At the time when the appellant was indicted in this matter, section 44(1) of the Offences Against the Person Act provided that a person convicted of rape was "liable to imprisonment for life". Since 30 June 2011, the matter has been governed by section 6(1) of the Sexual Offences Act, which provides that the penalty for rape is "imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years". Therefore, the prescribed sentencing range was (and to some extent remains) extremely wide.

[15] We have found the cases cited by Mr Gordon to be helpful reminders of some of the relevant considerations that a judge must have in mind in imposing sentence for rape. However, in relation to the actual period of imprisonment that may be suitable in a particular case, we have found it

necessary to consider the way in which this very question has been addressed by this court in recent times. In this regard, we need go no further than the most recent decision on the point, which is **Paul Maitland v R** [2013] JMCA Crim 7. In that case, the appellant was convicted of the offences of rape and indecent assault, for which he was sentenced to serve concurrent terms of imprisonment at hard labour of 30 years and three years respectively. The complainant in that case was forced at knife-point by two men into an open lot. There, one of the men touched her on her breasts and on her vagina and then forced her, still at knife-point, to perform oral sex on him. Thereafter, he had sexual intercourse with her from behind without her consent. When he was done, the second man also had his way with her. Before too long, the appellant was identified by the complainant as the first of the two men who had had sex with her.

[16] On appeal, the appellant contended that the sentence of 30 years' imprisonment for rape was manifestly excessive. Delivering the judgment of the court, Brooks JA referred to two previous decisions in which the level of sentences in rape cases had been considered by this court. The first is **Sheldon Brown v R** [2010] JMCA Crim 38, in which the complainant was abducted from her home, taken to various places and raped several times by the applicant. The applicant then returned her to her home, where he raped her again. The trial judge imposed a sentence of 20 years' imprisonment at hard labour, which this court declined to disturb. The second is **Paul Allen v R** [2010] JMCA Crim 79, in which the complainant was abducted at gunpoint and taken to a house, where the appellant raped her, indecently assaulted her and

robbed her of cash. On appeal, this court again declined to reduce the sentence of 20 years' imprisonment for rape.

[17] Commenting on these cases in **Maitland v R**, Brooks JA observed (at para. [35]) that "they do indicate a level of sentence that this court considers appropriate". The learned judge went on to say this:

> "The fact that two perpetrators defiled [the complainant] cannot be ignored. Although only one person has been convicted of the offence, and it may be said that he should only be punished for his acts, the fact remains that he was present and supporting the other offender. The fact of the multiple rapes warrants a sentence greater than that imposed on a man who acts alone, providing that there is no unusual depravity or other aggravating circumstance."

[18] In the result, taking into account the complainant's ordeal at the hands of two men, the fact that no firearm had been employed in the commission of the offences, the appellant's age (35 years old at the time of conviction) and his previous conviction for robbery with aggravation, that is, an offence involving the person, the court considered it appropriate to reduce the sentence of 30 years' imprisonment to one of 23 years' imprisonment.

[19] It is clear from these cases, in our view, that, for reasons which it is not now necessary to explore, the range of sentences approved by this court for the offence of rape in recent times is considerably higher than that described by the English cases to which we were referred by Mr Gordon. It is also equally clear that the sentence of 21 years' imprisonment imposed by DO McIntosh J in the instant case is in fact far closer

to the range of sentences sanctioned by the practice of this court than to the range contended for by Mr Gordon. But, the question nevertheless remains whether it was, as Mr Gordon submits, manifestly excessive given the circumstances of this case.

[20] As Mr Gordon quite properly acknowledged, it cannot be said that there were no aggravating factors in this case. For not only was the complainant a young child, but the appellant, a man over 35 years her senior, was the husband of her grandmother and plainly stood in a position of trust in relation to her. Further, despite the compelling evidence against him, the appellant chose not to spare the complainant the indignity and humiliation of a trial by entering a plea of guilty.

[21] But it is also clear that many of the other aggravating factors identified in the cases were absent from the instant case. So, for instance, no firearm or other weapon was used by the appellant in the commission of the offence; there was no 'unusual' violence, beyond the single dreadful act of rape itself; the complainant was not subjected to further sexual indignities or perversions; and the appellant acted alone, rather than in concert with other persons. The absence of these factors, it seems to us, certainly serves in one way or the other to distinguish this case – in the appellant's favour - from **Sheldon Brown v R**, **Paul Allen v R** and **Maitland v R**.

[22] In any event, it further appears to us that, despite the perfectly understandable sense of revulsion which this type of offence inevitably generates, the learned trial judge's remarks in sentencing the appellant fell short of the careful consideration of the individual circumstances of each offender which the sentencing exercise demands.

Thus, instead of acknowledging, as in our view he ought to have done, that neither of the appellant's previous convictions (the first of them more than 20 years past) involved offences of a sexual nature, the judge used them to stigmatise the appellant as, irrespective of the community's view of him, nothing more than "a thief". As Auld J observed of the defendant in **Rowlett** (at page 296), "[a]lthough he has a bad criminal record of dishonesty, he has no previous convictions for offences of a sexual nature, and there is no indication that he is likely to be a danger to anyone in this way again". The dissimilarity of the appellant's previous convictions to the conduct for which he was convicted in the instant case was therefore a factor which could have weighed in the balance in his favour in determining the appropriate sentence to be imposed on him in the instant case. Nor did the judge make any mention at all of the appellant's family circumstances, which revealed him to be a father of young children in a – on the face of it at any rate – stable long term marriage.

[23] We therefore consider that, taking all factors into account, the sentence of 21 years' imprisonment imposed by the learned trial judge was sufficiently in excess of the range of sentences established by the cases to which we have referred (at paras [15]-[17] above) as to warrant this court's intervention. It is for these reasons that we came to the conclusion and made the order set out at para. [1] above.