[2024] JMCA Crim 8

JAMAICA

IN THE COURT OF APPEAL

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

SUPREME COURT CRIMINAL APPEAL NO 93/2018

DEMITRI CLARKE V R

Oswest Senior Smith for the applicant

Ms Kathy-Ann Pyke and Dwayne Houston for the Crown.

19, 20 July 2023 and 16 February 2024

Criminal Law - Application for leave to appeal conviction and sentence - Buggery - Ingredients of the offence.

Criminal Law – Identification – Recognition - Whether the case ought to have been withdrawn from the jury.

Constitutional law - Delay in the production of transcript of the trial resulting in a delay in hearing of the appeal - breach of sections 16(1), (7) and (8) of the Constitution - Redress for breach

P WILLIAMS JA

[1] Mr Demitri Clarke ('the appellant') was charged on an indictment containing two counts for buggery. On 7 November 2018, after a trial before Jackson-Haisley J ('the learned trial judge'), sitting with a jury in the Home Circuit Court, he was convicted for one count. On 23 November 2018, he was sentenced to seven years' imprisonment at hard labour. On 19 April 2023, a single judge of this court considered and refused his application for leave to appeal his conviction and sentence.

[2] As is his right, the appellant renewed his application before us and, on 20 July 2023, after considering the oral and written submissions of counsel, we made the following orders:

> "1) The application for leave to appeal the conviction is refused.
>
> 2) The application for leave to appeal sentence is granted.
>
> 3) The hearing of the application in respect of the sentence is treated as the hearing of the appeal.
>
> 4) Appeal against the sentence is allowed.
>
> 5) By way of redress for the breach of the appellant's constitutional right to have his appeal heard within a reasonable time, the sentence of seven years' imprisonment at hard labour is set aside and a sentence of six years' imprisonment is substituted therefor.
>
> 6) The sentence shall be reckoned as having commenced on 23 November 2018, the date on which it was originally imposed."

We promised at that time to put our reasons in writing. This is in fulfilment of that promise.

The case at trial

[3] In 2015, TC ('the complainant') was a student at the Jessie Ripoll Primary School. He lived with his mother at McWhinney Street in Kingston. The appellant lived in a separate house in the same tenement yard. Sometime in that year, the appellant invited the complainant to rugby training at the Kingston College campus on North Street in Kingston. The training took place on Saturdays and lasted all day. The appellant was the coach. They would walk together from the yard to the campus and back.

[4] TC testified that one Saturday at the school campus, after training, the appellant told him to go upstairs and when the appellant joined him there, the appellant went behind him, and pulled down his pants and underpants. TC said he lay down on his belly on the floor and the appellant got on his back and placed his penis in his bottom. TC said it was night when the incident took place but he was able to see the appellant with the

assistance of moon light. Afterwards, the appellant and TC walked together back to the yard.

[5] When asked to describe the relationship he had with the appellant, TC said he "would speak to him now and then". He described the relationship between his mother and the appellant as "good".

[6] On 8 February 2017, his mother took TC to the Elleston Road Police Station. A report was made to Detective Constable Graciann Kerr-Bailey, who recorded a statement from TC and caused one to be recorded from his mother. TC was subsequently taken to the Centre for Investigation of Sexual Offences and Child Abuse ('CISOCA') and was examined by a medical doctor. TC said that at the time the report was made, the appellant no longer lived in the area but was unable to recall when he had left.

[7] Under cross-examination, TC agreed that he and the appellant shared a close relationship "like brothers" and that he spent a considerable amount of time at the appellant's house. He also agreed that he had at some point described the appellant as a good neighbour. TC was questioned about discussions he had had with his mother about the appellant. He acknowledged that his mother would make remarks about the appellant being a homosexual. He agreed further that some of the things said in his statement, he said because his mother guided him. He disagreed with suggestions that at no point in time did the appellant insert his penis into his anus.

[8] TC acknowledged that sometime in 2017 there was an incident in the yard between his father and the appellant, which resulted in his father throwing bricks at the appellant. TC however denied that the reason for that incident was that his father wanted the appellant out of the yard so someone else could get the appellant's room.

[9] When re-examined, TC testified that the incident between the appellant and his father had taken place before the report was made to CISOCA. His father did not live in the yard and someone who resided overseas owned the house in which he resided with

his mother. He further explained that his mother had not directly told him what to tell the police.

[10] The medical doctor who examined TC on 8 February 2017 was Dr Sheryl-Mae Johnson-Burke ('Dr Johnson-Burke'). She testified that upon examination of his anus she saw an old well-healed scar fissure. The mucosa was red and she observed an array of multiple warts. She explained that the colour of the mucosa was indicative of an infection. She stated that most anal warts are caused by the human papilloma virus and are generally associated with sexual activity. Warts of this nature can develop in a matter of weeks and if left untreated can remain and increase in size and number. Dr Johnson-Burke confirmed that warts could remain one year and six months after exposure if untreated.

[11] Under cross-examination, Dr Johnson-Burke, agreed that it was possible that TC's last sexual contact could have occurred at least a year prior to her seeing him. She maintained that the signs from her findings collectively pointed to sexual contact and it was unlikely that the use of an unclean inanimate object could have resulted in the development of the warts.

[12] In his defence, the appellant made a lengthy unsworn statement from the dock in which he was adamant that he was not guilty. He said he was neither a homosexual, bisexual nor a paedophile. He knew TC from 2007 and took him under his wing as a mentee. They became close as brothers. He explained how he had selected TC and several other children in the community to teach the sport of rugby. He described an incident that took place between TC's father and himself in 2017 during which time the father had told him to keep his distance from TC. Shortly after he learnt that TC's mother had said she felt the appellant was molesting TC. He sought the assistance of the pastor of a church he attended "to spark an investigation in the matter". Within a few weeks after that, he was taken into custody and eventually charged.

[13] He was convinced that the allegations were brought against him so he would be forced to leave the room he occupied since 2005. He suspected that because of their closeness, it was decided that TC "would have been the easiest person to use to manipulate the situation".

The appeal

[14] At the commencement of the hearing of the appeal, Mr Oswest Senior-Smith (Mr Senior-Smith), who appeared for the appellant, sought and was granted permission (with no objection from the Crown) to abandon the original grounds of appeal that had been filed and to argue four supplemental grounds. Those grounds of appeal are as follows:

> "1. The generating of the apposite transcripts of trial some five (5) years into the sentence of seven (7) years, has resulted in the trammelling of the applicant's infrangible covenant with the State under provisions 16(1), 16(7), and 16(8) of the Jamaica Constitution.
>
> 2. The material grounding the issue of identification was abysmal and thereby vitiates the conviction.
>
> 3. There was more than liberal reference in summation to 'placing penis in bottom'.
>
> 4. The sentence was manifestly excessive."

[15] The applicant filed a notice of application for court orders to be permitted to rely on fresh evidence in advancing ground 1. The underlying grounds on which he sought the order were that his constitutional rights were being breached and the fresh evidence was material to the adverse effects the long delay in the production in the production of the trial transcript had on him. Appropriately, Mr Dwayne Houston ('Mr Houston'), who appeared for the Crown at the time the application was made, indicated there was no objection to the application.

The submissions

For the appellant

[16] In respect of ground 1, Mr Senior-Smith submitted that this was not just a matter of delay simpliciter. There was extreme delay in the production of the transcript of the trial, with the applicant remaining in custody awaiting its production. The transcript of the summation was produced on 4 May 2022, three years and seven months after the trial. The transcript of the evidence taken at the trial was produced on 20 February 2023, five years and three months after the trial. The fact that the appellant had been sentenced to seven years' imprisonment meant that his sentence was more than substantially expended by the time the transcript of evidence was made available. Further, Mr Senior-Smith noted the early release date for the appellant was 22 July 2023. This meant that the full transcript of the trial was received only months before that date with the hearing of the appeal mere days before that date.

[17] Mr Senior-Smith contended that the conviction and sentence should be set aside because this matter concerned not only mere delay but custody was involved. He submitted that the appellant's series of entitlements under the Constitution: to a fair hearing within a reasonable time (section 16(1)), to be given a copy of the record of the proceedings (section 16(7)), plus to have his conviction and sentence appropriately reviewed (section 16(8)), have been extinguished. Mr Senior-Smith submitted that since the sentence had almost been fully served the only proportionate and reasonable remedy must be to quash the conviction.

[18] Mr Senior-Smith contended that the production of the transcript of the trial at the virtual end of the sentence was tantamount to the transcript not being provided at all during the time spent in custody. This was further supportive of the fact that in these circumstances compensation and a reduction in the sentence were not sufficient to remedy the breach suffered by the applicant by the state. Counsel referred to **Watson (Orville) v R** [2023] JMCA Crim 25, **Evon Jack v R** [2021] JMCA Crim 31 and **Melanie Tapper v The Director of Public Prosecutions** [2012] UKPC 26.

[19] In his written submissions in relation to ground 2, Mr Senior-Smith submitted that the evidence regarding the seminal issue of identification was woefully short of the hallowed expectations. He pointed out that the evidence indicated that the assault had transpired at night, the specific area was dark and exclusively lit by only moon light with the extent of the illumination never sought. Additionally, at all material times, the assailant was behind the complainant and the attempt at facial recognition was never pursued beyond a "head to toe" effort. It was further submitted there was an insufficiency of the applicable directions given by the learned trial judge who failed to properly analyse the weaknesses in the identification evidence. In concluding on this issue, it was submitted the paucity of the elicited testimony as regards identification was such that the case ought not to have been left for the jury's consideration. Counsel relied on **Tajae Campbell v R** [2022] JMCA 71 and **R v Turnbull** [1976] 3 All ER 549 in support of the submissions.

[20] In relation to Ground 3, Mr Senior-Smith took issue with the learned trial judge's numerous references to the word 'bottom' in reviewing the evidence and that the word was used interchangeably with the word 'anus'. Counsel noted that there must be proven as an essential ingredient of the offence of buggery, the penetration of the anus by the male organ. Mr Senior-Smith submitted that using the two words interchangeably meant that some degree of confusion might have arisen, thereby exposing the appellant to prejudice and eventual conviction. Further, it was submitted the numerous references to penis in the bottom might have overwhelmed the requirement for the jury to maintain "clear-eyed" focus on the requirement for the penetration by the penis to be in the anus. It was contended that the learned trial judge may have unwittingly redefined the "constituent raison d'etre" of the offence near the end of her summation and this inadvertent oversight deprived the appellant of the protection of the law inevitably leading to a conviction.

[21] The challenge to the sentence imposed was the manner in which the learned trial judge approached the sentencing exercise. It was submitted that she did not employ the

classical approach and in particular, she failed to adjust an identified starting point in a mathematical manner taking into account the aggravating and mitigating factors. This resulted in the imposition of a sentence that was manifestly excessive.

For the Crown

[22] In the written response filed on behalf of the Crown, it was accepted that there was merit in the complaint that there was delay in providing the appellant with the transcript. It was also accepted that the resultant delay had infringed the appellant's constitutional right to have his appeal heard in a reasonable time. It was acknowledged that this court has indicated that redress for such a breach may take the form of a public acknowledgment of the breach, a reduction in the sentence, or a quashing of the conviction. It was submitted that in order to determine the most appropriate redress, a determination had to be made on the issues to be resolved in the appeal.

[23] It was contended that given the quality of the evidence and the adequacy and appropriateness of the summation by the learned trial judge, the cure for the breach ought to be an acknowledgement of it as well as a reduction of the sentence. A one-year reduction was recommended.

[24] In relation to ground 2, it was submitted that the learned trial judge in approaching the identification evidence correctly indicated that this was a case of recognition. The learned trial judge alerted the jury to the special need for caution in respect to the evidence and highlighted the fact that mistakes can be made even in cases involving recognition. In respect of the weaknesses in the identification evidence, it was noted that the learned trial judge referred to the evidence that the incident had taken place at night and that the complainant saw the appellant with the aid of moonlight.

[25] It was contended that there was sufficient strength in the identification evidence to ground the conviction. In highlighting the bits of evidence considered strong it was noted TC said the appellant had invited him to go upstairs, he had seen the appellant come upstairs before going behind him and after the incident, and they had walked home

together. **Andrew Campbell v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 148/2005, judgment delivered on 18 December 2006, and **Evon Johnson v R** [2014] JMCA 43 were relied on in support of the submissions.

[26] In relation to ground 3, it was recognised that throughout his evidence TC testified that the appellant placed his penis in TC's bottom. It was however pointed out that TC was a minor and there was an obligation to take the witnesses as they are found. It was noted that in outlining the ingredients for the offence of buggery, the learned trial judge referred to a male person putting his penis into the anus of another person. It was acknowledged that on multiple occasions the learned trial judge indicated that the assailant's penis was placed in the bottom while also on a few instances referred to the penis being placed in the anus. It was contended that the jury had the benefit of Dr Johnson-Burke's testimony in which she spoke of her observations of anus. The learned trial judge in reviewing this evidence highlighted aspects of it and in so doing used the term anus.

[27] It was submitted that there was no merit in the suggestion that the jury did not understand what the learned trial judge meant when she made multiple references to bottom and neither were they overwhelmed by the reference. Further, it was submitted it was beyond clear that the learned trial judge used the words "anus" and "bottom" interchangeably. It was contended that the learned trial judge was speaking in terms any Jamaican would understand and was not reshaping the offence of buggery. The final submission on this ground was that the jury must be taken to have such a level of intelligence and experience to appreciate what the learned trial judge meant when she made reference to the bottom.

[28] In relation to ground 4, it was submitted that the complaint that the sentence was manifestly excessive was without merit. It was accepted that the learned trial judge did not state the starting point she applied in arriving at the sentence but showed a balancing of aggravating and mitigating factors and the weight she attached to them. The cases of **Constantine Atkinson v R** [2013] JMCA Crim 25 and **Seian Forbes and Tamoy**

Meggie v R [2016] JMCA Crim 20 were referred to, where sentences of six and seven years respectively were imposed for the similar offence of buggery.

Discussion and analysis

[29] The Charter of Fundamental Rights and Freedoms in the Constitution of Jamaica at section 16 deals with the right to due process. By virtue of this provision the appellant was entitled to a fair hearing within a reasonable time (section 16 (1)), and to be given, within a reasonable time after judgment, a copy of any record (section 16 (7)). The delay of almost four years in the production of the transcript of the summation was followed by a delay of a further 10 months for the production of the transcript of the evidence cannot be regarded as reasonable. Further, this delay in the production of the transcript meant that the appellant could not be said to have had a fair hearing in a reasonable time. Another provision deemed relevant to this matter is section 16(8), which entitles the appellant to have his conviction, and sentence reviewed by a superior court, which, while not specifying a time period, has been recognised to include a requirement of "reasonable time" as in subsections (1) and (8) (see para. [21] **Evon Jack v R**). In effect, this matter came on for review within six months of receipt of the full transcript and this cannot be said to be entirely unreasonable. However, in the circumstances, it was indisputable that the cumulative effect of the delay in the preparation and production of the full transcript was egregious and in breach of the appellant's constitutional right to a hearing of his appeal within a reasonable time.

[30] Ultimately, the delay in the production of the full transcript meant that the appellant had served a substantial portion of his sentence and the date for his early release was within days of the hearing of his appeal, although the fact that he was an appellant meant that the sentence was not deemed to have commenced. At the time of the hearing, the court was in possession of the transcript and his appeal could be properly, fully and fairly considered. This was significant in determining the appropriate redress for the identified breaches of the appellant's constitutional rights.

[31] The challenge to the conviction based on the adequacy of the evidence and the directions given in relation to the issue of identification was entirely without merit. The evidence was that not only did the appellant and TC go to the campus for rugby training together, after which the appellant instructed TC to await him upstairs but after the act had taken place TC said they walked together back to the yard where they both resided. Even if there was only moonlight that assisted TC to see his assailant who went behind him to commit the act, the fact that once the act had ceased, they walked back to the yard together meant that the identification evidence was not as abysmal as Mr Senior-Smith contended.

[32] The learned trial judge noted that this was a case of recognition and went on to give entirely appropriate unexceptional directions on the issue of identification. She warned the jury of the special need for caution and referenced the reason for such caution given the possibility for mistaken identification even in recognising persons well known. In reviewing the statement made by the appellant, the learned trial judge pointed out the possible reason as well as a possible motive advanced by the appellant as to why TC was making up a story against him. In the circumstances, there was no basis on which we could interfere with the conviction based on this complaint on the issue of identification.

[33] The complaint in ground 2 concerned the fact that in her summation the learned used the words "bottom" and "anus" interchangeably. In his evidence-in-chief, TC referred to his bottom as the place where the appellant had placed his penis. He described how the appellant pulled his pants and underpants down to around his foot, told him to lie on his belly on the floor and got on his back before placing his penis into TC's bottom. Under cross-examination the following exchanges took place between, defence counsel, Mr Steven Jackson ('Mr Jackson') and TC:

> "Q. We are at Kingston College now. You stated that just before [the appellant's] penis entered your anus you were laying on the floor?

A. Yes, sir"

....

Q. TC, I'm going to make a few suggestions to you. I'm going to suggest to you—I ask that you either agree or disagree with my suggestions, okay? I'm going to suggest to you TC that at no point in time did my client insert his penis into your anus?

A. Disagree."

From this stage, it was apparent that not only was there evidence that the appellant had placed his penis in TC's anus, but the words "anus" and "bottom" were being used interchangeably to refer to the part of the body in which the appellant's penis was inserted.

[34] The evidence of the doctor was replete with references to the examination of TC's anus and her findings that led her to conclude that there had been some sexual activity wherein a penis had come in contact with the anus. The learned trial judge was faithful in referencing the words as they had been used by the witnesses and cannot be faulted for so doing. Further, it would be unfair to say she would have confused the jury rehearsing the evidence largely in the manner in which it was given.

[35] The learned trial judge defined the offence of buggery as occurring when a male person puts his penis into the anus of another person. There can be no complaint as to the correctness of that definition. It is noted that after reviewing the evidence the learned trial judge stated, "the elements of buggery are simply that, he placed his penis into the bottom of [TC]". In the circumstances where the word "bottom" was clearly used interchangeably with "anus", we cannot agree that in making this statement the learned trial judge had redefined the "constituent raison d'etre of the offence", as Mr Senior-Smith submitted. There can be no dispute that the directions were tailored in keeping with the evidence given and it cannot properly be said that the jury would not have been able to understand their task in determining the guilt or innocence of the appellant. Accordingly, we found that the appellant had not been prejudiced by the manner in which

the learned trial judge used the words bottom and anus interchangeably. There was no merit in this ground either.

[36] Our finding was that there was no merit to the grounds of the appeal challenging the conviction. Mr Smith-Senior was on good ground in respect of the delay. There was, however, no basis to accede to Mr Smith-Senior's request for the conviction to be quashed as a remedy for the breaches of his constitutional right in particular to have his appeal heard in a reasonable time. An appropriate remedy was, however, required. In our view, the time spent awaiting the production of the transcript to facilitate the timely disposal of his appeal warranted the granting of his application to appeal his sentence. Further, by way of redress, a reduction of one year from the sentence imposed was considered appropriate with a sentence of six years' imprisonment at hard labour substituted which was reckoned to have commenced on 23 November 2018, the date on which it was imposed.

[37] It was for these reasons that we made the orders at [2] above.