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NOTICE TO PARTIES OF THE COURT'S MEMORANDUM OF REASONS FOR DECISION

SUPREME COURT CRIMINAL APPEAL NO 60/2018

SIMON DALEY v R

TAKE NOTICE that this matter was heard by the Hon Mrs Justice McDonald-Bishop JA, the Hon Ms Justice Simmons JA and the Hon Mrs Justice Dunbar Green JA on the 30th day of May 2023, with Mrs Mischel Morrison for the appellant and Miss Claudette Thompson and Miss Paula Sue Ferguson for the respondent.

TAKE FURTHER NOTICE that the court's memorandum of reasons as delivered orally in open court by the Hon Mrs Justice Dunbar Green JA is as follows:

[1] On 5 February 2018, the appellant, Simon Daley, pleaded guilty to the offence of having sexual intercourse with a person under the age of 16 years in the Circuit Court for the parish of Saint Ann. He was later sentenced to 15 years' imprisonment at hard labour.

[2] The offence was committed against the appellant's stepdaughter who was 14 years old at the time. It occurred on 19 May 2013, at the home at which the complainant lived with her siblings, mother, and the appellant. Her mother was away at the time.

[3] On 21 June 2018, the appellant filed a notice of application for permission to appeal the sentence imposed on him. On 12 April 2021, a single judge of this court granted him leave to appeal the sentence on the bases that the learned judge erred when she considered that she was constrained by law to impose the prescribed mandatory minimum sentence for the offence, under the Sexual Offences Act, and that she was unable to give him credit for the time spent on pre-sentence remand.

[4] At the hearing of the appeal, counsel appearing for the appellant, Mrs Morrison, argued a single ground of appeal - that the sentence was harsh and excessive. She contended that: (a) based on the circumstances of this case, the sentence imposed could not be justified in law; and (b) the learned judge did not temper justice with mercy as the appellant's guilty plea was not taken into consideration. Both aspects were conveniently dealt with together, as follows.

[5] Mrs Morrison submitted that the learned judge misdirected herself on the law and, therefore, failed to give any discount for the appellant's guilty plea. She referred to section 42D(3) of the Criminal Justice (Administration) (Amendment) Act 2015 ('the Act') which makes provision for a sentence reduction on guilty pleas. Counsel submitted that the appellant pleaded guilty before trial and was, therefore, entitled to a discount in accordance with section 42(D) of the Act. She relied on **Meisha Clement v R** [2016] JMCA Crim 26, paras. [36]-[38], where Morrison P affirmed the principle that a plea of guilt must "attract a specific consideration by the court". Counsel contended that, although the learned judge mentioned the relevant sentencing principles, aggravating factors, and personal mitigation, she failed to demonstrate how she arrived at the sentence. **Meisha Clement v R** was also referenced for guidance on the correct approach to sentencing.

[6] A brief outline of the relevant section of the Act is useful. Section 42D, as far as is relevant, provides:

> "(1) Subject to the provisions of this Part, where a defendant pleads guilty to an offence with which he has been charged, the Court may, in accordance with subsection (2), reduce the sentence that it would otherwise have imposed on the defendant, had the defendant been tried and convicted of the offence.
>
> (2) Pursuant to subsection (1), the Court may reduce the sentence that it would otherwise have imposed on the defendant in the following manner –

(a) where the defendant indicates to the Court, on the first relevant date, that he wishes to plead guilty to the offence, the sentence may be reduced by up to fifty *per cent*;

(b) where the defendant indicates to the Court, after the first relevant date but before the trial commences, that he wishes to plead guilty to the offence, the sentence may be reduced by up to thirty-five *per cent*;

…

(3) Subject to section 42E [which deals with reduction for murder falling within a specified category], and notwithstanding the provisions of any law to the contrary, where the offence to which the defendant pleads guilty is punishable by a prescribed minimum penalty the Court may –

(a) reduce the sentence pursuant to the provisions of this section without regard to the prescribed minimum penalty; and

(b) specify the period, not being less than two-thirds of the sentence imposed, which the defendant shall serve before becoming eligible for parole.

(4) In determining the percentage by which the sentence for an offence is to be reduced pursuant to subsection (2), the Court shall have regard to the factors outlined under section 42 , as may be relevant."

[7] At pages 58-59 of the transcript, the learned judge remarked:

"…Section 10 of the Sexual Offences Act prescribes the statutory maximum of life imprisonment. It also prescribes a fifteen-year statutory minimum where there is an adult in

> authority charged for the offence [sic]. The normal range is 15-20 years, but the Court cannot go below 15 years. So, while I consider this to be the relevant date, I see no reason to depart for [sic] 15 years as prescribed by Statute."

[8] Contrary to that pronouncement by the learned judge, section 42D(3) of the Act permitted her to impose a sentence that was below the statutory mandatory minimum sentence of 15 years' prescribed in section 10 of the Sexual Offences Act, on account of the appellant's plea of guilt. We, therefore, agreed with Mrs Morrison that the learned judge erred on that point, which the Crown also conceded.

[9] Having reviewed the judge's sentencing remarks, we also agreed with Mrs Morrison that, although the learned judge identified aggravating and mitigating circumstances peculiar to the offence and the appellant, she did not demonstrate how they impacted the starting point of 15 years' imprisonment, which she utilised.

[10] Mrs Morrison contended further that, although the learned judge mentioned the fact that the appellant spent three months on pre-sentence remand, she failed to show, arithmetically, how she had given him credit for that time.

[11] Having reviewed the transcript, we noted that, after deciding that she was unable to impose a sentence below the prescribed mandatory minimum, the learned judge, at page 59, remarked:

> "So, the usual starting point remains at 15 years. Now, taking into account your time served, what I will not do, Mr Daley, is increase the sentence, looking at all of the factors. The sentence remains the statutory minimum which is 15 years' imprisonment at hard labour on count three."

[12] Several authorities from the Privy Council and this court, including **Callachand & Anor v The State** [2008] UKPC 49, **Meisha Clement v R** and **Daniel Roulston v R** [2018] JMCA Crim 20 make it plain that the sentencing judge must give full credit for time spent on remand, and this must be clearly shown as an arithmetical deduction. This was not done by the learned judge.

[13] On the basis of the errors that were identified at paras. [8] and [10] above, it befell us to consider the appellant's sentence afresh. See section 14(3) of the Judicature (Appellate Jurisdiction) Act, which gives this court the power to quash a sentence and pass such other sentence as warranted in law by the verdict. See also **Meisha Clement v R** in which this court reaffirmed the principle enunciated in **R v Ball** (1952) 35 Cr App Rep 164 as to the circumstances in which the appellate court will disturb a sentence passed by a lower court.

[14] The new sentence was calculated in the following manner:

(a) A starting point of 15 years was adopted as the learned judge did. Inherent in this starting point was the breach of trust by the appellant as a person in authority. Therefore, to avoid double-counting, it was not treated as an aggravating factor.

(b) The starting point was adjusted, taking into account aggravating factors and elements of personal mitigation identified by the learned judge. We took account of the following aggravating factors, which would result in an upward adjustment to the starting point, resulting in a sentence at the upper limit of the sentencing range of 20 years: (i) a significant degree of premeditation; (ii) the disparity in age between the complainant (she being 14 years old) and the appellant (a mature man of 37 years); (iii) the psychological impact of the offence on the victim; and (iv) the prevalence of sexual offences in the society. The following factors were noted in mitigation of sentence, resulting in a downward adjustment of the figure: (i) the appellant's previous good character; (ii) the absence of any previous convictions; (iii) a report that the appellant was a hard worker; and (iv) a report that the appellant provided financial and other support for the complainant since she was three months old.

(c) Having weighed the aggravating and mitigating factors, we found that they were evenly balanced. In the result, we concluded that an appropriate provisional sentence would be 15 years' imprisonment. This would accord with the sentence imposed by the learned judge.

(d) As a next step, which was omitted by the learned judge, we considered the level of discount that would be reasonable for the guilty plea. In doing so, we took into account the fact that the appellant had first pleaded guilty in 2017 but withdrew that plea. He then pleaded guilty again in February 2018 but also attempted to withdraw that plea. We agreed with counsel for the Crown that his having vitiated the earlier plea, it could not be said that he pleaded guilty on the first relevant date, which, under the Act, entitles an offender to a consideration of a discount on his sentence of up to 50%. Rather, as the relevant plea of guilt came before trial, he was entitled to consideration of a maximum discount of 35%.

(e) Next, we considered relevant factors under section 42H of the Act, including (a) whether "the reduction of the sentence ... would be so disproportionate to the seriousness of the offence or, so inappropriate... that it would shock the public conscience; and (b) the circumstances of the offence, including its impact on the [victim]...". Having done so, we considered a discount of 25% percent to be reasonable.

(f) This calculation resulted in a sentence of 11 years and four months' imprisonment. When full credit of four months, for time spent on pre-sentence remand, was applied, the sentence amounted to 11 years' imprisonment. This sentence, was found

to be commensurate with the offending and, therefore, proportionate.

(g) In keeping with section 42(D)(3)(b) of the Act, we concluded that the appellant should serve nine years' imprisonment before he becomes eligible for parole.

[15] Accordingly, the orders of the court are as follows:

1. The appeal against sentence is allowed.

2. The sentence of 15 years' imprisonment at hard labour is set aside, and substituted therefor is a sentence of 11 years' imprisonment at hard labour with the stipulation that the appellant serves nine years before being eligible for parole, four months having been credited for time spent in pre-sentence custody.

3. The sentence is reckoned as having commenced on 8 June 2018, the date on which it was imposed.