JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 62/07

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A.

DWAYNE DRUMMOND v R

Donald Bryan for the applicant/appellant

Mrs. Diahann Gordon-Harrison, Deputy Director of Public Prosecutions and Mrs. Suzette Whittingham-Maxwell, Crown Counsel for the Crown

8th & 9th February 2010

ORAL JUDGMENT

PANTON, P.

[1] This is an application for leave to appeal against conviction and also an appeal against sentence. Mr. Dwayne Drummond was convicted in the Circuit Court for the parish of Saint James on the 23rd day of April, 2007 of the offence of carnal abuse. He was sentenced to serve a term of twelve years imprisonment at hard labour. The Court recommended that he be sent to the Richmond Farm Prison with a view to his learning a trade there. There was a further order for him to receive two years supervision by an aftercare probation officer after serving twelve years.

[2] The circumstances of the offence are that he had sexual intercourse with a six year old girl. This offence was committed on the 8th day of March 2006.

[3] Mr. Drummond applied for leave to appeal. The single judge refused the application in relation to conviction. In so doing, the single judge stated that the trial judge had given full directions to the jury on the issues of identification and credibility and had given specific instructions in respect of the age of the complainant and the nature of the offence. However, in respect of the sentence, the single judge questioned whether the order for the accused to serve twelve years imprisonment followed by two years supervision by an aftercare probation officer was permissible under the Probation of Offenders Act. In that respect, the single judge gave leave to appeal against sentence.

[4] Mr. Donald Bryan appearing for the applicant in respect of the application for leave to appeal against conviction, informed the court that having reviewed the transcript, he was not in a position to urge any ground which could have resulted in the conviction being overturned. Like the single judge, he could not fault the trial judge so far as the directions in respect of the critical issues in the case were concerned. However, he challenged the making of the supervision order, stating that the supervision order is usually applied where a non-custodial sentence is imposed and submitted that the making of the supervision order placed the appellant in what he termed a double-jeopardy situation, exposing him to the risk that if he were to violate the order, he may find himself being

committed to prison. He further submitted that the supervision order is one that has to be made immediately after conviction, not twelve years later.

[5] So far as Mr. Bryan's concession is concerned in respect of conviction, we are at one with him in saying that there is absolutely no basis on which the conviction could be faulted, and so in that respect the application for leave to appeal against conviction is refused. In respect of the sentence, quite apart from the addition of the supervision order to the term of imprisonment, Mr. Bryan also submitted that a sentence of twelve years imprisonment was manifestly excessive. In his argument, he said that the learned trial judge had indicated that the law provided for a sentence of ten years for an attempt at the offence and it was primarily on that basis that the sentence of twelve years imprisonment was imposed. He submitted that the learned trial judge was seemingly influenced by that comment that she made, and failed to exercise her discretion in considering a lower sentence which was open to her to impose. His submission was that the appellant was twenty-one years old at the time of the commission of the offence, and the fact that the judge recommended that the sentence be served in conditions that were less harsh than the norm, he said, is an indication that the sentence imposed by the learned trial judge was manifestly excessive.

[6] We have noted that the appellant was in fact twenty-three years old at the time of the commission of the offence, he having been born according to the

antecedents, on the 8th January 1983 at the Cornwall Regional Hospital in Montego Bay. We are at one with Mr. Bryan in his view that this is not the ideal circumstances for the making of a supervision order.

[7] The Criminal Justice (Reform) Act which was passed in 1978 provides in section 9 (1) that -

> "... where a court passes on an offender a suspended sentence the court may make a suspended sentence supervision order (hereinafter referred to as 'a supervision order') placing the offender under the supervision of a probation officer for such period as may be specified in the order not exceeding the period during which the sentence is suspended."

[8] Section 9 (2) provides that a supervision order shall specify the place of residence of the offender and the probation officer mentioned in the previous subsection shall be the probation officer appointed or assigned to the area in which the offender resides the section generally provides for the offender to keep in touch with the probation officer and to follow instructions given by the probation officer not to change address without informing the probation officer and so forth the section also provides that if an offender,

> "... has failed without reasonable cause to comply with any of the requirements of the supervision order, the court may, without prejudice to the continuance of the order, impose on him a fine not exceeding one hundred dollars."

We won't say anything on the question of the adequacy of the fine. Of course, in 1978 when this law was passed one hundred dollars was an appropriate fine.

[9] The true position is that from what we have seen and what has been brought to our attention a supervision order is provided for only in this law and it is restricted to the making of a suspended sentence order. In this case, there is no question of a suspended sentence and so, the learned trial judge was in error in making a supervision order. In the circumstances, that order has to be set aside. So far as the term of imprisonment is concerned, we are firmly of the view that the learned trial judge took into consideration all the relevant factors. These she clearly stated at pages 73 – 76 of the transcript. She adverted to the fact that this offence is prevalent islandwide and indeed there were several such offences down for trial at the very circuit at which she was presiding. There can be no doubt, that where a man, aged twenty-three years, is convicted for this sort of offence involving a girl aged six years, imprisonment is the answer. Because of the prevalence of the offence, sentences have to be imposed with the aim of deterring those who are minded to interfere in this way with babies. We note that learned counsel, (not Mr. Bryan) who appeared at the trial conceded that the complainant was in effect virtually scarred for life by this trauma that she was put through. That in itself is an indication that the learned trial judge was perfectly right in what she did.

[10] In the circumstances the order is that the application for leave to appeal against conviction is refused. The appeal against sentence is allowed, in part. The order for supervision by an aftercare probation officer after the sentence of

imprisonment has been served is hereby set aside. The sentence of twelve years imprisonment is affirmed and that sentence is to commence from the 23rd July 2007.