[2020] JMCA Crim 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 41/2017

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

HORACE GORDON v R

Isat Buchanan and Ms Alexandra LaBeach for the applicant

Mrs Maxine Dennis-McPherson for the Crown

15 and 24 January 2020

BROOKS JA

[1] On 31 March 2017, Mr Horace Gordon pleaded guilty, in the Circuit Court for the parish of Saint Catherine, to the offence of having sexual intercourse with a person under the age of 16 years. The girl was aged 15 years at the time of the offence, in April 2015, while Mr Gordon was 22 years old at that time. The sexual encounter took place at the high school, which the girl attended, while classes were in session. Mr Gordon was on the premises by virtue of his association with the school. He is a past student of the school and at the time was assisting its drama club.

[2] On 21 April 2017, the learned judge, before whom Mr Gordon tendered his guilty plea, sentenced him to eight years and nine months imprisonment at hard labour. She treated Mr Gordon as a person in authority, but nonetheless imposed a sentence that was less than the mandatory minimum sentence of 20 years. She, however, did not specify any minimum period that Mr Gordon should serve before becoming eligible for parole.

[3] Mr Gordon is nonetheless aggrieved by the sentence and has applied to this court for permission to appeal from his sentence. One of his main complaints is that the learned judge accepted that he was an assistant teacher and therefore a person in authority, for the purposes of considering a mandatory minimum sentence.

Application to adduce fresh evidence

[4] Counsel, Mr Buchanan, who appeared for Mr Gordon, sought and secured permission to adduce fresh evidence on behalf of Mr Gordon. Mrs Dennis-McPherson, for the Crown, did not object to the application. The effect of the fresh evidence is that Mr Gordon was not employed to the school, in any capacity whatsoever, and in particular was not an assistant teacher, as was indicated in the case that the prosecution had outlined to the learned judge, when Mr Gordon entered his guilty plea. The desire to attack this particular aspect of the prosecution's case is that there is a mandatory minimum sentence for persons in authority, such as teachers, who commit this offence.

[5] It is to be noted that at the time of the outline of the prosecution's case to the learned judge no evidence was adduced to refute the assertion that Mr Gordon was an

assistant teacher at the time of the offence. During the address in mitigation, defence counsel who appeared for Mr Gordon at that time (not Mr Buchanan), sought to correct the information about Mr Gordon being an assistant teacher, by saying that Mr Gordon was only a coach for certain individuals in the school's drama club. That effort by defence counsel, meant that Mr Gordon was aware of the prosecution's assertion and, therefore, he did have an opportunity to contradict it. It cannot, therefore, be said that the new information was not available at the time. This court, nonetheless, allowed the fresh evidence in the interests of justice, especially because of the impact of the section requring a minimum sentence in circumstances where a person is said to be in authority. Section 10 of the Sexual Offences Act is the relevant provision. It states:

> "10.-(1) Subject to subsection (3), a person who has sexual intercourse with another person who is under the age of sixteen years commits an offence.
>
> …
>
> (4) **Where the person charged with an offence under subsection (1) is an adult in authority, then, he or she is liable upon conviction in a Circuit Court to imprisonment for life, or such other term as the Court considers appropriate, not being less than fifteen years**, and the Court may, where the person so convicted has authority or guardianship over the child concerned, exercise its like powers as under section 7(7).
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> (5) **Where a person has been sentenced pursuant to subsection (4), then, in substitution for the provisions of section 6(1) to (4) of the Parole Act, the person's eligibility for parole shall be determined in the following manner: the Court shall specify a period of not less than ten years which that person shall serve, before becoming eligible for parole**.
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> (6) **In this section, 'adult in authority' means an adult who—**

> **(a) is in a position of trust or authority in relation to a child**;
> (b) is a person with whom a child is in a relationship of dependency; or
> (c) stands in *loco parentis* to a child." (Emphasis supplied)

Neither section 10(3) nor section 7(7), referred to in that extract, is relevant for these purposes. The former deals with a defence to the offence and the latter, to the removal of the victim of the offence from the control of the offender.

The application for leave to appeal

[6] In his application for leave to appeal, Mr Gordon filed a proposed ground that the sentence imposed was manifestly excessive. The proposed ground states:

> "That the sentence of nine years is manifestly excessive given the Appellants: [sic] guilty plea, his clean criminal record his age and good Social Enquiry Report; amongst other considerations."

[7] A single judge of this court considered Mr Gordon's application but refused it. Mr Gordon has sought to renew the application before the court. Mr Buchanan sought leave, and was permitted, to argue a supplemental ground which expanded on the original ground. The supplemental ground states:

> "The Sentence of the Court Imposed [sic] on the appellant Horace Gordon of nine (9) years [sic] imprisonment is manifestly excessive and cannot be supported in all the circumstances; **In that**:
>
> a. The Learned Sentencing judge '**LSJ**' erred when she found that Mr. Horace Gordon was a person in authority as he was never employed by the Ministry of education [sic] or Johnathan Grant

High school as an assistant teacher pursuant to the Education Act.

b. The LSJ erred in law when she failed to apply the Criminal Justice Reform Act, Section 3(1) and (2) stating only that the disparity between the age of the complainant and the appellant of (8) years justified the applicant's exclusion from the benefit of the provisions of the Act.

c. The LSJ failed to take into account the fact that the appellant was himself a victim of sexual assault and was recommended by the social inquiry report that psychosomatic therapy treatment was prudent when considering the appropriate sentence for the appellant.

d. The LSJ erred in finding as a fact that the appellant had the authority to pull the complainant out of class and further found that he removed her from class while class was in session to commit the offence." (Bold type as in original)

[8] Mr Buchanan argued that the learned judge erred:

a. in the starting point that she selected;

b. in accepting that Mr Gordon was a person in authority;

c. by overstressing the age difference between Mr Gordon and the girl;

d. by double–counting the aggravating factors;

e. by failing to consider some relevant mitigating factors; and

f. by failing to give Mr Gordon the most favourable view of the facts and circumstances of the case.

[9] Mrs Dennis-McPherson agreed with some of Mr Buchanan's points. She also contended that the learned judge arrived at a sentence which was not in line with other sentences previously imposed for this offence. Learned counsel asserted that the learned judge arrived at a manifestly excessive sentence because she:

a. used too high a starting point; and,

b. did not explain why she did not give the full discount for the guilty plea, as authorised by the Criminal Justice (Administration) (Amendment) Act, 2015.

[10] Before embarking on an analysis of the application and the submissions in respect of it, it must be stated that the learned judge made a commendable effort to apply the principles and procedure set out in **Meisha Clement v R** [2016] JMCA Crim 26 and the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts (the Guidelines). It is also necessary to state the well known principle, again set out in **Matthew Hull v R** [2013] JMCA Crim 21, that the appellate court is not entitled to disturb a sentence on the basis only that it would have imposed a different one. Only a departure from principle or a sentence which is manifestly excessive can justify such an interference.

[11] As stated above, the sentence for this offence is provided by section 10 of the Sexual Offences Act. It states that where the offender is a person in authority, a minimum sentence of 15 years imprisonment should be imposed, with a condition that the court

should specify that a period of 10 years should be served before the offender shall become eligible for parole.

[12] The recent approach to sentencing, based on **Meisha Clement** and the Guidelines, has become the standard to be used in sentencing. The approach was admirably summarised by McDonald-Bishop JA in **Daniel Roulston v R** [2018] JMCA Crim 20, and there is no need to use words other than hers. She said, at paragraph [17] of her judgment:

> "Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:
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> a. identify the sentence range;
> b. identify the appropriate starting point within the range;
> c. consider any relevant aggravating factors;
> d. consider any relevant mitigating features (including personal mitigation);
> e. consider, where appropriate, any reduction for a guilty plea;
> f. decide on the appropriate sentence (giving reasons); and
> g. give credit for time spent in custody, awaiting trial for the offence (where applicable[)]."

[13] The Guidelines state that the normal range for sentences for this offence is 15 – 20 years and that the usual starting point is 15 years. Where the offender is a person in authority, there must necessarily be an increase from that starting point to account for that aggravating feature. The learned judge identified the range of sentences, but used a starting point of 20 years based on, what she determined to be, the aggravating factors in the case. She found that he had abused his authority as a teacher by:

a. taking the child out of class; and

b. having sexual intercourse with her on the school compound and during class time.

She, therefore, rolled items b and c, from the list set out in **Daniel Roulston v R**, into one. It cannot be said that that is a major flaw in the procedure. It also cannot be said that the period that she added for the aggravating features was out of line with the circumstances or wrong in principle. Mr Gordon did abuse, not only his position in relation to the child, but also in relation to the school.

[14] Mr Buchanan made much of the fact that Mr Gordon was considered a person in authority for the purposes of assessing the aggravating circumstances of the offence. The reasons for rejecting that approach have been addressed earlier in this judgment. It bears repeating that Mr Gordon cannot properly deny that status as he was at least a coach for the drama club, or persons in that club, and was recognised in the school environment as such. Defence counsel, during her mitigation speech, properly conceded that he was a person in authority. She is recorded at page 18 of the transcript as having made that concession. She said, in part:

> "M'Lady, I am stating that he cannot totally say that he was not a person in authority. He was, in fact, a person in authority."

That aspect of the sentencing process cannot be disturbed.

[15] The learned judge, thereafter, applied the mitigating features that are unique to Mr Gordon, namely the excellent report about his progressive attitude, general

commendable conduct and contrition, as contained in the Social Enquiry Report. She used those positives, as well as the fact that he has a young child, to reduce the 20 years "starting point", to 15 years.

[16] Mr Buchanan submitted that the learned judge double-counted the aggravating factors while considering the mitigating factors. Along the lines of that submission, Mr Buchanan submitted that the learned judge did not take Mr Gordon's age into account.

[17] Mr Buchanan's submission about the double-counting is not a completely accurate description of the learned judge's reasoning. Although the learned judge did not, in specific terms, double-count the aggravating features, by again considering them, after arriving at the 20 year starting period, she used the factor of his authority, his education and the fact that he was not a sheltered person, to militate against one of Mr Gordon's mitigating factors, namely his youth. She did this in this way, at pages 35-36 of the transcript:

> "Now I note, as your lawyer has said, that you were 22 years old at the time. So, on the one hand, that may be viewed as young; but, on the other hand, you take your individual as you find him, 22, you were much older than this 14-year-old child. But not only that, the information that I have on you shows me that you were an individual who knew better. The Social Enquiry Report that we have shows that you would often reprimand your niece for associating with older men. So, at 22, you knew better.
>
> …You are not a sheltered individual. So you were an exposed individual, from what I see, and in any event, whether I am right or wrong on that, I know for sure that you yourself knew better. So, the age, your position, you were an assistant teacher."

She later said again that ,"it is clear that your superior position did factor into this incident".

[18] It may also be said that Mr Buchanan is not correct in saying that the learned judge did not consider Mr Gordon's age. She did so, although not to his favour, in respect of the gap in the age between the girl and Mr Gordon. His youth was also considered in the context of his pursuing a course to enhance his education.

[19] Nonetheless, she reduced the 20 years to 15, to account for the mitigating factors. It cannot be said that that was a stingy reduction. Bearing in mind the usual range for sentences for the offence, that reduction cannot be flawed.

[20] The learned judge then applied a discount of 40%, for his guilty plea, and arrived at a figure of nine years. Thereafter, she credited him with the three months that he had spent in custody prior to sentence. That reduction resulted in the sentence of eight years and nine months that she imposed.

[21] The only departure from the standard approach, is that the learned judge did not explain her use of a discount of 40%, instead of the maximum figure of 50% allowed by section 42D(2)(a) of the Criminal Justice (Administration) (Amendment) Act, 2015. It may well be that she thought that Mr Gordon was already getting a benefit for not having had to serve the statutory minimum sentence that she could have imposed. She, however, did not say so. It should be noted that the discount is available even where a statutory

minimum sentence is prescribed (see section 42D(3)(a) of the Criminal Justice (Administration) (Amendment) Act, 2015).

[22] Before deciding whether that departure is sufficiently egregious to warrant being set aside, the cases cited by counsel will be considered.

[23] Learned counsel have pointed out that there are a number of cases in which significantly shorter sentences were imposed for similar offences, even where the offenders were far older than Mr Gordon and the age gap between the offender and the child was much greater. Those cases were of little assistance to the court. Of the three cases cited by Mrs Dennis-McPherson, two were, in fact, her reporting of first instance sentences. This court did not have the benefit of the transcript in those cases to show what motivated the sentencing judge in each instance. The third was not a case involving this offence and so is not comparable.

[24] The case of **Stephen Collins v R** [2016] JMCA Crim 17 does, however, provide useful guidance. Mr Collins was 59 years old when he committed the offence of having sexual intercourse with a person under 16 years. The child was his stepdaughter, so he was properly treated as a person in authority. He impregnated her. Mr Collins pleaded guilty to the offence. The judge at first instance sentenced him to 15 years' imprisonment, with a direction that he should not be eligible for parole until 10 years had elapsed. That sentence was in accordance with the stipulation in the Sexual Offences Act and was upheld in this court.

[25] It must also be said that the judges who created the Guidelines did so after careful considersation, and arrived at the figures, mentioned above, for the usual range and the usual starting point. The learned judge followed them.

[26] Nonetheless, Mr Gordon's age and excellent antecedents do suggest that he should have the full discount allowed by the statute. That factor warrants this court adjusting the learned judge's sentence to that extent. Contrary to the submissions of Mrs Dennis-McPherson, the learned judge followed the correct procedure in applying the discount for the guilty plea, after, and not before, considering the aggravating and mitigating factors. In this review, the learned judge's discount for the guilty plea should be adjusted from 40% to 50%. The result would be a sentence of seven years and six months. The credit of three months, for the time that Mr Gordon spent in custody prior to sentence, should then be applied. That results in a sentence of seven years and three months.

[27] Having chosen to impose a sentence that was below the statutory minimum, it was impossible for the learned judge to have stipulated, according to subsection (5) of the Sexual Offences Act, that he should serve a minimum of 10 years imprisonment before being eligible for parole. The learned judge made no mention of the stipulation, nor did she stipulate any minimum period in place of the 10 years prescribed by subsection (5). That situation will not be disturbed. There will be no stipulation by this judgment of any minimum period that Mr Gordon should serve before being eligible for parole. The usual provisions of section 6(1) to (4) of the Parole Act should, therefore, apply.

[28] There is no doubt that this sentence will have a dramatic effect on Mr Gordon's life. Hopefully he will be able to recover from this setback. Hopefully also, his situation will be a warning to young men who are aware of his situation. It is, however, not a new warning. Panton P gave such a warning to men who consider having sexual intercourse with underaged girls. He said at page 4 of his judgment in **R v Rayon Mason** (unreported) Court of Appeal Jamaica, Supreme Court Criminal Appeal No 56/2007, judgment delivered 10 June 2008:

> "We trust that the young men, and indeed the old men too, because old men are doing it, will recognize that girls are to be left alone and those who interfere with them sexually can expect nothing but imprisonment. We urge the courts below not [to] fail to impose imprisonment in these situations. If men will not hear, then, they will feel."

[29] Accordingly, the orders are:

a. the application for leave to appeal sentence is granted;

b. the hearing of the application for leave to appeal is treated as the hearing of the appeal;

c. the appeal is allowed;

d. the sentence imposed by the learned sentencing judge is set aside and a sentence of seven years and three months is substituted therefor;

e. the sentence is to be reckoned as having commenced on 21 April 2017, the date that the appellant was originally sentenced.