[2024] JMCA Crim 39

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2023CR00030

JP v R

Miss Jacqueline Cummings and Stephen Palmer instructed by Archer Cummings & Co for the appellant

Miss Kathy-Anne Pyke and Miss Tashell Powell for the Crown

7 and 15 October 2024

Criminal law - Sentence - Imposition of statutory minimum sentence pursuant to section 6(1)(b) of the Sexual Offences Act - Grievous sexual assault - Child offender - Certificate issued pursuant to section 42K of the Criminal Justice Administration (Amendment) Act - Whether compelling reasons that would render prescribed sentence manifestly excessive and unjust

ORAL JUDGMENT

DUNBAR GREEN JA

Introduction

[1] Section 6(1)(b)(ii) of the Sexual Offences Act ('the Act') prescribes a minimum sentence of 15 years' imprisonment for a person convicted of grievous sexual assault in a Circuit Court in Jamaica. Section 6(2) of the Act specifies parole eligibility of not less than 10 years.

[2] JP ('the appellant'), a minor, was convicted of the aforementioned offence in the Circuit Court for the parish of Manchester, following a trial by judge and jury that took place on divers' days between 29 September and 11 October 2022. He was also convicted

for two counts of having sexual intercourse with a person under 16 years. On 8 March 2023, the trial judge, McKenzie J ('the learned judge'), sentenced the appellant to 15 years' imprisonment with eligibility for parole after 10 years for the offence of grievous sexual assault and concurrent terms of 11 months' imprisonment for having sexual intercourse with a person under 16 years. The sentences were ordered to run concurrently. It was also specified that the appellant should serve the sentences at a juvenile correctional facility until he attains the age of 18 years.

[3] With respect to the sentence for grievous sexual assault, the learned judge issued a certificate pursuant to section 42K of the Criminal Justice (Administration) (Amendment) Act, 2015 ('CJAA') ('section 42K certificate') on the basis that, in her opinion, the prescribed minimum sentence was manifestly excessive and unjust in the circumstances. She would have imposed, instead, a sentence of 17 months' imprisonment with parole eligibility after 11 months, given the mitigating factors, which she said far outweighed the aggravating ones.

[4] Section 42K of the CJAA provides for an appeal to a judge of this court where the sentencing judge forms the opinion, based on the circumstances of the case, that the prescribed minimum penalty would be manifestly excessive and unjust. It is convenient to reproduce the provision:

> "42K. – (1) Where a defendant has been tried and convicted of an offence that is punishable by a prescribed minimum penalty and the court determines that, having regard to the circumstances of the particular case, it would be manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty for which the offence is punishable, the court shall –
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> (a) sentence the defendant to the prescribed minimum penalty; and
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> (b) issue to the defendant a certificate so as to allow the defendant to seek leave to appeal to a Judge of the Court of Appeal against his sentence.

(2) A certificate issued to a defendant under subsection (1) shall outline the following namely –

(a) that the defendant has been sentenced to the prescribed minimum penalty for the offence;

(b) that the court decides that, having regard to the circumstances of the particular case, it would be manifestly unjust for the defendant to be sentenced to the prescribed minimum penalty for which the offence is punishable and stating the reasons therefor; and

(c) the sentence that the court would have imposed on the defendant had there been no prescribed minimum penalty in relation to the offence.

(3) Where a certificate has been issued by the Court pursuant to subsection (2) and the Judge of the Court of Appeal agrees with the decision of the court and determines that there are compelling reasons that would render it manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty, the Judge of the Court of Appeal may –

(a) impose on the defendant a sentence that is below the prescribed minimum penalty; and

(b) notwithstanding the provisions of the *Parole Act*, specify the period, not being less than two-thirds of the sentence imposed by him, which the defendant shall serve before becoming eligible for parole."

[5] Under sections 13(1A) and (1B) of the Judicature (Appellate Jurisdiction) (Amendment) Act, 2015 ('JAJAA'), (a "companion measure" as observed in **Paul Haughton v R** [2019] JMCA Crim 29, at para. [6]), "a person who has been sentenced to a prescribed minimum sentence, and who has been granted [a section 42K certificate has] a right of appeal to the Court of Appeal with the leave of the court in the usual way" (see para. [7] of **Paul Haughton v R**).

The appeal

[6] By notice of application for permission to appeal, dated 10 March 2023, the appellant applied for permission to appeal against the sentences imposed by the learned judge. He was granted leave by a single judge of this court, on 10 November 2023, to appeal his sentence for grievous sexual assault based on the section 42K certificate.

[7] The sole ground of appeal is that the sentence of 15 years' imprisonment for the offence of grievous sexual assault is manifestly excessive in all the circumstances.

Factual background

[8] The facts are as gleaned from the summation as we did not have the benefit of the trial transcript.

[9] It was usual for the complainant and her minor cousins to play in the old car which was parked in her aunt's yard. On a date unknown, in 2018, she was playing a game described as "taxi and passenger" with one of her cousins when the appellant came inside the car and requested that she remove her clothes. She asked why and the appellant did not respond. He then sent the cousin, with whom the complainant was playing, out of the car. The appellant then removed her underwear, came on top of her and pushed his penis into her vagina. She told him to stop, and he complied, but then pushed his penis into her mouth. At the time, the appellant was 13 years of age, and the complainant was eight.

[10] There was a second sexual encounter on a date unknown in 2019, while the complainant was again at play in the old car. As noted above, neither incident of having sexual intercourse with the complainant is directly relevant to this appeal.

[11] In his unsworn statement, the appellant denied having committed the offences but stated that he had "sexually touched" the complainant's leg when they played "mother, father, son, girlfriend, boyfriend".

The sentencing exercise

[12] At the start of the sentencing process, the learned judge remarked that the offences were serious, and the penalties reflected their gravity. She observed that the offence of grievous sexual assault carries a maximum sentence of life imprisonment or such other term as the court considers appropriate, being not less than 15 years, the normal range being 15 to 20 years, with the usual starting point of 15 years. She reviewed the evidence, identifying factors which, in her view, weighed against the appellant. These were the prevalence of sexual offences in the country, especially against children; the fact of the virtual complainant being of tender years and a vulnerable victim; and the repeat occurrence of one of the offences within a two-year period.

[13] The learned judge highlighted, as mitigating circumstances, that the appellant (a) was a child up to the date of sentencing; (b) may have been immature at the time the offences were committed; (c) had a favourable community report (he was quiet, mannerly and not viewed as a threat to the community); (d) had lost his mother at the age of 14 years; (e) did not have the benefit of guidance by his father; and (f) was employed since he was 16 years' old. She also considered that the appellant's grandmother had begged for leniency, the complainant said she did not wish to see the appellant go to prison, the community had asked for a non-custodial sentence, and the Aftercare Officer was of the view that the appellant could benefit from counselling. She noted that the appellant requested that his conviction not be recorded, as this would negatively impact his ambition of becoming an international chef. She also observed that there was no gratuitous violence in relation to the offences, and the appellant had no history of offending.

[14] The learned judge rejected defence counsel's submission that it would be appropriate for the appellant to receive a non-custodial sentence under section 76 of the Child Care and Protection Act ('the CCPA') (citing **NF v R** [2020] JMCA Crim 4 and **A v R** [2018] JMCA Crim 26). She ruled that the CCPA did not displace the sentencing regime in the Act under which the appellant was charged, and no distinction or exception was

made for children. The learned judge also considered that under section 3 of the Criminal Justice (Reform) Act, a custodial sentence is to be a last resort.

[15] Having weighed up the aggravating and mitigating factors alongside the principles of sentencing, the learned judge considered that the prevalence and seriousness of the offence warranted "a very short shock". But for the mandatory prescribed minimum penalty of 15 years' imprisonment, she would have imposed 17 months' imprisonment, calculated as follows. A starting point of five years' imprisonment would be adopted, adding three years for the aggravating factors. Six and a half years would then be subtracted on account of the mitigating factors. She would then credit the appellant with one month spent on pre-trial remand. The certificate was issued with these considerations in mind.

[16] At pages 139-140 of the transcript, starting at line six, she remarked:

> "In the circumstances, the only recourse open to me, I find, is to impose the mandatory minimum sentence of 15 years on the accused and …issue the certificate as prescribed under section 42 K of the Criminal Justice (Administration) Amendment Act 2015…to allow the defendant to seek leave to a judge of the Court of Appeal against sentence having regard to the circumstances of this case, including the age of the accused at the time of the commission of the offence…his good Antecedent report, good community report, both SER, the complainant's request that he not be incarcerated, having regard to all these factors I think it is a fit and proper case for the Court to issue a certificate that I am of the view that the prescribed minimum penalty in all the circumstances of this case is manifestly excessive and unjust."

Submissions

[17] Ms Cummings submitted that there was a plethora of mitigating factors which characterised exceptional circumstances on which a case could be made for a sentence far below the prescribed minimum penalty. These included the fact that the appellant was not considered a threat to society and had a prior unblemished record. She also agreed with the learned judge's conclusion that the aggravating factors were outweighed

by the mitigating circumstances. Counsel urged us to reduce the sentence imposed, in line with the factors outlined by the learned judge in arriving at the position that the appropriate sentence ought to have been 17 months' imprisonment.

[18] Counsel referred us to **Tafari Morrison v R** [2023] UKPC 14 in support of her position that a sentence of 15 years' imprisonment would be manifestly excessive and unjust, emphasising that when dealing with child offenders, the court ought to have "regard to the child's best interest". We were also referred to the United Nations Treaty on the Rights of the Child, particularly the provision for young offenders to be treated distinctly from older offenders. Counsel urged us not to place any weight on the appellant's absence of remorse, arguing instead that the mitigating factors provide compelling reasons for a determination that the prescribed minimum penalty is manifestly excessive and unjust.

[19] Counsel for the Crown agreed that the mitigating circumstances provided compelling reasons for imposing a lesser sentence as recommended by the learned judge but disagreed with the computation, including a five-year starting point.

[20] Counsel for the Crown ably assisted us with useful authorities on the matters under consideration. For the section 42K regime, she pointed to **Sweetland Burgess v R** [2023] JMCA Crim 23, **Leopold Matthews v R** [2023] JMCA Crim 36, **Paul Haughton v R** and **Kerone Morris v R** [2021] JMCA Crim 10. She placed heavy reliance on section 65 of the CCPA and **A v R** to illustrate "the best interest" consideration applicable to the sentencing of young offenders. In explaining how this court ought to approach this matter, Counsel for the Crown helpfully referred us to this court's decisions in **Paul Haughton v R** and **Rashane Desouza v R** [2023] JMCA Crim 1, the Bahamian case of **Leroy Rolle v The Attorney Genera**l SCCR App No 182 of 2010, the UK Guideline on Sentencing Children and Young People, and the England and Wales Court of Appeal decisions of **ZA v R** [2023] EWCA Crim 596 and **Kara Baldwin v Regina** [2021] EWCA Crim 417.

[21] Turning to the computation of the sentence, Counsel for the Crown relied on **Garfield Elliott v R** [2023] JMCA Crim 22 and **Miguel Moss v R** [2022] JMCA Crim 10, for the submission that the statutory minimum should have been the starting point and not five years as determined by the learned judge. Counsel for the Crown computed the suggested sentence as follows. Five years and six months should be added for the aggravating factors: the prevalence of the offence; the age of the complainant at the time the offence was committed; the complainant being viewed as a vulnerable victim because of age; the impact of the offence on the complainant overall; the recurrence of the offences; and the breach of trust by the appellant. That figure should then be reduced by 19 years on account of the mitigating factors: the age of the appellant at the time of the incident and trial; a favourable social enquiry report; loss of the appellant's mother when he was 14 years old; absence of a father figure during the appellant's lifetime; absence of violence beyond that inherent in the offence; the appellant's cooperation when told by the complainant to stop; the appellant's previous good character; his expressed acceptance of the court's verdict; and his capacity for reform. A credit of one month should then be applied to the provisional sentence for pre-trial remand. As a result, there should be a sentence of 17 months' imprisonment with parole ineligibility of 11 months and 33 days.

Discussion

[22] In the Sentencing Guidelines for use by Judges of the Supreme Court and the Parish Courts, December 2017 ('the Sentencing Guidelines'), the normal range of sentences for grievous sexual assault is 15 to 25 years, with a usual starting point of 15 years. Neither the prescribed minimum sentence nor the normal range makes any distinction between young and adult offenders. The Sentencing Guidelines do, however, recognise the special provisions that are applicable to children under the CCPA (see Guidelines 3.6-3.7), none of which arises in this case. Children may also benefit from guideline 3.5, which allows for custody to be avoided in an appropriate case where there is personal mitigation. We note in passing, too, that had this offence been prosecuted in the parish court, the maximum penalty would have been three years' imprisonment.

[23] The option open to the learned judge, which she exercised, was to issue a section 42K certificate by which this court may impose a sentence below the statutory minimum prescribed where it agrees with the judge's decision that there are compelling reasons that render the imposition of the prescribed minimum sentence manifestly excessive and unjust. It is necessary to examine the circumstances of this case to determine whether, as envisaged by the Act, it would be "manifestly excessive and unjust" to impose the minimum penalty. The narrow issue is whether it is manifestly excessive and unjust to impose the prescribed minimum sentence of 15 years' imprisonment, given the circumstances in which the offence of grievous sexual assault occurred, and, if so, what would be the appropriate sentence to be imposed on the appellant.

[24] We need not reiterate the learned judge's approach, which, in our view, was substantially a correct application of the guidelines outlined in **Tevino Stewart v R** [2024] JMCA Crim 12 in relation to the section 42K regime, and **Meisha Clement v R** [2016] JMCA Crim 26 and **Daniel Roulston v R** [2018] JMCA Crim 20, in relation to the standard approach to sentencing. Suffice it to say that she, having looked at the prescribed minimum sentence (which was her starting point, although not so expressed) in relation to the aggravating and mitigating circumstances, formed the view that the prescribed minimum penalty was too severe. Hence, her reason for imposing the prescribed minimum sentence and then issuing the section 42K certificate. She then went on to consider what an appropriate sentence would be. Her sentencing approach would have been adequate.

[25] We have already referenced the learned judge's detailed sentencing remarks, and particularly her reasons for advancing the case for a much lower sentence than the prescribed minimum sentence. We must now determine whether there is anything which took this case outside the sentencing range of 15-25 years (see **Leopold Matthews v R**, at para. [109]; **Paul Haughton v R**). In other words, it is imperative that we ascertain and review "the peculiar circumstances of the case" on which the issuance of the

certificate was predicated (see **Paul Haughton v R** and **Sweetland Burgess v R** per Brown JA, at para. [15]).

[26] The appellant's antecedent report revealed that he was born on 25 May 2005. At the date of this offence, he was, therefore, 13 years old and, at the date of sentencing, 17 years old. He was still a child (see section 2(1) of the CCPA). Section 65 of the CCPA mandates that every court dealing with a child is to have regard to the "best interests of the child". This mirrors the United Nations Convention on the Rights of the Child. Counsel for the Crown also referred us to the Child Diversion Act of 2018, which makes provisions for the referral of a child offender in relation to a diversion offence to an appropriate Child Diversion Committee for participation in a child diversion programme. We note, however, that, whereas sexual intercourse with a child under 16 is a diversion offence, the instant offence is not. The broader point, though, is that there is legislative support in this jurisdiction (see also section 75 et seq of the CCPA) for treating child offenders distinctly and less severely than adults.

[27] At paras. [23]–[24] of **A v R**, Brooks JA (as he then was), citing the author DA Thomas and his work, Principles of Sentencing, and Richard Edney and Mirko Bagaric in their work, Australian Sentencing, discusses the implications of youth in the sentencing for particular crimes, and adopts the principles that "youth is one of the most important mitigating factors", therefore, a " young offender ….is usually treated less severely than an older man in similar circumstances", and youth offenders "require their own separate and discrete consideration".

[28] To similar effect, Lawton LJ in **R v Sargeant** (1975) 60 Cr App Rep 74, at page 78, makes the point that a long prison sentence is of little value where 'prison training' is not needed for the rehabilitation of a youth:

> "…Some 20 to 25 years ago there was a view abroad…that short sentences were of little value, because there was not enough time to give in prison the benefit of training. That view is no longer held as firmly as it was. This young man does not want prison training. It is not going to do him any good. It is

> his memory of the clanging of prison gates which is likely to keep him from crime in the future."

[29] In **ZA v R**, at para. 52, the Court of Appeal of England and Wales makes the following observation relative to the sentencing of young offenders:

> "It has been recognised for some time that the brains of young people are still developing up to the age of 25, particularly in the areas of frontal cortex and hippocampus. These areas are the seat of emotional control, restraint, awareness of risk and the ability to appreciate the consequences of one's own and others' actions; in short, the processes of thought engaged in by, and the hallmark of, mature and responsible adults. It is also known that adverse childhood experiences, educational difficulties and mental health issues negatively affect the development of those adult thought processes. Accordingly very particular considerations apply to sentencing children and young people who commit offences. It is categorically wrong to set about the sentencing of children and young people as if they are "mini adults". An entirely different approach is required."

[30] The learned judge attached much weight to the appellant's age both at the time of the offences and at conviction, and properly so as it seemed there was evidence that could possibly connect the commission of the offences to the age and immaturity of the appellant. We do not share the Crown's view that a thirteen-year-old could have had any trust reposed in him in relation to an eight-year-old, such that his offending could be described as a breach of trust. There was also no evidence that this offence was repeated, albeit it was not isolated.

[31] We accept that the appellant, being only 13 years old at the time of the offence, made it unlikely, without more, that he would have had previous convictions or a history of offending. This was confirmed by the social enquiry report. Additionally, he held holiday jobs, was employed up to the date of conviction at age 17 years, received a favourable community report and was not considered a threat to his community. His mother was 16 years' old when he was born, and he never met his father. At age 14, his mother passed away, and he was raised by his maternal grandmother. The Aftercare

Officer opined that he could benefit from counselling. We believe these factors hold significant mitigating value.

[32] We also accept Miss Cummings' submission that by accepting the jury's verdict, the appellant has shown a capacity for reform. His aspiration not to be imprisoned, as it would likely affect his prospect of becoming an international chef, points to him being ambitious, which is an important consideration, along with the "best interest of the child" principle.

[33] The court acknowledges the seriousness of the offence, especially in cases involving sexual offences against children. However, in this case, the offender is also young and vulnerable. Therefore, the focus of sentencing should be on the appellant's vulnerability, and the potential negative impact that a lengthy prison sentence could have on him. While punishment is necessary, the primary objective should be rehabilitation with a view to preventing future offences. The authorities have shown a reluctance to imprison very young offenders for extended periods, emphasising the importance of rehabilitation in such cases.

[34] These matters were not lost on the learned judge. We set great store on the fact that she would have seen and heard the appellant and judiciously considered the mitigating factors as sufficiently weighty to cancel out the significant aggravating features of the offences, to warrant issuing the section 42K certificate. We agree with her that the appellant's age, along with the other mitigating factors, constitute compelling circumstances that would render the prescribed minimum penalty manifestly excessive and unjust.

[35] In computing the recommended sentence, she adopted a starting point of five years, a starting point lower than the usual starting point (the prescribed minimum sentence), as per the Sentencing Guidelines. Whilst we do not believe it was the best approach, we do not agree with counsel for the Crown that the learned judge erred in principle. As Morrison P, observed in **Paul Haughton v R**, at para. [33]:

> "There can be no doubt that the fixing of 15 years' imprisonment as the usual starting point for rape [similarly for grievous sexual assault] in the Sentencing Guidelines was done by reference to the prescribed minimum sentence in the SOA. As a practical matter, given the fact that a sentencing judge has no power to go below 15 years in arriving at the appropriate sentence for the rape, the framers of the guidelines obviously took the view that there was nothing to be gained by leaving the sentencing judge at large to fix the starting point in such cases. And, in the large majority of cases, in our view, this will be completely unproblematic."

[36] Further, in our view, this court's observation at paras. [21]-[22] of **Garfield Elliott v R** is not inconsistent with that position as the judge of appeal was careful to indicate, not only that the 15 years was "the usual starting point" but that his remarks about its applicability were confined to the case in point.

[37] The only case cited to us which bears some factual resemblance to the instant one is **Rashane Desouza v R**. The appellant was convicted for indecent assault and rape. He was sentenced to three years and two months' imprisonment for indecent assault, and 15 years' imprisonment for rape with the stipulation that he should serve 10 years before being eligible for parole. The sentencing judge issued a section 42K certificate and recommended a sentence of 11 years' imprisonment as being more appropriate than the statutory prescribed minimum of 15 years. This court agreed with the sentencing judge that there were compelling reasons that would render the prescribed minimum sentence manifestly excessive and unjust, given the facts of the case and the circumstances of the appellant.

[38] The appellant was 22 years old, and the complainant was 19. The court found no aggravating features relevant to the commission of the offence. As regards the circumstances of the offender, the court found multiple mitigating factors, including the absence of any previous conviction, the age of the appellant and that at the time he was enrolled in an educational institution. He was progressive, ambitious and had potential. He received a positive social enquiry report and the members of the community in which he resided expressed shock on hearing of his conviction.

[39] This court concluded that he was a young offender "in respect of whom rehabilitation as an objective should weigh in his favour". The sentence of 15 years' imprisonment for rape was, therefore, reduced to eight years, eight months and 20 days (after a credit of three months and 10 days for time spent on pre-sentence remand), with the stipulation that he should serve six years before being eligible for parole.

[40] It should be observed that both the appellant and the complainant, in that case, were adults, yet on account of the appellant's good antecedents, among other compelling factors, he received a reduction in the prescribed minimum sentence.

[41] Accordingly, we adopt a starting point of 15 years' imprisonment and adjust it upwards and downwards in considering the respective aggravating and mitigating factors, including those highlighted by the learned judge and counsel. As the learned judge found, the mitigating factors far outweigh the aggravating ones. In the result, and consistent with the recommendation of the learned judge, we believe that an appropriate sentence would be 17 month's imprisonment, after giving full credit for time spent on pre-trial remand (see **Callachand and Another v State of Mauritius** [2008] UKPC 49). The appellant should serve 11 months' imprisonment before he is eligible for parole.

[42] The sole ground of appeal, therefore, succeeds.

Order

[43] Accordingly, we make the following orders:

> 1) The appeal against sentence imposed on count 2, is allowed.
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> 2) The court accepts the recommendation of the learned Judge issued pursuant to section 42K of the Criminal Justice (Administration) (Amendment) Act for the reduction of the sentence below the mandatory minimum of 15 years.

3) The sentence of 15 years' imprisonment for grievous sexual assault is set aside and a sentence of 17 months' imprisonment (after a credit of 1 month for time spent in pre-trial remand) is substituted therefor. The appellant is to serve 11 months' imprisonment before becoming eligible for parole.

4) The sentence is to be served at a juvenile correctional institution until the appellant attains the age of 18 years.

5) The sentence is to be reckoned as having commenced on 8 March 2023, the date on which it was imposed.