[2024] JMCA Crim 14

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CRIMINAL APPEAL NO 21/2018

APPLICATION NO CA2024APP00013

EVERTON JENKINS v R

Mr Steven Powell for the applicant

Mr Dwayne Green for the Crown

8 and 27 February 2024

Criminal Law – leave to appeal against sentence where period before becoming eligible for parole not specified period before eligibility for parole to be specified – grievous sexual assault – incest – indecent assault Sexual Offences Act, ss 6(1) and 6(2)

ORAL JUDGMENT

STRAW JA

[1] This matter concerns an application for leave to appeal sentence. The application for leave to appeal conviction is not renewed. Mr Everton Jenkins ('the applicant') was tried and found guilty on an indictment containing seven counts for the offences of indecent assault (counts one, three and six), incest (counts two, five and seven) and grievous sexual assault (count four) in the Home Circuit Court before Shelly-Williams J ('the learned judge') on 26 January 2018. On 2 March 2018, he was sentenced by the learned trial judge to five years' imprisonment for counts one, three and six, eight years' imprisonment for counts two, five and seven and 15 years' imprisonment in relation to count four. The sentences were ordered to run concurrently.

[2] The offences were committed between April 2015 and June 2016. The applicant was the father of the complainant. The evidence led by the Crown in relation to counts one and two was that on a day in August 2015, the applicant called the complainant, his daughter, into his room, used a razor to shave her vagina and then had sexual intercourse with her. In relation to counts three, four and five, the complainant gave evidence that, on a day in October 2015, after she came from the bathroom, the applicant took her into his room, shaved her, inserted his finger into her vagina and then had sexual intercourse with her. Counts six and seven concerned 15 June 2016, where the complainant testified that the applicant again shaved her vagina and then had sexual intercourse with her.

[3] The applicant filed a notice of application for leave to appeal conviction on 16 March 2018. His application was considered by a single judge of this court, and leave was refused on 21 September 2018. Thereafter, on 31 March 2022, the applicant filed a notice of application for leave to appeal to be considered by this court. However, on 26 January 2024, the applicant filed a notice of application for court orders seeking to abandon his appeal, citing the lack of prospects of success as the main ground for doing so.

[4] On 7 February 2024, before this latter application was considered, counsel for the applicant, Mr Steven Powell ('Mr Powell'), filed an amended notice of application seeking leave to appeal sentence. Thereafter, on 8 February 2024, in an oral application, counsel requested leave to withdraw the application to abandon the appeal. This oral request was granted by the court. On 26 February 2024, counsel filed supplemental grounds of appeal as set out below:

> "a. The learned judge erred in not stipulating a specific period before which the [applicant] shall become eligible for parole.
>
> b. The trial judge erred in failing to state arithmetically how she arrived at the various sentences."

[5] At the hearing before this court on 27 February 2024, Mr Powell indicated that he would no longer be pursuing ground b. Concerning ground a, Mr Powell referred this court to section 6(1)(b)(ii) and 6(2) of the Sexual Offences Act ('the Act'). These provisions are set out below:

> "6 (1) A person who-
>
> (a) …
>
> (b) commits the offence of grievous sexual assault is liable-
>
> (i)…
>
> (ii) on conviction in a Circuit Court, to imprisonment for life or such other term as the court considers appropriate not being less than fifteen years.
>
> …
>
> 6 (2) Where a person has been sentenced pursuant to subsection 1(a) or (b) (ii), 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."

[6] Mr Powell is asking that this court rectify the omission of the learned judge and seeks an order that the applicant be eligible for parole upon serving 10 years of his sentence in relation to the offence of grievous sexual assault. He referred this court to **Oraine Ellis v R** [2022] JMCA Crim 8, where the appellant was sentenced to 20 years' imprisonment on a charge of rape. This court set a parole eligibility period of 15 years which was then reduced to 13 years and 11 months, after deduction of the appropriate pre-sentence detention. Mr Powell contended that this reflected approximately 65% of his sentence of 20 years.

[7] Mr Dwayne Green, counsel for the Crown, concedes that the learned judge erred in failing to specify the period before eligibility for parole on count four. However, he has asked the court to weigh the aggravating and mitigating factors along with a consideration of the usual range of sentences for that offence and to

set the parole period of 12 years. Counsel referred the court to the cases of **Levi Levy v R** [2022] JMCA Crim 13; **Linford McIntosh v R** [2015] JMCA Crim 26; and **Patrick Dalbert v R** [2023] JMCA Crim 17 for a consideration of an appropriate parole period.

[8] Grievous sexual assault is contrary to section 4(1)(a)(i) of the Act. The penalty for that offence on conviction in the circuit court is contained within the sections of the Act as set out above. It attracts a mandatory minimum penalty of 15 years and a stated parole period of not less than 10 years.

[9] The learned judge was mandated to set a period of at least 10 years before eligibility for parole. This court must, therefore, intervene to determine an appropriate period before the appellant becomes eligible for parole. Consideration of the aggravating and mitigating factors is germane to that determination. The aggravating factors are as follows: (1) The complainant was the daughter of the appellant; (2) she was a minor between the age of 14 and 15 at the time of the offences; (3) this offence was one of several sexual assaults committed by the appellant. The mitigating factors include: (1) the appellant has no previous convictions and has a good social enquiry report; (2) good character evidence.

[10] In **Levy v R**, the appellant was convicted for the offences of rape and grievous sexual assault and was sentenced to 18 years' imprisonment at hard labour with respect to each count. In relation to the offence of rape, he was ordered to serve 12 years before becoming eligible for parole. However, in relation to the offence of grievous sexual assault, there was no imposition of a period to be served before eligibility for parole as required by section 6(2) of the Act. He appealed his conviction and sentence, and a single judge of this court refused his application for leave to appeal his conviction but granted leave to appeal sentence for this court to formally bring the sentence for grievous sexual assault in accordance with section 6(2) of the Act. It was found that the appellant should also serve a period of 12 years' imprisonment before becoming eligible for parole for the offence of grievous sexual assault. It meant, therefore, that his sentence

for grievous sexual assault of 18 years' imprisonment at hard labour was set aside and substituted therefor was a sentence of 18 years' imprisonment at hard labour with the specification that the appellant serves 12 years' imprisonment before becoming eligible for parole.

[11] In **McIntosh v R**, the appellant was convicted for the offences of grievous sexual assault and rape. With respect to grievous sexual assault, he was sentenced to 18 years' imprisonment with the stipulation that he should serve a minimum of 12 years before becoming eligible for parole. With respect to rape, he was sentenced to eight years' imprisonment at hard labour with the sentences on both counts ordered to run concurrently. His application for leave to appeal his conviction and sentence was considered and refused by a single judge of this court. Notwithstanding, the applicant renewed his application before this court. In relation to the sentence for grievous sexual assault, the court found at paras. [17] and [18] that,

> "[17] The learned trial judge had paid due regard to the relevant provisions of the statute, as was incumbent on her to do and she cannot be faulted for imposing an additional three years on the mandatory minimum and setting the period for eligibility for parole at 12 years. She took into consideration, as she was obliged to do, all pertinent matters relating to the commission of the offence and the circumstances of the applicant's previously unblemished antecedents and good character were weighed in the equation, to his credit, but weighing heavily against him, as an aggravating factor, was the betrayal of trust arising from his close relationship with the complainant and her family.
>
> [18] It cannot reasonably be said, therefore, that the sentence imposed by the learned trial judge for grievous sexual assault is manifestly excessive so as to warrant the interference of this court."

[12] In **Dalbert v R**, the appellant was tried and convicted for the offences of rape, grievous sexual assault, and assault. He was sentenced to 18 years' imprisonment for the offence of rape, 15 years' imprisonment for the offence of grievous sexual assault and 12 months' imprisonment for the offence of assault.

He was ordered to serve 12 years in respect of the offence of rape and 10 years in respect of the offence of grievous sexual assault before being eligible for parole. The appellant applied for leave to appeal against his sentence. A single judge of this court considered his application but refused leave. His application for leave to appeal his sentences was renewed before the court and was refused on the basis that the sentences that were imposed could not have been said to be excessive. The court found that the judge below had explained the basis for exceeding the statutory minimum sentence for the offence of rape, and as a result, the sentences could not have been rightfully disturbed.

[13] We note that in both **McIntosh v R** and **Levy v R**, the parole period of 12 years was not considered to be excessive. In **Dalbert v R**, a period of 10 years was set before the appellant became eligible for parole on a similar charge of grievous sexual assault. In that case, however, the offences of rape, grievous sexual assault and assault occurred in one incident. We have considered the circumstances of the case at bar, which occurred over a period of several months, which distinguishes this case from **Dalbert**. Having due regard to the factors (including the aggravating and mitigating features) as outlined above, we are of the view that the appellant should serve a period of 12 years before being eligible for parole. We would, however, deduct the period of three months spent by the applicant in pre-sentence detention.

[14] The court, therefore, orders as follows:

1. The application for leave to appeal sentence is granted.

2. The hearing of the application is treated as the hearing of the appeal.

3. The appeal against sentence is allowed in part.

4. The sentences for indecent assault (counts one, three and six) of five years' imprisonment at hard labour and incest (counts

two, five and seven) of eight years' imprisonment at hard labour are affirmed.

5. The sentence for grievous sexual assault (count four) of 15 years' imprisonment at hard labour is set aside. Substituted therefor is a sentence of 15 years' imprisonment at hard labour with the stipulation that the appellant serves 11 years and nine months before becoming eligible for parole, the pre-sentence remand period of three months having been deducted.

6. The sentences shall be reckoned as having commenced on 2 March 2018, the date they were imposed and are to run concurrently.