JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 66/2018

BEFORE: THE HON. MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CRIMINAL APPEAL NO 66/2018

DWAYNE MILLER v R

Ms Jacqueline Cummings for the appellant

Ms Maxine Jackson and Ms Christina Porter for the Crown

24 and 25 January 2022

EDWARDS JA

[1] On 27 June 2018 the appellant pleaded guilty in the Circuit Court in the parish of Saint Mary before Wint-Blair J ('the learned trial judge') to one count of having sexual intercourse with a person under 16 years of age, contrary to section 10(1) of the Sexual Offences Act. On 5 July 2018 the learned trial judge sentenced the appellant to 18 years' imprisonment at hard labour with a stipulation that he serve 12 years before being eligible for parole.

[2] The facts briefly are that the appellant, who was 29 years old at the time, had sexual intercourse with the complainant, who, at the time, was 12 years old. The complainant is his cousin, she being the daughter of his mother's niece.

[3] The appellant was granted leave to appeal sentence by a single judge of this court. Counsel for the appellant was permitted to abandon the original grounds filed and argue three grounds of appeal against sentence as follows:

> "Ground one-The sentence of 18 years' imprisonment is manifestly excessive having regard to all of the circumstances of this case.
>
> Ground two-The learned trial judge applied the wrong principles of law in accessing the appropriate sentence to impose on the Appellant herein.
>
> Ground three-The judge erred in exercising her discretion in ordering that the Appellant's name be placed on the Sex Offender Registry."

[4] This appeal raises two main issues. The first is whether the sentence is manifestly excessive. This arises from grounds one and two. The second is whether the learned trial judge erred in ordering that the appellant be entered in the Sex Offender Registry. This arises from ground 3. I will deal with the issue arising from grounds one and two first.

Whether the sentence is manifestly excessive

[5] In submitting on grounds one and two, counsel for the appellant, Ms Cummings, contends that the sentence of 18 years' imprisonment at hard labour is manifestly excessive and ought to be set aside. She maintains that a sentence of 8 years was more appropriate. Counsel, in her submissions to this court, contends that the learned trial judge applied the wrong principles and made several errors in sentencing the appellant. Her contentions in summary are that:

> (i) The learned trial judge erred in applying a starting point of 20 years when the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') suggests a starting point of 15 years;

(ii) The appellant pleaded guilty but the sentence imposed fell outside the range of sentences usually applied to such cases when a guilty plea is entered;

(iii) The learned trial judge erred in giving more weight to the aggravating factors and failed to give adequate weight to the mitigating factors;

(iv) No force or violence was used in the commission of the offence;

(v) The appellant had no previous convictions;

(vi) The offence was not premeditated;

(vii) The appellant was previously of unblemished character;

(viii) The social enquiry report showed that the appellant was highly regarded in the community;

(ix) The learned trial judge erred in not giving the appellant the appropriate reduction in sentence on his guilty plea; and

(x) A sentence of eight years was more appropriate.

[6] Counsel for the Crown, Miss Porter, in her submissions, conceded that the learned trial judge erred in her approach to the sentencing exercise. She submitted that although the learned trial judge gave due regard to the general principles and objectives of sentencing and directed her mind to deterrence, prevention rehabilitation and retribution, the methodology used by her in arriving at the sentence was incorrect. She also conceded that the learned trial judge applied the wrong starting point and ought to have started at

15 years. Crown Counsel also expressed the view that the learned trial judge may have given too little weight to the mitigating factors in the case, while placing heavy weight on the aggravating factors. She submitted that, in applying a 25% discount on account of the guilty plea, the learned trial judge may have erred in the exercise of her discretion, in that, having found that the plea was not made on the first relevant occasion (for which there was no evidence on the transcript to support that finding) the learned trial judge ought to have considered applying a 35% reduction.

[7] Based on Crown Counsel's calculations of what the learned trial judge ought properly to have done, she submitted that a sentence of nine years and eight months was more appropriate. Crown Counsel also maintained that if the appellant had indeed pleaded guilty on the first relevant date then she would agree that a sentence of eight years would be appropriate.

[8] We commend Counsel for the Crown in the stance she took which, in the circumstances of this case, was inevitable. We agree that the learned trial judge's approach to the application of the appellant's sentence was, in some respects, flawed. The learned trial judge begun by declaring, correctly, that the maximum sentence for the offence for which the appellant was pleading guilty was life imprisonment. She found, however, that because the appellant pleaded guilty life imprisonment was deemed to be 30 years. This she did by virtue of section 42F of the Criminal Justice Administration Act. However, the learned trial judge seems to have interpreted the section incorrectly.

[9] Curiously, she then determined that because the appellant had pleaded guilty she would not start at the maximum of 30 years but would instead start at 20 years. This was indeed a curious approach to take. For, as will be seen, starting at the maximum of 30 years was an incorrect approach to take. The deduction 10 years from the maximum of 30 years as a result of the guilty plea was also an incorrect approach to take. Furthermore, having reduced the maximum sentence by 10 years because of the guilty plea, the learned trial judge later deducted a further five years as a discount on account of the guilty, which computes to a 25% discount on the sentence she arrived at. This approach

in calculating the final sentence which was appropriate to impose on the appellant was an obvious error.

[10] Section 42F of the Criminal Justice (Administration) Act indicates when the maximum of 30 years should be applied in the case of a guilty plea. It states:

> "If the offence to which the offender pleads guilty is one for which the maximum sentence is life imprisonment, **and that is the sentence which the sentencing judge would have imposed had he or she tried and convicted the offender, then for the purposes of calculating a reduced sentence on account of the guilty plea, the sentencing judge should treat the term of life imprisonment as though it was one of 30 years**." (Emphasis added)

[11] In this case, there was no indication that the learned trial judge considered this case to be one in which she would have imposed the maximum sentence of life imprisonment, if the case had gone to trial. The principle also is that the maximum sentence is reserved for the cases which are examples of the worst of the worst (see **Meisha Clement v R** [2016] JMCA Crim 26 at paras. [27-28]). There is no assertion that this case fell into that category, even though the learned trial judge considered the appellant's behaviour to be reprehensible. The learned trial judge, therefore, seemed to have confused the applicable principles.

[12] As conceded by counsel for the Crown, the correct approach the learned trial judge ought to have taken was that which was set out in **R v Everald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002, **Meisha Clement v R** and in the Sentencing Guidelines, the latter of which was available to the learned trial judge at the date of sentence. The learned trial judge was, therefore, required to determine the normal range of sentence for this particular offence and thereafter choose an appropriate starting point aided by the Sentencing Guidelines and the appropriate authorities. She was to then consider the impact of any relevant aggravating and mitigating features in the case and arrive at a

sentence which she would have imposed had the case gone to trial. Thereafter she would consider whether to reduce the sentence on account of the guilty plea and by what percentage.

[11] Of course, in theory, the learned trial judge was at liberty to impose a sentence outside of the usual range, however, it would be necessary for her to state her reasons for doing so and to ensure that there was no double counting of the relevant factors she considered. The offence for which the appellant was charged is "Having sexual intercourse with a child under 16 years" contrary to section 10 of the Sexual Offences Act; the maximum penalty for which is life imprisonment. The Sentencing Guidelines provide that the normal range for such offences is 15-20 years, and the usual starting point is 15 years.

[12] While it is quite possible and proper to apply a higher than usual starting point and to impose a sentence outside the normal range, in an appropriate case, the learned trial judge, in this case, gave no indication of any reason why the usual starting point should not have been applied. Instead, the learned trial judge started at 20 years having reduced it from the maximum of 30 years on account of the appellant's guilty plea. In this regard we agree with both counsel that she erred. The learned trial judge then applied what amounted to a 25% discount to the sentence to the starting point of 20 years. This she said was on the basis that the appellant had not pleaded guilty at the first relevant date. The appellant pleaded guilty quite early and was entitled to a discount. There was no evidence that this was or ought to have been treated as a tactical plea so as to deny him the entitlement to a discount. The appellant's trial counsel indicated to the learned trial judge that he had pleaded guilty at the first opportunity. If she was correct, the appellant would have been entitled to a discount of up to 50%. However, the learned trial judge stated that the appellant had not pleaded guilty at the first relevant date. We are unsure as to the basis of this assessment. There is no evidence of or indication as to the earlier occasion at which the appellant had been required to enter a plea to the indictment. The Crown was not able to assist this court as to the basis of the learned trial judge's

determination of that fact. There was some indication that this was the second circuit at which the matter was before the court, but, as conceded by the counsel for the Crown, there was nothing to support the learned trial judge's conclusion that the date the plea was entered was not the first relevant date.

[14] Having reduced the starting point of 20 years by 25%, the learned trial judge then applied five years for aggravating circumstances and deducted three years for mitigating circumstances. The learned trial judge's calculation would, therefore, look something like this:

> Starting point - 20 years (Life imprisonment deemed 30 years on a plea of guilty less 10 years)
>
> Deduction for guilty plea … less five years (25%) -15years
>
> Aggravating features … add five years -20 years
>
> Mitigating features … less three years – 18 years
>
> Sentence imposed - 18 years

[15] It is clear from this that the learned trial judge did not conduct the appropriate assessment, as laid down in the Sentencing Guidelines and in the cases. Furthermore, the learned trial judge was required to determine the appropriate sentence that she would have imposed if the case had gone to trial, and, having done so, apply the appropriate discount on account of the fact that the appellant had pleaded guilty.

[16] Therefore, this court, conducting the correct assessment, will give due regard to the normal range of sentence for this offence and the usual starting point, nothing having been shown to us why it should be otherwise. Applying the starting point of 15 years, and applying five years for the aggravating circumstances, as did the learned trial judge, we would arrive at a provisional sentence of 20 years. The learned trial judge applied three years for mitigating factors, however, we agree that she erred in doing so, as the mitigating factors she outlined were far more than the aggravating factors. The aggravating features identified by the learned trial judge was the age difference between

the appellant and the complainant, as well as the prevalence of the offence. She considered no less than nine factors which she viewed as mitigating, most of which we agreed could have been viewed as mitigating features in the case. Therefore, the weight to be attached to both sets of factors should, at the very least, be the same. As a result, accounting for five years for the mitigating factors, the sentence arrived at would be 15 years. A sentence of 15 years rather than the 22 years arrived at by the learned trial judge would have been the more appropriate sentence, if the appellant had gone to trial. Having arrived at a sentence of 15 years, a discount to take account of the guilty plea would have to be considered.

[17] Section 42D of the Criminal Justice (Administration) (Amendment) Act ('The Act') provides for a reduction in the sentence the court may otherwise have imposed on a defendant, if that defendant had gone to trial and been convicted. It provides for possibility of the sentence being reduced by up to a 50% if the plea of guilty is indicated at the first relevant date, by up to 35% if the plea is indicated after the first relevant date but before the trial commences, and by up to 15% if the plea of guilty is entered after the trial has commenced but before the verdict is given.

[18] Section 2 of the Act defines "first relevant date" as the "first date on which the defendant (a) who is represented by an attorney-at-law; or (b) who elects not to be represented by an attorney-at-law", is brought before the court after adequate disclosure to the defence of the case against him in respect of the charge for which he is before the court. There is nothing on the transcript to indicate the position of the case before the circuit on the first occasion, or when the appellant secured legal representation. It is clear from the record that an indication had been made the previous day the case came before the learned trial judge and an adjournment given. The plea was entered the next day. We could not discern, from the record, the basis of the learned trial judge's assessment. We, therefore, conclude that the appellant was entitled to a discount in keeping with a plea of guilty at the first relevant date. We believe that discount should be a 40%

reduction from that first category, since the learned trial judge had given 10% less than the maximum 35% in the second category.

[19] As a result of that, when 40% reduction is applied to the 15 years, the sentence arrived at is nine years. In the circumstances of this case, therefore, the more appropriate sentence is nine years' imprisonment at hard labour.

[20] We also note in passing that the learned trial judge also gave a sentence and specified a period for parole. As Crown Counsel has helpfully pointed out, the appellant was not charged under section 10(4) of the Sexual Offences Act as an adult in authority, therefore, section 10(5) (where the person's eligibility for parole shall be determined) was not applicable.

[21] Section 14(3) of the Judicature (Appellate Jurisdiction) Act empowers this court, on an appeal against sentence, to quash the sentence passed at trial and to pass such other sentence as it thinks warranted in law by the verdict. However, this court will not disturb the sentence imposed by a trial judge simply because it would have imposed a different sentence. In this case, the learned trial judge departed from principle and, as a result, imposed a sentence that was manifestly excessive and in the interests of justice, it must be set aside.

[22] In arriving at our decision on the appropriate sentence in this case, we considered the cases cited by the appellant as well as by the Crown. These were:

1. **Delton Smikle v R** [2020] JMCA Crim 48
2. **Leighton Rowe v R** [2017] JMCA Crim 22
3. **Daniel Robinson v R** [2010] JMCA Crim 75
4. **R v Rayon Mason** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 56/2007, judgment delivered 10 June 2008
5. **Samuel Blake v R** [2015] JMCA Crim 9

6. **Jermaine McKenzie v R** [2020] JMCA Crim 9

7. **Daniel Roulston v R** [2018] JMCA Crim 20

Whether the learned judge erred in ordering that the appellant's name be entered on the Sex Offender Registry

[23] It is worth setting out the provisions of the section dealing with the Sex Offender Registry. Section 30 of the Sexual Offences Act states:

> "30. — (1) The particulars of every conviction for a specified offence committed after the coming into operation of this part shall be furnished, in the circumstances specified in subsection (2), to the Sex Offender Registry –
>
> (a) if the conviction is recorded in the Supreme Court at Kingston, by the Registrar of the Supreme Court;
>
> (b) if the conviction is recorded in a circuit court, by the Clerk of the Circuit Court; or
>
> (c) if the conviction is recorded in the Court of Appeal, by the Registrar of the Court of Appeal.
>
> (2) The circumstances referred to in subsection (1) are that-
>
> (a) the specified offence is an incest offence;
>
> (b) the offender has been previously convicted for a specified offence; or
>
> (c) the offence has not been exempted; pursuant to subsection (3), from the registration and reporting requirements of this part.
>
> (3) A judge of the Supreme Court (whether or not the judge before whom the specified offences tried) may direct that a person who has been convicted of a specified offence (hereinafter called the 'offender') be exempt from any or all of

> the registration and reporting requirements of this part by virtue of —
>
> (a) the conviction of the offender being a first time conviction for a specified offence;
>
> (b) The offender being a child;
>
> (c) the sentence imposed for the offence being minimal severity (being of such category as may be prescribed); or
>
> (d) the judge being satisfied that the effect of the imposition of such requirements on the offenders, including his privacy or liberty, would be grossly disproportionate to the public interest to be achieved by registering the offender as a sex offender."

[24] It is seen, therefore, that upon conviction all offenders of specified offences are subject to being entered into the Sex Offender Registry. With the exception of the offence of incest and where the offender is a repeat offender, a judge of the Supreme Court has the discretion to exempt a person convicted of a specified offence from the registration and reporting requirements, on the basis of the factors set out in subsection (3).

[25] In this case, as counsel for the Crown correctly pointed out, no application for exemption was made to the learned trial judge and none was granted. Counsel for the applicant maintains that the learned trial judge should, nevertheless, have considered it and should have given reasons why an exemption was not being granted. In our view the learned trial judge was under no obligation to consider such an exemption of her own motion.

[27] In any event, only one of the factors in subsection (3) applies to this appellant and the appellant has not shown to this court any basis upon which it could be said that the effect of his being entered in the registry would be "grossly disproportionate to the public interest to be achieved" by his registration. There is no merit in the ground.

[28] The orders of the court therefore, are: -

1. The appeal against sentence is allowed.

2. The sentence imposed by the learned trial judge on 5 July 2018, of 18 years' imprisonment with a stipulation that the appellant serves 12 years before being eligible for parole, is set aside.

3. Substituted therefor is a sentence of nine years' imprisonment at hard labour. Sentence is reckoned to have commenced from 5 July 2018.

4. The order that the appellant is to be entered in the Sexual Offender Registry is affirmed.