[2014] JMCA Crim 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 69/2010

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MRS JUSTICE McINTOSH JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

ONEIL MURRAY v R

Leroy Equiano for the applicant

Mrs Kamar Henry-Anderson and Miss Patrice Hickson for the Crown

31 March, 4 April and 9 May 2014

MORRISON JA

[1] This is an application for leave to appeal against the sentences imposed on the applicant by Sinclair-Haynes J sitting in the Western Regional Gun Court on 20 May 2010. The single issue which arises on the application is whether the sentences imposed by the learned trial judge were manifestly excessive in the circumstances, particularly having regard to the applicant's plea of guilty.

[2] On 5 May 2010, the applicant was brought before the court on two indictments (nos 197200/2009 and 84-87/2010), arising out of two separate incidents, less than a

month apart. The prosecution's case was that (i) on 19 March 2009, the applicant, armed with a gun, abducted and raped a 12 year old schoolgirl ('the first incident'); and (ii) on 14 April 2009, the applicant, again armed with a gun, abducted and raped a young woman of 22 years ('the second incident'). When pleaded on each of these indictments, the applicant pleaded guilty to the counts relating to illegal possession of firearm and rape.

[3] On 20 May 2010, the applicant was sentenced to five and 23 years' imprisonment respectively for illegal possession and rape in respect of the first incident; and five and 19 years' imprisonment respectively for illegal possession of firearm and rape in respect of the second incident. The learned judge ordered that in each case the sentences should run concurrently.

[4] On 15 July 2013, a single judge of this court refused the applicant's application for leave to appeal against these sentences, which were ordered to commence on 20 May 2010. This is therefore the applicant's renewed application for leave to appeal against the sentences. Before coming to the grounds of this application, it is necessary to say something of the facts of each incident, as outlined to the court by counsel for the prosecution.

[5] In the first incident, the complainant, who was awaiting a ride to go to school at 7:00 in the morning, got into the applicant's car, supposing it to be a taxi. At a point, after the applicant had driven off, with her being the only passenger on board, the complainant realised that they were not travelling in the direction of her school. When

she asked the applicant why this was so, his reply was, "Ah tek wey yuh jus get tek wey." The complainant was then taken to an isolated area in Bogue Heights, where the applicant produced a gun from his waist, forcibly removed her clothing and proceeded to have sexual intercourse with her without her consent. When he was finished, the applicant ordered the complainant to put on her clothes and then drove her back into Montego Bay, where he let her off. He left her with the threat that he would kill her if she told anyone what had happened.

[6] In the second incident, the complainant boarded a taxi driven by the applicant at Catherine Hall at about 2:30 in the afternoon, aiming to get to downtown, Montego Bay. Instead, the applicant drove her to Fairfield, Irwin. There, after pointing a gun at her and threatening to shoot her, he had sexual intercourse with her against her will. After robbing her of a cellular telephone and a bank card, the appellant drove off.

[7] The antecedent report provided to the court showed the applicant to be a man of 32 years, married, with five dependent children and no previous convictions. Perhaps unusually, his wife of five years gave character evidence on his behalf. She described him as a "nice person", both to her and "to the people dem in the area". She testified that she did not know the applicant to be "capable of so much things that I hear he have done [sic]", and asked the court to "give him a second chance that he will turn over his life to God, and come back and look after his children".

[8] In passing sentence on the applicant, Sinclair-Haynes J characterised the first incident as not only an "egregious violation of a woman's right…[but]…a breach of

trust…". The judge acknowledged that the applicant had pleaded guilty, thus entitling him to "the necessary deductions". She also referred to the fact that he had no previous convictions, that he was gainfully employed at the time of the offences and a source of support to his children, and that "his wife speaks well of him". Nevertheless, taking into account the factors of rehabilitation, deterrence and punishment, the judge considered that, "…in balancing, when the necessary deductions are made,…the appropriate sentence [for rape] must be 23 years at hard labour".

[9] As regards the second incident, the judge observed that although the 22 year old complainant was "a little older", rape is "…still an awful offence". She accordingly considered 19 years' imprisonment (taking into account the year spent in custody by the applicant) to be an appropriate sentence for rape in the case of this complainant.

[10] When the matter came on for hearing before us, Mr Leroy Equiano for the applicant was given leave to argue a single ground of appeal; that is, that the judge's sentence was manifestly excessive. In considering the appropriate sentence in a given case, Mr Equiano submitted, the court should have regard to the gravity of the offence and any aggravating factors along with the antecedents of the offender and any mitigating factors in his favour. Further, the court should strive for an appropriate balance between the aggravating and the mitigating factors and the need for public order, taking into account similar sentences previously given for like offences. Principal among the mitigating factors relied on by Mr Equiano in this case is the fact that the applicant pleaded guilty to both indictments.

[11] Taking all the relevant factors (some of which he listed) into account, Mr Equiano submitted that the appropriate sentencing ranges for illegal possession of firearm and rape, following on from a plea of guilty, were periods of imprisonment of five to six and seven to 15 years respectively. In these circumstances, it was submitted that, while no complaint could be made about the judge's sentences for the firearm offence, a maximum sentence of no more than 15 years would have been appropriate for the offence of rape.

[12] At our invitation, both Mr Equiano and Miss Patrice Hickson, who appeared for the prosecution, provided us with brief reports of previous sentences for like offences given in the court below and/or approved by this court. We are grateful to counsel for their efforts in this regard.

[13] We will deal firstly with a group of cases in which there was no appeal against sentence, but appeals against convictions for rape were dismissed and the sentences imposed in the Supreme Court were by that means implicitly approved.

[14] In ***R v Trevor Clarke*** (SCCA No 26/1996, judgment delivered 2 June 1997), the appellant was tried and convicted of illegal possession of firearm, robbery with aggravation and two counts of rape. The circumstances were that the appellant and two other men entered the home in which a mother lived with her two daughters, the older of whom was 16 years old. While there, the appellant, who was armed with a knife, and one of the other men, who was armed with a gun, forcibly removed the clothing of the 16 year old girl and each in turn had sexual intercourse with her against

her will. The third man, armed with a machete, also forced the mother of the girls to have sexual intercourse with him against her will. The appellant was sentenced to concurrent terms of 15 years' imprisonment for rape.

[15] In ***R v Simon Hoyte*** (SCCA No 72/1996, judgment delivered 2 June 1997), the appellant was tried and convicted on three counts of rape. All three victims were children of tender years. The offences were all committed on the same occasion, when the appellant locked the three victims in a room and had sexual intercourse with each of them. Before committing the offence on the first victim, the appellant gagged one of the others and tied up the third. After he had had his way with the first, he removed the gag from the mouth of the second and had his way with her also. Not yet done, he then untied the third victim and did the same with her. The appellant was given concurrent sentences of 20 years' imprisonment on each count.

[16] In ***R v Christopher Doyley*** (SCCA No 79/2001, judgment delivered 18 February 2004), the applicant was tried and convicted for the offences of illegal possession of firearm, robbery with aggravation and rape. The circumstances were that, while the complainant was entertaining visitors, the applicant and another man, both armed at one time or another with a gun, a machete and a knife, invaded her home and robbed the visitors. During the incident, which lasted in excess of an hour, the complainant was taken into a separate room on different occasions by each of the intruders and raped. The applicant was sentenced to 21 years' imprisonment for rape.

[17] In ***R v Noel Campbell & Robert Levy*** (SCCA Nos 135 & 136/2003, judgment delivered 27 April 2007), the applicants were tried and convicted for the offences of illegal possession of firearm, rape and robbery with aggravation. The circumstances were that the complainant, while on her way to work, was forced into a gully at gunpoint by the two applicants. Each man then had sexual intercourse with her from behind while the other stood in front of her with a gun pointed at her. The men then robbed her and ordered her out of the gully. Each of the applicants was sentenced to 20 years' imprisonment for rape.

[18] In ***Richard Barrett v R*** (SCCA No 190/2006, judgment delivered 3 April 2009), the applicant was tried and convicted for the offences of illegal possession of firearm and rape. The circumstances were that the applicant accosted the complainant, a 16 year old schoolgirl, on the street and forced her at gunpoint to accompany him to the house where he lived. There, the applicant had sexual intercourse with her without her consent. He was sentenced to 15 years' imprisonment for rape and a ground of appeal against sentence was not pursued.

[19] Finally in this group of cases, in ***Marvin Reid v R*** [2011] JMCA Crim 50, the applicant was tried and convicted for the offences of illegal possession of firearm, abduction and rape. The complainant in that case was a schoolgirl. The applicant, armed with a gun, and his male cousin, who was armed with a knife, apprehended the complainant on the street and took her to the cousin's house, where both men had sexual intercourse with her without her consent. The applicant was sentenced to 10 years' imprisonment for rape.

[20] Secondly, we should refer to ***R v Lynden Levy et al*** (SCCA Nos 152,155, 156, 157 and 158/1999, judgment delivered 16 May 2002), in which appeals against convictions on one count of illegal possession of firearm and two counts of rape were dismissed, but the appeals against sentence were allowed. The complainants in that case were two sisters, aged 15 and 16 years. Each of them was repeatedly raped and forced to perform oral sex and various other acts, described by the trial judge as "utterly disgusting, degrading and repulsive", with a group of about 11 men. Some of what took place was videotaped on the instructions of the first named appellant, who was described by the judge as the "ring master". The trial judge sentenced the first named appellant to 50 years' imprisonment on each count, to run concurrently. The four other appellants were each sentenced to 20 years' imprisonment on each count, but it was ordered that the sentences for illegal possession of firearm should run consecutively to the sentences on the two counts of rape, which were ordered to run concurrently. In effect, therefore, the first named appellant was sentenced to a total of 50 years' and the other appellants to a total of 40 years' imprisonment.

[21] This court considered that in all the circumstances the sentences imposed were manifestly excessive. In addition to setting aside the consecutive sentences (which the court held to be inappropriate in these circumstances), the court substituted for the sentence imposed on the first named appellant a sentence of 25 years' imprisonment for the firearm offence and 30 years' imprisonment on the two counts of rape, to run concurrently. In respect of the other four appellants, the court substituted sentences of 15 years' imprisonment for the firearm offence and 20 years' imprisonment on the two

counts of rape, to run concurrently. Overall, the first named appellant's sentence was therefore reduced to a total of 30 years' imprisonment, while that of the other appellants was reduced to a total of 20 years' imprisonment.

[22] And thirdly, we should mention in passing ***R v Omar Nelson*** (SCCA No 89/1999, judgment delivered 20 December 2001), ***Albert Edmonson v R*** (SCCA No 55/2005, judgment delivered 3 February 2009) and ***R v Vincent Jones*** (SCCA No 187/2004, judgment delivered 7 April 2006). In the first two cases, sentences of 20 years' imprisonment for rape were imposed after trial in the Supreme Court, while in the third the sentence was 25 years' imprisonment. However, in all three cases the sentences were set aside as a result of the quashing of the convictions by this court.

[23] In our view, these cases, which span a period of close to 15 years, suggest a sentencing range of 15-25 years' imprisonment, with 20 years perhaps most closely approximating the norm, on convictions for rape after trial in a variety of circumstances. For this purpose, we have disregarded ***Marvin Reid v R***, in which the sentence of 10 years' imprisonment appears to be plainly on the low side, and ***Lynden Levy et al v R***, in which the sentence of 30 years' imprisonment handed down to the first named appellant clearly reflected, not only the particularly heinous circumstances of that case, but also his role as the "ring master".

[24] While any list of aggravating and mitigating factors is likely to vary from case to case, there will inevitably be common factors. So, on the one hand, the nature of the victim (for example, whether young or elderly), the position of the victim in relation to

the offender and the actual circumstances of the offence are generally accepted aggravating factors. Mitigating factors, on the other hand, may generally include the age of the offender, his general circumstances, his previous good character, his mental state at the time of the offence, the actual circumstances of the offence and a plea of guilty (see generally Australian Sentencing: Principles and Practice, by Richard Edney & Mirko Bagaric, chapters six and seven; and Sentencing and Criminal Justice, 5th edn, by Andrew Ashworth, chapter five). We hasten to say that neither of these lists, which are intended for illustrative purposes only, is exhaustive.

[25] Turning specifically to the plea of guilty, this is now explicitly recognised by statute in some jurisdictions as a mitigating factor (see, for instance, section 144 of the English Criminal Justice Act 2003). However, the common law of sentencing has for long been that such a plea, the earlier the better, will normally attract a reduction in sentence; though, in determining the extent of the discount to be applied in a particular case, "the court may have regard to the strength of the case against the offender: an offender who pleads guilty in the face of overwhelming evidence may not receive the same discount as one who has a plausible defence" (Archbold 1992, para.5-153). In the United Kingdom, the generally accepted rationale for the guilty plea discount is helpfully restated in para. 2.2 of the Definitive Guideline on Reduction in Sentence for Guilty Plea, as revised in 2007, issued by the former Sentencing Guidelines Council (now the Sentencing Council):

> "A reduction in sentence is appropriate because a guilty plea avoids the need for a trial (thus enabling other cases to be disposed of more expeditiously), shortens the gap between

> charge and sentence, saves considerable cost, and, in the case of an early plea, saves victims and witnesses from the concern about having to give evidence. The reduction principle derives from the need for the effective administration of justice and not as an aspect of mitigation."

[26] Thus in ***R v Delroy Scott*** (1989) 26 JLR 409, in which the appellant pleaded guilty, this court considered that some discount should have been given in that regard and that the trial judge "did not accord sufficient significance to that factor in mitigation of sentence" (per Carey P (Ag), at page 410). In the result, the court reduced a sentence of seven years' imprisonment for illegal possession of firearm to one of five years' imprisonment.

[27] Against this background, we come now to consider whether the sentences imposed by the learned judge in this case can be said to have been manifestly excessive. There were undoubtedly, as Mr Equiano realistically accepted, some severely aggravating factors in the case, including in particular the intrinsically awful nature of the offence of rape, aggravated by the applicant's deployment of a firearm, the ages of both victims, most particularly so the complainant in the first incident, and the fact that in both cases the complainants were lured into the applicant's vehicle on the pretext that he was a provider of a public passenger transport service. Had the applicant been found guilty after a trial, all these factors would manifestly have militated, in our view, in favour of sentences close to the top of the range established by the cases for sentences for rape.

[28] But the question remains whether, despite her having said more than once that she was taking the guilty pleas into account, the learned trial judge did in fact make a sufficient allowance for the applicant's pleas of guilty. In our view, with utmost respect to the judge's obvious attempt to strike a fair balance in all the circumstances, she did not. The sentences of 23 and 19 years' imprisonment in respect of the first and second incidents would, it seems to us, have been quite unexceptionable in this case had the applicant been found guilty after a full trial of the matter. Therefore, taking into account the applicant's early plea of guilty (in a case in which it could not be said that the evidence of his guilt left him with no choice), we have come to the view that sentences of 18 and 15 years' imprisonment in relation to the first and second incidents respectively would have sufficed to meet the justice of the case. A reduction of the sentences imposed by the judge accordingly will at the same time go some way towards promoting the highly desirable aim of what Wright JA once referred to as "uniformity and proportionality in the system of sentencing" (in ***R v Earl Mowatt, R v Christopher Brown*** (1990) 27 JLR 32, 35).

[29] The application for leave to appeal against sentence is therefore granted. The hearing of the application is treated as the hearing of the appeal, which is allowed. The sentences of 23 years and 19 years' imprisonment imposed by the trial judge are set aside. In their stead, this court imposes sentences of 18 years' imprisonment in respect of indictment number 197200/2009 and 15 years' imprisonment in respect of indictment number 84-87/2010. The sentences are to run concurrently from 20 May 2010.