[2010] JMCA Crim 58

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 142/2008

BEFORE: THE HON. MR JUSTICE PANTON, P
THE HON. MR JUSTICE MORRISON, JA
THE HON. MR JUSTICE BROOKS, JA (Ag)

LESLIE PUSEY v R

Leonard Green for the appellant

Miss Kathy-Ann Pyke on Fiat & Greg Walcolm for the Crown

12 April 2010

ORAL JUDGMENT

PANTON, P

[1] The appellant Mr Leslie Pusey was convicted at a trial in the Circuit Court for the parish of St. Elizabeth held at Black River, before Mr Justice McIntosh and a jury, on 19 November 2008. He was sentenced on 4 December 2008 to terms of imprisonment of six years and nine years on the two counts of buggery for which he was charged. The sentences were ordered to run concurrently.

[2] A single judge of this court granted leave to appeal in respect of sentence. Mr Leonard Green, in response to the request of the Registrar

of this court has appeared for Mr Pusey, seeking a reduction of the sentences of imprisonment.

[3] The facts briefly are that the appellant, who was at the time of the offences, in his thirties, had anal intercourse with the complainant who was 12 years old at the time of these offences. On the first occasion, in August 2005, he had taken the complainant to an abandoned mud house some 3 miles away from the village in which they lived. In the bushes, there he threatened and forcibly committed the act. In December 2005, the act was repeated and thereafter, a report was made to the police. The complainant was examined by Dr Craig Gayle who found that the sphincter muscle, in the anus was rather loose. That, he said, indicated penile penetration.

[4] The complainant was a frequent visitor to the appellant's house and this was something that was allowed by his mother who, no doubt, had some confidence and trust in the appellant.

[5] Mr Green, having perused the transcript, has indicated that there was no basis on which the conviction could be challenged, and we agree with that opinion that he formed. However, he has pointed to what, on the face of it, appears to be an unexplained disparity in the sentence, in that there is a sentence of six years for count one and nine years for count two.

[6] The learned trial judge made rather terse remarks when sentencing. This is what he said at page 55 of the transcript:

> "Stand up Mr. Pusey. I take into account what your lawyer said on your behalf, also the fact that you have no previous conviction. The fact is that you cannot be treated in the community. The fact is that you have preyed on a youngster and that in all likelihood and probability, you would consider to do the same again, there is really nothing I can do except to send you to prison. Count one, six years imprisonment at hard labour. Count two, nine years, sentence is concurrent."

It seems that the learned trial judge may have treated the sentencing process as one where for the first count there would be a six years sentence and for the second count, the commission on the first count would be taken into consideration and thereby increased for the second count. Given the time frame within which these acts took place, there really is no good reason for there to be any differentiation in the sentences.

[7] The appellant, according to the judge, cannot be treated in the community. We cannot say what was the basis for that statement. That imprisonment is to be imposed is without doubt in a situation of this nature, and we are of the view that a sentence of six years is appropriate to deal with these acts that were committed.

[8] In the circumstances, the appeal is allowed in respect of count two, in that, that sentence is set aside and substituted by one of six years imprisonment. The sentences on both counts will remain concurrent. These sentences are to commence from 4 March 2009.