IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 22/2018
IND. 77/2017
GCR#0004/2017#01687/2012SC#4834/2017

BETWEEN:

OKENO NICHOLAS SOLOMON

Appellant

- and –

Her Majesty the Queen

Respondent

BEFORE: **The Rt Hon John Goldring, President**
The Hon Sir Richard Field, Justice of Appeal
The Rt Hon Sir Jack Beatson, Justice of Appeal

Date of Hearing**:** **2 September 2019**

Appearances: Mr. John Furniss for the Appellant
Mr. Kenneth Ferguson of DPP for the Respondent

JUDGMENT

Oral judgment delivered: 2 September 2019

Transcript Approved for Release: 29 November 2019

BEATSON, J.A.

1. On 26 January 2018, in the Grand Court before Justice Quin, the applicant, Okeno Nicholas Solomon, born on the 6 March 1993 and now aged 26, pleaded guilty to rape, contrary to

section 127 of the Penal Code; aggravated burglary, contrary to section 244; and theft, contrary to section 214, on Ind.77/2017.

2. On 15 March 2018 he was sentenced by Acting Justice Carter to the following periods of imprisonment for the offences in that indictment. For the rape, 13½ years; for aggravated burglary, 8 years; and for theft, 4 years. These sentences were to run concurrently, making a total sentence of 13½ years' imprisonment.

3. On that day, Acting Justice Carter also sentenced the applicant for offences for which he had been summarily convicted in August 2017 (**GCR 4/2017**) and re-sentenced him for a sentence of 2 years' imprisonment, suspended for 2 years, imposed on him on 4 August 2014 for three counts of burglary and one of handling. These matters were transferred to the Grand Court pursuant to section 7 of the Criminal Procedure Code.

4. On **GCR 4/2017** the learned judge imposed the following sentences: For burglary, contrary to section 243 of the Penal Code, 7 years' imprisonment, and for indecent assault, contrary to section 132, to four years' imprisonment, to be served concurrently to each other, but consecutively to the sentences on **Ind.77/2017.** As to the suspended sentence, she activated the custodial period, but imposed a sentence of 2 years' imprisonment to run concurrently to all the other sentences imposed on that date.

5. The applicant applies for leave to appeal against sentence. The facts of the offences can be summarised as follows:

> "*Indictment 77/2017: Shortly after 1:00 am, on Wednesday, 13 September 2017, the victim, a 32 year old foreign national who had been working on the island for approximately 10 months, was sitting on the sofa in her living room near the glass door to the patio. She was in her nightclothes with a blanket covering her working on her laptop. Her television was on and tuned to the CNN network.*

When she happened to look up from her work, she saw a man, the applicant, hovering over her. He was wearing a covering over his head, black gloves, and holding a knife in one of his hands. He suddenly lunged at her, pushed her into the couch and, holding the knife to her side, told her not to make any noise or he would use it. She struggled with him and received a graze to her left arm. During the struggle she noticed that his clothes were damp. He put the knife to her throat and told her that if she did not stop making noise he would use it.

The applicant then ordered her to turn on her stomach. He bent her arms behind her and unsuccessfully attempted to gag her mouth with electrical tape. He then wrapped the reel around her face, bound her ankles and her wrists, and tied her hands behind her back with a pair of running shoes' laces. After rummaging through the living room, he proceeded to rummage through the rest of the apartment.

The applicant removed the tape from the victim's mouth when she started to cough and have an asthma attack. He told her that, if she screamed, he would kill her. She begged him to take whatever he wanted, but not to harm her.

He then cut her underwear off with his knife and touched her. She begged him not to and, when he took her into the bedroom, again begged him not to harm her. He took her back into the living room, tried to bend her over the couch and then took her to a second bedroom. He told her to stand in the corner and he then moved laundry off the bed. She continued to beg him and asked what if she had been his mother or sister. After he pushed her on to the bed, she said that if he was going rape her he should at least use a condom. He told her that he would. After placing a condom on his penis, he raped her. He complained that he could not finish, took off the condom, put another one on, and raped her again.

The applicant then took her back to the living room, where he continued to rummage through the property. He demanded the password to her work mobile telephone. She did not know what it was and asked him to at least allow her to keep her personal mobile phone. He did this, but stole the work phone. He finished ransacking the apartment, picked up the property he'd taken, which included jewellery, the laptop, and the work phones. With a knife at her throat he then asked her for the key to her car and where it was. She complied and he took the key and carried what he had taken to the car. When removing her property, he told her that she must not move or scream. After he left, she ran into the bedroom and locked the door. When she was certain that he had gone, she called the police. She was treated at George Town Hospital and a rape kit was obtained from her.

The applicant had left the first condom he used in the apartment and his DNA was subsequently recovered from it. This was the only piece of evidence which connected him to the offence and he pleaded guilty after the test results were served on the defence."

6. ***GCR 4/2017***:

"*On* Wednesday 9 December 2015, the victim went to bed at about 11:00 *pm, dressed in her sleepwear. She fell asleep, but was woken by somebody feeling up her buttocks. She had been asleep on her stomach and turned over. The sheet that had been covering her had been pulled off. She saw a figure who tried to grab at her face. He covered her mouth and she tried to bite him. She then realised it was the applicant, who she had known for about three years because he was a friend of her uncle's and a frequent visitor to the house.*

The applicant then made his escape through the bedroom window. The victim informed her mother what had occurred and police were called. She informed the police of his identity. After the police had left, the applicant

returned to the house. When confronted by the victim with what he had attempted to do, he denied it.

The applicant became involved in the justice system at the age of 15, but the suspended sentences imposed on the August 2014 burglary and handling matters are the only offences on his antecedents.

When sentencing, the judge had before her a Social Inquiry Report, a psychiatric report by Dr Arline McGill, and a Victim Impact Report.

The writer of the Social Inquiry Report stated that the applicant had expressed remorse for his actions and stated that while he had no memory of the events, the victim had no reason to lie about the incident. The report stated that there was significant concern that the rape, aggravated burglary, and theft occurred while the applicant was on bail pending sentence for the burglary and indecent assault. The writer noted the pattern of committing offences of a similar nature and of increasing seriousness. The report assessed the applicant's overall risk of re-offending as "very high".

In her Victim Impact Report, the victim stated she had visible scars from cuts on her arm and leg inflicted by the applicant with the knife. She was reminded of the incident by the scars and also by the fact that she had had to cut her hair because it had been matted and had blood on it. She said she was no longer a confident, high-functioning person, but was fearful, nervous and jumpy. She had problems with self-worth and was unable to perform at a high level at work. She is on medication for depression and anxiety, has panic attacks, and is receiving psychological care."

7. We turn to the sentencing remarks.

8. As far as **Ind.77/2017** is concerned, the judge first listed the aggravating factors in this applicant's case. They are: (1) he was on bail pending sentence for the earlier burglary and

indecent assault for which he had been convicted in August of 2017; (2)he has three previous convictions for residential burglaries; (3) he had been convicted, although not sentenced, for what the judge described as a "serious sexual assault" during the course of a burglary at night when the victim was at home; (4) he used a knife to cause fear; (5) there was repeated rape in the course of one attack, and; (6) she took account of the effect on the victim. The judge later referred to the fact that the applicant had broken into the victim's home at night.

9. The judge rejected the submission that the applicant should be given full credit for his early plea. He had pleaded at an early stage, but it was on his fifth appearance in the Grand Court. It was, moreover, only after he had been confronted with the DNA evidence which made a guilty plea almost inevitable. She concluded that the appropriate discount for the plea in this case was 25 percent.

10. After referring to the reports before her, she turned to the decision of this Court in *Dilbert* (2010) 1 CICA 10. In that case, after affirming the starting point for rape, with no mitigating or aggravating factors, was between 10 and 12 years, the court stated that the presence of any of the listed aggravating factors could warrant an uplift of the appropriate starting point to "15 years or more".

11. The judge stated that, in this case, there were at least three aggravated factors: repeated rape, use of a weapon to frighten a victim, and breaking into the victim's home at night. As to the last of these, she stated that the defendant accepted he had not been invited into the apartment and that the undoing or opening a closed door sufficed to amount to breaking in. In that she was clearly correct. See para. 25 of *Dilbert*, referring to the fact that an offender has "broken into **or otherwise gained access** to the victim's dwelling" (emphasis added) as a significant aggravating factor

12. The judge stating that an uplift to the starting point was warranted. Following the words used by this court in *Dilbert*, she said, at para. 48, that the most appropriate starting point “would be 15 years' imprisonment or more” and, when the aggravating factors were

coupled with this applicant's antecedents, 20 years' would not be inappropriate. However, in view of the principles in the Sentencing Guidelines, especially the totality principle, she concluded the appropriate sentence for the rape was 18 years, to which she applied the discount for the plea.

13. The judge's sentences for the aggravated burglary and the theft were respectively 8 years and 4 years' imprisonment, both to run concurrently with the sentence for rape.

14. On the matters in **GCR 4/2017,** the judge stated that it was common ground between the Crown and the defence that the burglary fell within category 1(B) of the Cayman Islands Sentencing Guidelines, with a starting point of 6 years' custody and a range of between 4 and 8 years. The aggravating factors were the three previous convictions for residential burglaries, that the offence was committed during the currency of a suspended sentence, what the judge described as "the sexual nature of the offence committed during the burglary", and the applicant's lack of remorse. The second and fourth of these were also relevant to the indecent assault count.

15. There were no mitigating factors for either offence. The judge concluded that the aggravating factors justified an uplift of the starting point for the burglary. Bearing in mind that the both offences arose out of the same facts, she sentenced the applicant to 7 years' imprisonment for the burglary and 4 years for the indecent assault, to run concurrently to each other.

16. The judge then considered whether the 7 years' imprisonment should be concurrent to the sentences on **Ind.77/2017** or whether it should be consecutive. She referred to the Sentencing Guidelines, para.6.2(b), which states that consecutive sentences will ordinarily be appropriate where the offences are of the same or similar kind, but overall criminality would not be sufficiently reflected by concurrent sentences. The applicant was to be sentenced for a series of offences of a similar nature, committed against different victims at different times, with the facts showing an escalation in the scale of seriousness and serious harm. For that reason, she concluded that the 13 years and 6 months' imprisonment for the offences on the indictment and the sentence of 7 years' imprisonment for the

offences in **GCR 4/2017** should be consecutive. The total sentence thus imposed was 20 years and 6 months' imprisonment. The judge ordered the time spent in custody to be deducted from this period.

17. Mr Furniss' written grounds, and his oral submissions before us, reflect and focus on the fact that the judge moved the starting point from 15 years to 20 before bringing it down to 18 because of the principle of totality. The written grounds state that the judge placed a premium of 3 years on the burglary in **GCR 4/2017** which was added onto the rape. At the hearing, Mr Furniss submitted that, to that extent, there was an element of double counting. But his submissions do not criticise the sentence of 13 years and 6 months for the rape arrived at by deducting 25 percent from the 18 year starting point to reflect the plea.

18. He was correct not to do so. This rape fully justified a sentence of 18 years. See, for example, the decision of this court in the case of *Barnes*, handed down today, in which sentencing for the more serious rapes are discussed.

19. Nor did Mr Furniss maintain that a consecutive sentence for offences in GCR 4/2017 was inappropriate. His submission was that what he described as a "premium" of 3 years on that burglary was wrong because account had also been taken of that when sentencing for the rape and that the appropriate consecutive sentence should have been four years.

20. We do not agree. It was common ground before the judge that the burglary in GCR 4/2017 is to be categorised as category 1. Mr Furniss does not criticise that. He also does not criticise the factors the judge regarded as aggravating and warranting an uplift of the starting point. The sentence of 7 years is, moreover, within the range in the guidelines. The applicant did not have the benefit of a plea for the GCR 4/2017 offences. He had contested them and was being sentenced after a trial. The judge, in her careful sentencing remarks, referred to the need not to allow him to receive the benefit of a guilty plea for offences for which he was convicted after trial. She was right to do so. She had the principle of totality fully in mind during this sentencing exercise and carefully examined it immediately before considering whether to impose a consecutive sentence.

21. In relation to the submission that the judge added a three year "premium" reflecting the burglary to the rape, we observe that the judge was entitled to refer to the circumstances of that burglary and indecent assault as one of the aggravating factors. Her approach to the aggravating factors was, in our judgment, impeccable, and in line with the decision in Dilbert.

22. For these reasons, we refuse this application.