IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 23/2016
IND. 18/2013
C#0281/2013

HER MAJESTY THE QUEEN

Respondent

- and -

Walter Jordan McLaughlin

Appellant

BEFORE:

The Rt. Hon Sir John Goldring, President
The Rt. Hon Sir Bernard Rix, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal

Appearances: Mr. Laurence Aiolfi of Priestleys for the Appellant /Ms. Candia James for DPP

Date of Hearing: Thursday, 9 November 2017

JUDGMENT

Revised from transcript of oral judgment 9 November 2017 and Approved Released 27 November 2017

Sir Richard Field, JA

1. The applicant, Walter Jordan McLaughlin, applies for leave to appeal against a sentence of two and a half years imposed for an offence of robbery.

2. He faced trial by jury (Justice Mettyear) presiding in the Grand Court on a four-count indictment in September 2016. He was charged in count 1 with abducting the complainant by getting her to go from the Seven Mile Shopping Centre on

West Bay Road to Sparky Drive by deceitful means. Count 2 charged him with indecently assaulting the complainant by touching her breasts and her vagina. Count 3 charged him with robbing the complainant of a cell phone, a gold chain and a pendant that she was wearing, and a bag containing some jewellery, including a wedding ring and some earrings, and some things that she had for her son. Count 4 alleged a common assault on the complainant by punching her, pulling her hair and grabbing her around the neck.

3. At the trial, the complainant testified that in the company of some female companions on the night in question, she met the applicant in the Nectar Bar in the Seven Mile Shopping Centre at about 3:00 am. She asked him if he would give her and her friends a lift. But the friends found a lift with someone else and she got into the applicant's car in response to his offer to take her home. However, the applicant took her to Barcadere by Grand Cayman Yacht Club, which she described as a "*dark place*".

4. She tried to get out of the car but was grabbed by the hair, and once out of the car, she was grabbed around the waist, and the appellant said that he would throw her into the lake and no one would see her again. She was so frightened that she wet herself. She pleaded with him not to kill her. He took the pendant from around her neck, her bag and the cell phone. When they were in the car, the appellant touched her breasts and her vagina. She ran away towards some lights and met up with a garbage truck in which she was driven home in the company of the driver and his co-worker.

5. A statement made by the garbage truck driver was read to the jury in which he stated that when the complainant approached the vehicle, she said, "Please help me. Someone is trying to kill me". She appeared to be terrified.

6. The evidence of the doctor who examined the complainant was read to the court. He noted the following injuries, amongst others: tenderness and swelling to the forehead and the right side of the head, a linear bruise to the right chest, a linear bruise to the anterior of the neck, a small scrape to the anterior aspect of the left

shoulder and tenderness to the right side of the lower chest extending to the right lumbar region.

7. The applicant's evidence was that over about a year prior to the incident he had got to know the complainant, whom he would meet for sex for which he paid her money. When he met her at the Nectar Bar on the night in question, she agreed to go with him to hang out and smoke some marijuana.

8. They went to Barcadere and sat and smoked and then decided to have sex somewhere remote. They went to a remote area down the road, and he touched the complainant's breasts and vagina. Payment was discussed, and when he said that he would pay her later, she went hysterical and slapped and punched him. She got out of the car and would not get back in and so he drove away. When he discovered that she had left her bag and phone in the car, he threw these items into the garbage. He had not done anything illegal.

9. The jury acquitted the appellant on counts 1 and 2 but convicted him on counts 3 and 4.

10. The Cayman Islands Sentencing Guidelines for robbery sets out three types of robbery: street robbery (category C); commercial robbery (category D); and robbery in a dwelling (category E). The guideline contemplates the court determining in respect of the type of robbery in question the level of culpability as between high (category A), medium (category B), or lesser (category C); and the category of harm, choosing between categories 1, 2 and 3; and then applying the starting point and sentencing range appropriate to the level of culpability and harm so determined.

11. At the sentencing hearing, the Crown submitted that the nature of the robbery did not readily fall into any of the categories set out in the guidelines and suggested that a street robbery in the nature of a mugging was the closest type of robbery to the index offence. Proceeding on this basis, the robbery fell within the lesser of culpability category, category C, as there was very little or no planning and only

minimal force was used or threatened; and in terms of harm, it fell within category 3, because there was no physical or psychological harm above the level of harm inherent in the offence of robbery of the type under consideration. It followed that the starting point was one year's custody and the range stretched from a community based sentence up to two years' custody.

12. When passing the sentence of two and a half years' custody, the judge said that he accepted the verdicts of the jury, which he had no difficulty in understanding. It was clear to him that the jury accepted the defence account that the complainant was a prostitute and consented to the touching of her breasts and vagina, or at least thought that the applicant might be telling the truth about these matters.

13. During or after the sexual activity, there was violence inflicted on the complainant by the applicant, and it mattered not whether this was because she declined to have sex or refused to do so without payment. The jury had accepted that the applicant used violence on the complainant and so did the judge. He accepted the complainant's account of the serious and frightening threats made by the applicant, including the threat that she would be killed and put into a lake and her body never found. He further accepted that she was so frightened that she had wet herself, and he observed that the violence occurred in a dark and remote place and that the defendant was much bigger and stronger than the complainant.

14. The terror she was in was confirmed by the evidence from the men in the garbage truck. None of the items taken was recovered. The applicant's conduct was despicable and spiteful. The items taken were of material and sentimental value. The injuries inflicted were not serious but were unpleasant.

15. The judge noted the applicant was 29 years of age and sentenced him on the basis that he was of good character. The judge observed that whilst the robbery in question was not a street robbery, that was the closest guideline to the present case. It was always a mistake to shoehorn cases into guidelines, but the

guidelines contain some useful guidance and some general sense was to be gained from them.

16. The culpability in this case did not conveniently sit exactly into any of the specified categories. It straddled the bottom of category B — production and use of a weapon to threaten violence; threat of violence by a bladed article or firearm (but which is not produced); other cases where the characteristics of A and C are not present — and the top of category C — played limited role in the offence; involved through coercion; threat or use of minimal force; very little or no planning.

17. So far as harm was concerned, it was a category 3 case — factors in categories 1 and 2 not being present.

18. In addition, the offence was aggravated by the personal sentimental value of the unrecovered items, the level and nature of the threats and the location of the offence.

19. The judge said that count 4, the common assault charge, was intimately connected with count 3 and imposed no separate penalty in respect of that count.

20. Mr. Aiolfi has submitted on behalf of the applicant that the sentencing guideline for robbery was more or less applicable even though it was not a classic "*mugging*". There was no planning or premeditation. The robbery developed spontaneously out of an argument rather than any targeting of the victim.

21. Whilst rightly accepting that the learned judge was entitled to come to conclusions on the facts of the case, Mr Aiolfi contended that the evidence did not take the case upwards from the lesser category of culpability, category C. He submitted that the force used was minimal. There had been no more than a struggle. Whilst the sentimental value of the goods and the time and location of the offence were aggravating features, it was of some balance that the applicant did not choose the location for the commission of the offence or to target the complainant.

22. Mr Aiolfi also submitted that the threats were not made in relation to any intent or attempt to rob the complainant or in order to carry out the robbery. He argued that whilst the threats could not be entirely ignored, they had insufficient connection with the robbery for them to be taken into account as an aggravating feature in respect of count 3.

23. We do not accept that the facts can be analysed in the manner suggested by Mr Aiolfi. Throughout the event, there were continuing acts of violence and threats, and, in our view, the judge was well entitled to relate those to the robbery so as to take them into account as aggravating circumstances. The judge was well placed to make this assessment. He had heard the entire evidence adduced in the case.

24. Mr Aiolfi contended that in all the circumstances the sentence passed was manifestly excessive. The judge had not been justified in passing a sentence beyond the top of the range for a category C offence, namely, two years.

25. We do not accept the contention that the robbery in this case was more or less straightforwardly a street robbery for the purposes of the guidelines. The applicant's violence and threats took place in a remote place, to which he had driven the complainant, and the taking of the complainant's property occurred in some respects in the car. We are also of the view that the level of culpability did not fall neatly into category C, but, as the judge found, straddled the bottom of category B by reason of the state of terror the applicant induced in the complainant. The judge was therefore not limited to passing a sentence of no more than two years if the circumstances justified a higher sentence.

26. This was a very nasty offence. The complainant was reduced to a state of terror by a man much larger and stronger than she is. She was so frightened that she wet herself. Her injuries were not serious but they were unpleasant. The items taken have not been recovered. They were of material value, especially the gold chain and pendant, and perhaps more importantly some were of considerable sentimental value. In our judgment, the judge was justified in passing the

sentence he did. It was towards the top end of the appropriate sentencing range, but it was not manifestly excessive or wrong in principle. For these reasons, this application for leave to appeal is refused.

The Rt. Hon Sir John Goldring, President
The Rt. Hon Sir Bernard Rix, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal