IN THE CAYMAN ISLANDS COURT OF APPEAL

CACR010/2015
IND 57/14 & 70/14
#03014/2014

BETWEEN:

DELROY JAMES

APPELLANT

and

HER MAJESTY THE QUEEN

RESPONDENT

BEFORE

THE RIGHT HON SIR BERNARD RIX, JUSTICE OF APPEAL
THE HON SIR RICHARD FIELD, JUSTICE OF APPEAL
THE RIGHT HON SIR ALAN MOSES, JUSTICE OF APPEAL

Appearances: Nicholas Dixey of Nelson & Co for the Appellant and Toyin Salako Crown Counsel for the Director of Public Prosecutions.

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JUDGMENT
Revised from transcript of oral judgment 17 November 2015 and Approved
Released 26 May 2016

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THE HONOURABLE JUSTICE RIX (Orally)

1. This is the appeal against sentence of Delroy James who was sentenced by Mr. Justice Quin on 15 April 2015 for a number of sexual offences against three pupils of the school at which he was a teacher and was sentenced in all to a sentence of three years' imprisonment. There were originally two indictments, although the second indictment may ultimately have been brought within the first indictment.

2. There were, as we have said, three victims, each 15 years old. Count 1 of the indictment, which was a count of indecent assault and concerned one victim; Count 11, as it became, that was the count which started off on the second indictment, concerned a second victim and was also a count of indecent assault; and then so far as the third victim was concerned, Count 3 was a count of indecent assault, Count 6 was a count of gross indecency, and Count 7 was a count of possession of an indecent image of a child — this was an image that the third victim had sent of himself to the appellant at the appellant's behest and which the appellant admitted was received on his phone.

3. The judge proceeded essentially as follows: on the three counts of indecent assault he gave a full discount of one third for the appellant's cooperation and early plea, and sentenced the appellant for ultimately two years. He started at three years before the discount for the plea. For the possession of an indecent image, the judge sentenced the appellant to 8 months, 12 months before the discount, to run concurrently. But on Count 6, the count of gross indecency, he sentenced to a period of four and a half years, reduced to three years after the discount, also to run concurrently. So it was Count 6 which set the highest mark at three years for what were otherwise a series of concurrent sentences and all the other offences fell within that period.

4. The appeal which has been helpfully and succinctly argued by Mr. Nicholas Dixey on behalf of the appellant is only with respect to Count 6, the three-year sentence for gross indecency. The complaint here is primarily that the judge in sentencing the appellant for three years on that count omitted to take into account the basis of plea which had been ultimately agreed and signed by both parties, the prosecution and the defence, and was before the judge. Mr. Dixey also in the alternative submits that in any event the sentence of three years was manifestly excessive on Guideline principles.

5. We will start with the submission relating to the alleged failure to take into account the basis of plea.

6. Discussion about the plea on Count 6 lasted some period over which there were negotiations between the prosecution and the defence. An original basis of plea put forward on behalf of the appellant was not accepted by the prosecution, and Mr. Justice Panton, who was seized with the matter at that earlier stage, directed a Newton Hearing to be held to determine the differences of fact between the prosecution and the defence. However, a new basis of plea was subsequently proffered on behalf of the appellant, and this one was acceptable to the prosecution and, as we have said, a basis of plea was drawn up and signed by both parties. That went before the court and the court was satisfied with that basis of plea and did not direct a Newton Hearing. So the question of the Newton Hearing which Mr. Justice Panton had directed fell away.

7. Now, what was the issue between the parties on Count 6? The central issue was whether the appellant had encouraged the third victim to masturbate on the occasion in question covered by Count 6. We remind ourselves that there were two other counts involving this victim, that of indecent assault and possession of an indecent photograph. But ultimately the prosecution accepted the defendant's case that he had not encouraged the third victim to masturbate and a basis of plea was drawn up in these terms:

> "The defendant did not attempt to masturbate the complainant or to encourage him to masturbate. In due course, however, the complainant became aroused and voluntarily exposed his own penis, albeit with encouragement from the defendant. The defendant encouraged the complainant to try to put on the condom. In the event, although the

complainant attempted to put on the condom, his penis became flaccid and he was unable to do so. The complainant left shortly afterwards. At no time did the defendant attempt or intend to touch the complainant's penis whether by masturbating him or by trying to put a condom on him …."

8. In his sentencing ruling, however, the judge — although the basis of plea was before him, and prosecution counsel Ms. Salako had reminded the judge of the common basis of plea and that the judge should sentence the appellant on that basis — nevertheless, omitted to mention the basis of plea in his sentence ruling and instead, when dealing with Count 6, the count of gross indecency, set out as the relevant facts the opening case of the prosecution which included the allegation that the defendant was encouraged to masturbate. Indeed, the words "you must whip out your meat and jerk it off" were expressly set out in the judgment as being part of the facts of the offence. When the judge, having set out the facts of each offence and proceeded through a consideration of the relevant law and relevant guidelines and aggravating and mitigating features, came ultimately, quite briefly, to his analysis and conclusion, the critical paragraphs for present purposes are paragraphs 65 and 66 of his ruling.

9. Paragraphs 65 and 66 of the judge's ruling read as follows:

> "65. For Count 1 and Count 3 on Indictment 57 of 2014 and for the single Count on Indictment 70 of 2014 [that is, Count 11, the third indecent assault] I find that, in consideration of all the circumstances of these three counts, the appropriate sentence is three years' imprisonment on each count. I will allow the Defendant the usual 33 1/3 discount off for his early guilty plea — resulting in a sentence of two years' imprisonment on each count with time spent in custody to be deducted and with the sentences running concurrently.
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> 66. For Count 6, the appropriate sentence is four and a half years' imprisonment. I will allow the Defendant the usual 33 1/3 discount off for his early guilty plea — resulting in a sentence of three years' imprisonment with time spent in custody to be deducted and with the sentence running concurrent to the two years' imprisonment above".

10. The three counts of indecent assault which the judge dealt with in paragraph 65, counts of indecent assault on each of three different victims, involved brief touching of the victims' penis.

11. So far as Count 1 and victim one was concerned, the appellant used a ruler to measure the victim's erect penis, making brief contact with the penis by means of the ruler only. So far as Count 11, the count coming from the second indictment and the second victim, is concerned, that indecent assault involved brief touching the victim concerned with count of gross indecency, the appellant unzipped that victim's boxer shorts, used the victim's hand to hold the victim's penis, and in doing so the appellant's hand grazed the penis.

12. Now, in the critical paragraphs, 65 and 66, the judge gives no explanation at all of why the sentence for Count 6 is fifty percent longer than the sentences of indecent assault on

Counts 1, 3 and 11. The judge had said in sentencing on those three counts of indecent assault that he had taken into consideration all the circumstances of those three counts. In doing so, he was taking into consideration the fact there were three victims involved in those three indecent assaults. In these circumstances, and without any reference to the basis of plea, the judge effectively sentenced on the basis of the stated facts earlier in his ruling that the appellant had encouraged this victim to masturbate. Counsel for the appellant, Mr. Dixey, on the handing down of the judge's ruling two weeks after the submissions on sentencing before him, brought to the judge's attention the judge's absence of dealing with or sentencing on the agreed basis of plea. We have before us the transcript of that occasion. The court responded to Mr. Dixey's submissions in these terms:

> “I dealt with that from Ms. Salako's note on sentencing and I married that with the signed and I know there was some differences, but as it was referred to I felt comfortable in also relying upon it. “

That was at page 79 of the transcript. At page 80 the judge said:

> "I did see the conflict, but because she referred to it I felt comfortable relying upon it. I have to be fair to both parties."

13. Now, it seems to us that it is perfectly clear from that exchange between Mr. Dixey and the judge following the handing down of the judge's sentencing ruling that the judge had been prepared to depart from the basis of plea which had been agreed and he explained why he had done so. He had done so because facts which went beyond the basis of plea had been opened to the judge by the prosecution as the facts of the case. Now it is perfectly true that Ms. Salako had gone out of her way in the course of her submissions to the judge on the earlier occasion to make clear that the judge should sentence on the basis of plea. But, nevertheless, the judge makes it clear in those remarks following the handing down of his ruling that the judge had gone beyond the basis of plea for the reason which he sets out.

14. It is of course very difficult for the prosecution, in the face of parents and interested parties in these unfortunate matters, to be as cautious as perhaps caution dictates in such a situation in setting out the facts of the case and Ms. Salako thought that she had done her duty by reference to the prosecution's acceptance of the basis of plea by emphasising to the judge that that was the basis upon which he should sentence. Nevertheless, it does appear that the judge had been misled by those opening facts. At any rate, it is quite clear that the judge did not sentence on the basis of plea, but as he said himself, married that basis together with the further facts opened by the Crown. Those further facts had been the essential bone of contention between Crown and defence, prior to the agreed basis of plea, and the judge sentenced upon them.

15. Now, in her excellent submissions before us, Ms. Salako, who unfortunately was not present before the judge on that second occasion when his ruling was handed down and therefore could not assist the judge further on that occasion, nevertheless submits, first, that the judge did sentence on the basis of plea; and, secondly, that in any event the sentence was not only not manifestly excessive, but fully justified on the agreed facts of the case.

16. We consider first her submission that the judge did sentence on the basis of the basis of plea. She makes that submission on the ground that since the basis of plea was before the judge and because the prosecution had emphasised to the judge that he should sentence on the basis of that plea, therefore it should be inferred that he had done so. In our judgment, however, it is impossible to accept that submission in circumstances not only where the judge does not refer to the basis of plea at all, but refers to important facts which go beyond the basis of plea as the facts upon which he is sentencing, but also because the judge makes it clear in the post-ruling submissions that he had in fact sentenced on the basis which went beyond the basis of plea. Therefore, we accept Mr. Dixey's submission that there has been here a material irregularity and a mistake of principle in sentencing that the judge has not sentenced on the basis of a basis of plea which he has given no indication of not accepting.

17. The principles applicable in such a situation are well set out in the authorities such as *R v Nathan Tolera* [1999] 1 Cr.App.R.(S) 25, and *R v Philip Cairns et al* [2013] 2 Cr.App.R.(S) 73. It is clear from those authorities that although a basis of plea, even when it is accepted by the prosecution, is not binding on the judge, nevertheless, the judge is under a duty to make clear if he is not prepared to accept a basis of plea and in the absence of that being made clear, it is a fundamental principle of sentencing that in general circumstances a defendant should be sentenced on the basis of the facts that he admits rather than on the basis of other facts. Therefore, we consider that the judge should have sentenced on the basis of plea.

18. In those circumstances, where the judge has not sentenced on the basis of plea, where the essential difference between prosecution and defence which had led ultimately to an accepted basis of plea was in respect of the allegation of an encouragement to masturbate, and where that allegation is not a fact which can be taken into account for the basis of sentencing, we feel that it would be wrong in principle not to accept Mr. Dixey's primary submission and allow an appeal on that basis. The judge did not sentence on the basis that three years was the right sentence for the totality of sentencing against the three victims. On the contrary, he accepted that essentially two years was the correct sentence for sentencing the offences of indecent assault against all three victims and he gave no separate reason for sentencing on Count 6, the count of gross indecency, by an additional period of one year taking account of the guilty plea. It is true that the count of gross indecency has a maximum sentence somewhat ahead of that for indecent assault, 12 years instead of 10 years, but that is because it is capable of covering a larger range and a potentially even more serious range of offending. It would be, in our view, entirely anomalous if in a situation where there had been touching on three victims justifying counts of indecent assault leading to a sentence in respect of those three victims of only two years, a count which did not involve touching should result in a count of three years — and we say that, even though we bear in mind, as Ms. Salako has invited us to do so, the fact that there were three counts involving this victim, the separate count of indecent assault and the count of possessing an indecent photograph of the child. Nevertheless, the judge made no reference to the accumulation of these matters as leading to his higher sentence.

19. As far as Mr. Dixey's secondary submission, that in any event the sentence of three years was manifestly excessive, and in reference to Ms. Salako's submission that on the basis of totality for all the offending, both involving these three victims and for the three offences involving this third victim, a sentence of three years in total was not manifestly excessive, we accept the Crown's submission to the extent of saying that that may be the case in other circumstances and we do not accept Mr. Dixey's submission that three years would be manifestly excessive. We do not intend, as it were, to enter into a further exercise of re-sentencing over these five counts ourselves. What we are guided by is the judge's obvious error of principle in failing to sentence on the agreed basis of plea and in circumstances where he gives no reasons whatsoever in his ruling for his higher sentence on Count 6.

20. For these reasons, this appeal will be allowed to this extent only: That the sentence of three years on Count 6 for gross indecency is quashed and is replaced by a sentence of two years. The effect of allowing the appeal to this extent is that the total sentence over all the offences becomes one of two years rather than three years with time spent in custody is to be deducted from the sentence.

Rix JA
Field JA
Moses JA