IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No 21/2013 (Sentence)
IND 87B/11
C05425/2011

Between

HER MAJESTY THE QUEEN

Respondent

- and -

Jeffrey Barnes

Appellant

Before:

Hon John Martin QC, Justice of Appeal
Hon Dennis Morrison, Justice of Appeal
Hon Sir Richard Field, Justice of Appeal

Appearances: Mr Nicholas Dixey of Nelsons for the Appellant. Ms Cheryll Richards QC, Director of Public Prosecutions, and Ms Candia James for the Crown.

Heard: 11 April 2016
Judgment delivered: 21 April 2016

Martin JA:

1. This is the judgment of the Court.

2. On 8 April 2013, the appellant Jeffrey Barnes was convicted after a trial of one count of aggravated burglary and two counts of rape. On 5 September 2013 he was sentenced by Quin J to life imprisonment on each count, the sentences to run concurrently. His appeal against conviction was dismissed by this Court on 24 July 2015. He now appeals against sentence.

3. As originally formulated, the appeal against sentence had three main bases: a contention that the imposition of a discretionary life sentence was incompatible with Article 3 of the Cayman Islands Bill of Rights; a contention that, since the only possibility of release lay in the exercise by the Governor of the discretion to release an offender conferred by section 31A(1)(c) of the Prison Law 1975, and that was in substance the performance of a judicial function inconsistent with the Constitution, the imposition of a life sentence without any valid mechanism for release was wrong in law; and that in the circumstances of the case a sentence of life imprisonment was manifestly excessive and wrong in law. With the passage of the Conditional Release Law 2014, which retrospectively provides for a tariff system when sentences of life imprisonment are passed and establishes a statutory mechanism for review, the first two bases have now gone; and the appeal proceeds only on the ground that the sentence was manifestly excessive and wrong in law.

4. The circumstances of the offences were as follows. In the early hours of 20 October 2011, the complainant, who was at her home, woke to find the appellant on top of her. He had one hand on her throat and a knife against her windpipe. The appellant's entry into the complainant's house as a trespasser with intent to rape her, having with him an offensive weapon, formed the basis of the count of aggravated burglary. The complainant began to fight. The appellant squeezed her throat more tightly and told her to stop fighting. She said she could not breathe. She begged the appellant not to rape her, as she

was having her period. He said he did not care. He used the knife he had to cut off her clothes. The complainant was crying and again begged him not to rape her. The appellant said it could have been six men and she should stop crying, it could have been worse. The appellant removed his clothes and put on a condom, He lay on top of the complainant and began kissing her. She closed her mouth, and he told her to act as though she was enjoying it. He had a knife at her neck. He then had vaginal sexual intercourse with her. This formed the basis of the first count of rape. After he had finished, he lay on the bed and asked the complainant her name, where she was from, and where she worked. He started touching her again, and placed his penis in her vagina. He then told her to turn over onto her hands and knees. The complainant said she could not do so because her stomach was hurting. He said he did not care. The complainant then turned over and saw that she had been lying on her mobile phone. She tried to hide it, but the phone's light came on and the appellant saw it. He placed the knife between her vagina and anus and told her that if she tried anything stupid he would cut it out. He then had anal sexual intercourse with her. This formed the basis of the second count of rape. Finally, he once again placed his penis in her vagina, and eventually ejaculated. He then went to sleep for a short while. When the complainant tried to get up, he awoke. She said she had to go to work. He told her to act normally and not tell anyone what had happened, and he would be waiting for her when she came back. Once the complainant was out of the house she told a friend and her boss's

husband what had occurred; and arrangements were made for her to leave the Island without going back to her house. She made a complaint to the police, and semen was found on articles in her house that matched the appellant's DNA. He was also identified by a tattoo and marks on his body that the complainant had noticed.

5. The maximum sentence for each of the offences of which the appellant was convicted is a life sentence: see section 244 of the Penal Code (2010 Revision) in the case of aggravated burglary, and section 128 of the Code in the case of rape. In addition, section 23 of the Code permits the imposition of a life sentence if a person is found guilty after 31 August 2004 of a second Category A offence – that is to say an offence triable on indictment. The appellant had previously been found guilty of rape in 2001, so section 23 applied to him.

6. The judge, who had been the trial judge, had available to him the following materials when sentencing the appellant.

(1) An agreed summary of the facts.

(2) A Social Inquiry Report. This report included an assessment of risk, designed to predict the risk of the appellant's committing a general criminal offence within a year. He was assessed as being at a very high risk of recidivism in regard to general criminal offences but not specifically a sexual offence. The report emphasised that the tool used to conduct the risk assessment was not designed to predict a sex offender's risk of harm to society or his propensity to commit another sexually related offence. The report also recorded that the appellant had committed a total of 11 infractions since

2012 while in prison, and a further nine when in prison between 2000 and 2002. It referred to a psychological risk report prepared in 2008, which itself had stated that the appellant had commenced but not completed the Sex Offender Treatment programme and the Time to Change programme. We were told by the appellant's counsel that the appellant maintains that his failure to complete these programmes was because they were withdrawn. The report concluded by saying this:

> "[The appellant] is deemed a chronic offender and his rehabilitation will be a challenging task since he presently does not see the need to change. He has a long history of committing serious crimes against person, irrespective of their gender and status. He has professed his innocence, in spite of the verdict and has blamed the police for framing him. Hence, [the appellant] will need time to eventually recognise the impact of crime on him, his family and the community. He is now more mature and is the father of one child, who could be his motivator for change in the future…. Despite [the appellant's] identifiable needs and treatment recommendations, his rehabilitation will be based on his personal desire to change and not a mere fulfilment of what is required. He is adverse to being told what to do and it would be best to have continued dialogue that will guide him to recognise the need to amend his lifestyle".

(3) A psychological evaluation. This contained the following passages.

"[The appellant] reported that he has four rape charges. He was very adamant about the nature of the sexual offences. He admitted that he is capable of raping women, "but not random rape"; he clarified that he would only engage in sex with females he knows. He defined knowing as females who would party with him or drink with him. When he is told "no" by such individuals, he would "become frustrated and take it". He did not perceive this as a problem because "the next day there would be no problems with the girls involved". He admits feeling a sense of pleasure from taking sex by force but reported no additional deviant sexual preferences but, he added, he likes beautiful women. [The appellant] stated that he probably has unintentionally hurt sexual partners physically or emotionally. He stated that he has never used a weapon to force women to engage in sex with him. He strongly reiterated that he would never rape someone he did not know or someone he would pick up from off the road. Therefore, he said, he is not guilty of his latest charge."

"[The appellant's] assessment of sexual violence risk indicates that he is at moderate risk for reoffending sexually if no efforts and treatment interventions are made to manage the following risk factors: high antisocial score, presence of antisocial attitudes and values (feels justified in

raping acquaintances) and past antisocial behaviours, exacerbating circumstances such as use of drugs and alcohol and his associates, his lack of stable and supportive relationships and employment.

Personality Findings: [The appellant's] highest score (90, very high) on the MMPI-2, Psychopathic deviate, confirms his acknowledgement of antisocial behaviours and trouble with the law. His score also confirms his tendency to be impulsive, impatient, irritable, hostile and aggressive. His frustration tolerance is low and when he becomes frustrated, his judgment is poor. This is supported by his report that when stressed and overwhelmed, he feels like doing something drastic, feels vindictive and would premeditate about getting back at others. He stated that if he is offended, he will retaliate and that he is capable of violence, but not random violence. He "will not randomly pick people from off the road or hurt someone without a purpose". ... Additional scale and content analysis shows that [the appellant] feels resentful of societal and parental standards. He is also likely to behave in an aggressive, angry, argumentative manner, will find it difficult to conform to societal norms and standards, will experience difficulty with authority figures, and is at increased risk of engaging in substance abuse and sexual acting out.

His second-highest score of 86 (very high) on Paranoia is not reflecting psychotic features and disturbed thinking but instead reflects his feeling lonely, misunderstood, mistreated, angry and persecuted. … [The appellant's] high scores on paranoia and schizophrenia scales are not reflections of paranoid thinking and not symptomatic of schizophrenia or delusional disorder. A detailed analysis indicates his scores are elevated because he endorsed feeling mistreated and picked on and he endorsed significant difficulty forming trusting relationships.

[The appellant's] third highest score, 72 (high), on Hypomania indicates that he has a high energy level, experiences periods of irritability and hostility, experiences underlying anxiety, has low frustration tolerance and tends to overreact to stress. He is impulsive, labile, may display libidinousness (excessive sexual desire) and pugnacity, may engage in poor planning, may act aggressively and has a high tendency to substance abuse.

[The appellant's] Depression and Schizophrenia scales are also within the high range. An analysis of the scales indicates that his Depression score (65) reflects that he is an unhappy, impulsive person with low self-confidence and overall dissatisfaction with life. Additionally, his score (65) on schizophrenia reflects social and emotional alienation, feelings of anxiety and sadness."

The report recommended that the appellant participate in a sex offender treatment program, a drug and alcohol treatment program, and individual and group therapy focusing on cognitive restructuring of thoughts, views and values. It concluded by saying this:

> "[The appellant] should be monitored in therapy to determine the need for medications to manage symptoms such as impulsivity, aggression, underlying depression and anxiety. Ongoing monitoring in a therapeutic context should also rule out Bipolar Disorder and Adult ADHD"

(4) A psychiatric report. This report opened by stating that the appellant had been referred to assess whether he had any major psychiatric disorder, history of bizarre or unusual behaviour, risk of recidivism and any psychiatric or medical explanation for his persistent sexual assaults on females. It recorded that [the appellant] "initially was reluctant to be interviewed and refused to be seen on the first visit. He was allowed to defer and another visit arranged. The [appellant] did attend the second appointment and the collection of data was started. However, the [appellant] refused to return for the final assessment visit and so this submitted report is incomplete". It set out some medical and psychiatric history, including a diagnosis in 2005 of adjustment disorder; but it concluded by stating that "the major portion of the examination was not completed due to [the appellant's] refusal to attend for the second portion of the evaluation".

(5) A list of the appellant's previous convictions. There were 19 of these, including offences of assault, burglary, indecent assault, rape and arson. We have already mentioned the offence of rape, for which the appellant was sentenced to 10 years imprisonment in 2001. In addition to that offence of rape and the offences the subject of this appeal, the appellant pleaded guilty in October 2011 to a further offence of rape committed nine days after the offences the subject of this appeal. On that occasion, he was sentenced to 15 years imprisonment.

(6) A victim impact report, in which the claimant said (among other things) this:

> "I came to the Cayman Islands to make my life better and in coming here my life was ruined. I am forever changed since the incident and I will not ever be the same".

(7) Limited mitigation. As the judge recorded,

> "Counsel for the [appellant] pointed to the fact that the [appellant] is 33 years of age with 19 previous convictions and would pose a moderate risk of recidivism. Counsel submits that, unfortunately, because the [appellant] maintains his innocence, it is very difficult to present anything on the [appellant's] behalf".

7. In his very full and careful sentencing remarks, the judge referred extensively to authority in this jurisdiction and in England. We consider these authorities below. He recorded that the appellant continued to deny his guilt with the consequence that the court could not find any mitigating factors. He referred to the following aggravating factors, which he described as "very serious":

"i. The Defendant broke into the victim's dwelling place at approximately 3 am on 20th October 2011;

ii. The victim awoke to find the Defendant on top of her, with one hand on her throat and a knife against her windpipe;

iii. The apartment was dark and the victim began to fight and the Defendant squeezed her throat a little tighter and told her to stop fighting. The victim begged the Defendant to stop and said she was having her period and the Defendant responded that he did not care.

iv. The Defendant used his knife to cut off the victim's clothes.

v. The victim was crying and begged the Defendant not to rape her. The Defendant's response was that it could have been "six men" and she should stop crying because it could be worse.

vi. The Defendant continued and told the victim to act like she was enjoying it, whilst keeping the knife to her neck.

vii. The Defendant raped her per vagina.

viii. The victim told the Defendant that this was the worst fear she ever had.

ix. The Defendant placed a knife between the victim's vagina and anus and told her that if she tried anything stupid he would cut it out.

x. The Defendant placed his penis into the victim's anus and had anal sex with her.

xi. The Defendant then placed his penis in the victim's vagina and eventually ejaculated.

xii. Before she left her apartment the Defendant told the victim to act normal and not tell anyone."

The judge then expressed the court's gratitude to the complainant for ensuring that justice was done. He referred to the appellant's previous convictions, of which 10 were for violence; and he referred specifically to the 2001 conviction of rape; a 2010 conviction of indecent assault; and the other offence of rape committed nine days after the instant offences. He noted that the instant offences and the offence of rape committed nine days later occurred only some six months after the appellant's completion of his sentence on the indecent assault charge. He then concluded in these terms (the paragraph numbers are those in the sentencing remarks]:

"95. The majority of the aggravating factors restated by our Court of Appeal in *Dilbert and Samuels* appear in this case. The Defendant entered the victim's home at night and by his actions has caused severe physical and psychological injury to the victim. It was, the victim said, her very worst nightmare. The Defendant not only ignored her pleas and protests but increased the level of fear she must have experienced to an unimaginable level.

96. The evidence before this Court demonstrates that the Defendant Jeffery Barnes is violent, dangerous and likely to offend again if not imprisoned for a very long time.

97. In this Court's view, the proper and appropriate sentence for Jeffery Barnes is life imprisonment. He has committed a repeated rape, with most, if not all, of the aggravating factors listed above. The Defendant is viewed by this Court as a serious risk to women in the Cayman Islands, and, accordingly, the sentence of imprisonment for life is commensurate punishment, and for the protection of the public.

98. The Court also orders that the Defendant participates in the sex offenders' treatment program and the anger management program in Northward prison."

8. The leading authority on sentencing for rape in this jurisdiction is the decision of this Court in *R v Dilbert and Samuels* CICA 3/2008 and 17/2009. In that case, as the Court remarked, "the appeals raise a common question of some importance: when sentencing in accordance with the tariff in respect of rape which is set out in the Statement of Tariffs and Guidelines issued by the Chief Justice on 16 January 2002, what effect (if any) should be given by a court in the Cayman Islands to observations in the Court of Appeal of England and Wales in *R v Millberry* [2002] EWCA Crim 2891, [2003] 1 WLR 546". The Court referred to the Chief Justice's Statement that for rape, "which has become alarmingly prevalent, an offender can expect a tariff of between 10 and 12 years imprisonment". It then considered

Millberry, in which the English Court of Appeal had referred to the "more extensive guidelines" set out by Lord Lane CJ in *R v Billam* [1986] 1 WLR 349, which it then quoted as follows:

> "For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years.
>
> At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime upon a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may be appropriate.
>
> *Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate*" (emphasis added)

This Court then listed eight aggravating factors identified by Lord Lane CJ in *Billam*, and the following nine aggravating factors identified by the Sentencing Advisory Panel:

> "(i) the use of violence over and above the force necessary to commit the rape; (ii) use of a weapon to frighten or injure the

victim; (iii) the offence was planned; (iv) an especially serious physical or mental effect on the victim; this would include, for example, a rape resulting in pregnancy, or in transmission of a life-threatening or serious disease; (v) further degradation of the victim, e.g. by forced oral sex or urination on the victim;(vi) the offender has broken into or otherwise gained access to the place where the victim is living; (vii) the presence of children when the offence is committed; (viii) the covert use of a drug to overcome the victim's resistance and/or obliterate his or her memory of the offence; (xi) a history of sexual assaults or violence by the offender against the victim."

The court summarised the principles to be derived from *Millberry*, stating (among other things) that "there will be cases in which a life sentence is appropriate"; and in paragraph 19 of its judgment, this Court stated that the starting points of five and eight years identified in *Billam* and endorsed in *Millberry* had no direct application in the Cayman Islands where the tariffs had been set deliberately at a higher level than that which, at the time, was thought appropriate in England and Wales. The court pointed out that the sentences suggested by the tariffs were sentences to be applied in a typical case: mitigating factors would reduce them and aggravating factors would increase them. In identifying aggravating factors, the nine factors identified by the Sentencing Advisory Panel provided a useful (but not exclusive) reference.

9. In the instant appeal, much of the argument for the appellant focused on the passage from *Billam* which we have emphasised above. It was said that that passage set out a cumulative requirement for the imposition of a life sentence: the offender's behaviour must have manifested perverted or psychopathic tendencies or gross personality disorder, and it must be shown that he is likely, if at large, to remain a danger to women indefinitely. Both elements of this requirement had to be satisfied before a life sentence could be passed. In the present case, the psychological evaluation demonstrated that the appellant did not have psychopathic tendencies or gross personality disorder, and the first element of the requirement was accordingly not satisfied.

10. It was additionally argued on behalf of the appellant that a sentence of life imprisonment was a sentence of last resort. In the present case, the appropriate sentence was a long determinate sentence. The case was similar to the case of *R v Dave Kennedy Whittaker* CICA 14/2006, a case of indecent assault described by the trial judge as "an exceptionally unpleasant and serious sexual assault", where the sentence imposed was 25 years imprisonment, reduced on appeal to 20 years imprisonment. 20 years imprisonment was the appropriate sentence in the present case.

11. The Crown contended that the nature of and aggravating features present in the case, the appellant's antecedent history and the contents of the reports provided a proper basis for the imposition of a life sentence. The appellant's behaviour had demonstrated perverted tendencies, and the material available to the court demonstrated that

the appellant was likely to remain a danger to women for an unknowable period. The test set out in *Billam* was accordingly satisfied; but an alternate line of authority in England and Wales made clear that the existence of the mental element emphasized in *Billam* was not a precondition of the imposition of a life sentence.

12. The line of cases cited by the Crown consisted of *R v Hodgson* (1968) 52 Cr App R 113; *Attorney-General's Reference No 32 of 1996 (Whittaker)* [1997] 1 Cr App Rep (S) 261, and *R v DP* [2013] 2 Cr App R (S) 63. In *Hodgson*, a case of rape, buggery and other assaults on women, the Court of Appeal (Criminal Division) said this:

"When the following conditions are satisfied, a sentence of life imprisonment is in our opinion justified: (1) where the offence or offences are in themselves grave enough to require a very long sentence; (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence".

In *A-G's Reference No 32 of 1996*, a case of grievous bodily harm with intent where the offender had previously been convicted of murder and sentenced to life imprisonment, the Court of Appeal (Criminal Division) concluded that some abnormality of mind or personality was not an essential requirement before a life sentence could be imposed. The Court said this:

“In our judgement the learned judge was taking an unnecessarily narrow view of the circumstances in which a discretionary life sentence can be imposed. It appears to this Court that the conditions may be put under two heads. The first is that the offender should have been convicted of a very serious offence. If he (or she) has not, then there can be no question of imposing a life sentence. But the second condition is that there should be good grounds for believing that the offender may remain a serious danger to the public for a period which cannot be reliably estimated at the date of sentence. By "serious danger" the Court has in mind particularly serious offences of violence and serious offences of a sexual nature. The grounds which may found such a belief will often relate to the mental condition of the offender. So much is made plain by *Wilkinson* (1983) 5 Cr App R (S) 105, in particular in the passage at 108 where Lord Lane CJ cites the judgment of Lawton LJ in *Pither* (1979) 1 Cr App R (S) 209 and continues:

"It seems to us that the sentence of life imprisonment, other than for an offence where the sentence is obligatory, is really appropriate and must only be passed in the most exceptional circumstances. With a few exceptions, of which this case is not one, it is reserved, broadly speaking, as Lawton LJ pointed out, for offenders who for one reason or another cannot be dealt with under the provisions of the Mental Health Act, yet who are in a mental state which makes them dangerous to the life or limb of members of the public. It is sometimes impossible to say when that danger will subside, and therefore an indeterminate sentence is required, so that the prisoner's progress

may be monitored by those who have him under their supervision in prison, and so that he will be kept in custody only so long as public safety may be jeopardised by his being let loose at large".

It is therefore plain that evidence of an offender's mental state is often highly relevant, but the crucial question is whether on all the facts it appears that an offender is likely to represent a serious danger to the public for an indeterminate time" (emphasis added).

13. It is perhaps unfortunate that the *Millberry* and *Billam* line of cases was not referred to in any of the three cases cited by the Crown. It is nevertheless in our view clear that what were referred to in *R v DP* as the "two Hodgson/Whittaker criteria", namely whether the offender has been convicted of a very serious offence, and if so whether there are good grounds for believing that he may remain a serious danger to the public for a period that cannot be reliably estimated at the date of the sentence, represent the law in England and Wales. The absence of abnormality of mind or personality is not determinative against the imposition of a life sentence. In our judgment, the same is the case in the Cayman Islands. Accordingly, in this jurisdiction the position is that the sentencing guideline authority in cases of rape remains *Dilbert and Samuels*; but to the extent that that authority suggests that life sentences may be imposed only in the circumstances identified in *Billam* it states the position too narrowly. The correct test is that set out at the end of the passage we have quoted above from *Attorney-General's Reference No 32 of 1996*. It must, however, always be borne in mind that a life sentence is a sentence of last resort to be reserved

for exceptional circumstances, and that – as *Billam* shows – even extremely serious cases of rape, involving a campaign against women, may attract only a determinate sentence, albeit a very long one.

14. Applying the *Hodgson/Whittaker* criteria to the present case, the judge's imposition of a life sentence can be seen to be justified. These were undoubtedly very serious offences, with many aggravating features; and the judge was plainly entitled to take the view that the appellant would remain a serious danger to the public for an indefinite period. That conclusion was warranted by the appellant's attitude, recorded in the psychological evaluation, that when refused sex by females he has met socially he becomes frustrated and takes it, and by his admission (recorded in the same document) that he feels a sense of pleasure from taking sex by force. It was justified also by the fact that this was the appellant's third conviction for rape, in addition to his conviction for indecent assault, indicating that he has little or no hesitation in implementing the attitudes recorded in the psychological evaluation. Although the psychological evaluation suggested that the appellant was at moderate risk of reoffending sexually if no efforts and treatment interventions were made to manage the risk factors it identified, the appellant's antecedent history strongly suggested otherwise; and the judge was not obliged to accept the suggestion in the psychological evaluation in preference to his own view of the facts and likelihoods.

15. We should mention two further points. First, as a subsidiary ground of appeal the appellant asserted that he had been misled by a

discussion between the judge and counsel about the necessity to ensure that the sentence passed reflected the total criminality into assuming that the judge was intending a determinate sentence, and that it was unfair to him to frustrate his legitimate expectation to that effect. There is nothing in this point: the discussion about totality was merely one of a number of elements of the discussion about sentencing, and the judge made it entirely clear that the sentence he would ultimately impose was the one he regarded as appropriate in all the circumstances. The appellant's counsel was given a fair opportunity to make such points about sentence as were available to the appellant, and the appellant cannot sensibly have assumed that the judge was committing himself to a determinate sentence.

16. The second point is this. The statements in *Dilbert and Samuels, Millberry, Billam, Hodgson, Whittaker and DP* are all concerned with sentencing for an isolated case of rape. They say nothing about how the court should approach sentencing in a case where section 23 of the Code applies. As we have said, that section gives the court a discretionary power to impose a life sentence in the case of a second Category A offence. Subsection (3) of the section is in the following terms:

> "When determining whether it would be appropriate not to impose a life sentence, the court shall have regard to the circumstances relating to either of the offences or to the offender".

Although this wording falls far short of raising a presumption that a life sentence will be appropriate, it may be taken to suggest that the

legislative focus is on reasons why a life sentence should not be imposed rather than on why one should. We did not have any submissions on this point, and do not rely on it as any part of our decision; but it may well be that in circumstances to which section 23 applies different criteria for the imposition of a life sentence may be appropriate.

17. For the reasons we have given, we dismiss the appeal.

Martin JA

Field JA

Morrison JA