In the St. Helena Court of Appeal

Citation: SHCA 3/2019

Criminal

In the matter of an appeal against sentence

Appellant

Eric Benjamin

Judgment on appeal against sentence

Heard on 24th May 2019

Before: Sir John Saunders, President; HHJ R Mayo, Member; and HHJ L Drummond, Member

1. Having been convicted after a trial this Appellant was sentenced to a total of 6 years imprisonment for three offences of sexual assault and one offence of attempted rape. The sentences for the individual offences were 4 ½ years for the offence of attempted rape and 6 months imprisonment for each of the sexual assaults. All the sentences were ordered to run consecutively to one another.
2. Reporting restrictions apply to this case and nothing must be published in any report of this case which is capable of identifying the victims.
3. The brief facts are as follows. Count 1 was an offence of indecent assault in 1999 on a woman who we shall refer to as BP. She was 16 at the time and the Appellant was 64. The Appellant who was a photographer was commissioned to take photographs of the island. BP had been hired as a model to feature in the photographs. The photographs were taken at various different locations. At the end of one photographic session which took place in a wood the Appellant kissed BP on the lips and tried to put his tongue inside her mouth. BP did not want this to happen and she stepped back which prevented the Appellant succeeding in what he

was trying to do. BP was upset after this incident but didn't report it to the police.

4. The next two offences were committed in 2016 some 17 years later. By then the Appellant was 82 and was Speaker of the Legislative Council; an important position on the Island. He was also a lay advocate. GB was the victim of these offences. The Appellant was a close friend of her family and knew her well. She held a position with the St Helena Government. GB had personal problems including financial ones. GB would visit the Appellant for help, not only because he was a family friend but also because he was a lay advocate. Over a period of two years, he gave her some £350 to £400 of his own money to assist her with her debts. Some of those payments were made after the offences. £70 to £120 were paid before. On one of her visits in 2016, the Appellant hugged her, kissed her on the cheek as she was leaving, which was not unusual, and then kissed her on the lips and put his tongue in her mouth. GB pushed him away and left the office. That is count 2.
5. Some weeks later in early October 2016 the Appellant committed the most serious of these offences, the attempted rape of GB. She had visited him again because of money problems. The Appellant gave her money but said she would have to let him have her just once. He kissed her on the mouth and undid her trousers which fell to the floor. He undid his trousers and the two of them ended up on the floor with the Appellant on top of GB. GB could feel the Appellant's unerect penis on her leg. Fortunately GB's phone rang and she answered it. It was her partner. The Appellant allowed her to get up, answer the phone; do up her clothing and leave.
6. GB did not complain about either of these offences at the time.
7. The last victim we will refer to as JS. She was in her early 20's at the time of the offence. She consulted the Appellant over a period of time in his capacity as a lay advisor in relation to child maintenance. On the occasion of the offence she had gone to him to get passport photographs taken. After he had done that, he suggested that she should do some nude modelling for him which she refused to do. The Appellant then said that she had to help him as he was helping her and forcibly kissed her on the mouth using his tongue.
8. JS did not report the offence at the time. The offences came to light because two of the victims separately told the same psychologist that

the Appellant had forcibly kissed them. The offences were reported to the police and eventually came to trial.

9. All three of the victims were affected by the offences to varying degrees. As might be expected the greatest affect was on GB. The Judge in his sentencing remarks said 'the psychological effect of what you did to this already troubled young lady……..was very considerable'.
10. The Judge looked for guidance as to the appropriate starting points for sentence to the Sentencing Guidelines for England and Wales. He was right to do so. He considered the aggravating factors for each offence. In relation to the sexual assault on the 16 year old he found there was a breach of trust because of the age difference and because she had been entrusted to him for the purpose of being included in photographs of the island. He concluded that the appropriate category of offence was 3A.
11. In relation to the other women, the Judge decided that while the sexual assaults came within category 3B they were aggravated by the vulnerabilities the women had, of which he was aware. Those vulnerabilities were not of a sort to make them vulnerable within the guidelines but they were capable of being aggravating features. The women had approached him for help and he had taken advantage of their need for help. We agree with the Judge's analysis. The Judge also concluded that it was 'plainly an aggravating feature' that the Appellant had already committed the first offence of sexual assault. This observation we find more difficult. We are not convinced that an offence for which there has been no conviction is an aggravating factor. By virtue of s. 143(2) of the Criminal Justice Act 2003, each **previous conviction** (our emphasis) must be treated as an aggravating factor. Does the same apply to offences where there has not been a conviction? Prior to the Criminal Justice Act 2003, the rule was that previous convictions did not increase a sentence but they reduced or removed any possible credit for good character. Arguably the reasoning behind s. 143(2) is that, having been convicted and punished once for an offence, an offender should have learnt his or her lesson. If that reasoning is correct then the pre 2003 rule applies to offences which pre date the index offence but for which there has been no conviction by the time of the commission of any subsequent offence. This matter of principle has not been fully argued before us but our preliminary view is that the fact of previous

offending without a conviction is not an aggravating factor to be taken into account when sentencing for any subsequent offence. In so far as it was argued, we were not convinced by Mr. Jackson's argument which was in effect that the fact of a conviction makes no difference and it is the fact of the commission of a previous offence which is relevant. In the end we do not need to decide this point definitively as we agree with the individual sentences passed by the Judge on the offences of sexual assault and do not think that whatever our decision on the point would have made any real difference to sentence.

12. The Judge described the sexual assaults as relatively minor and said that had the Appellant admitted them, it might not have been necessary to pass an immediate sentence of imprisonment. We agree with his assessment.
13. The attempted rape was, as the Judge said, the most serious of the charges. GB was desperate for help from the Appellant and the Judge said to the Appellant 'you must have thought that this gave you free rein to do what you wanted with her.' There is no range or starting point for sentences for attempted rape and the Judge had to obtain what guidance he could from the sentence ranges for the completed offence.
14. The Judge decided that the first of the sexual assaults was a Category 3A offence with a range of community service to 1 year and a starting point of 6 months. The other two sexual assaults he decided were Category 3B offences but with significant aggravating factors. The Judge further decided that, had the offence of attempted rape been completed it would have been a category 3B offence with a range of 4 to 7 years and a starting point of 5 years. The Judge said there were significant aggravating features but did not specify what sentence he would have passed had the rape been completed. The Judge did not suggest that the aggravating factors were so serious that they took the offence into another category. It follows that the highest starting point he would have taken for the completed offence would have been 7 years.
15. Clearly the offence of attempted rape would normally attract a shorter sentence than the completed offence depending on the degree of proximity to the completed offence and the degree of persistence and violence with which the attempt was pursued.
16. Here the Appellant relies on the fact that while GB's trousers were removed, her underwear had not been interfered with. Also the

Appellant relies on the fact that once GB's phone rang, he did not persist or try to prevent her leaving. As the Judge said in his sentencing remarks, the ringing of the phone 'perhaps … brought you to your senses'.

17. As to any mitigation, the Judge treated the Appellant as a man of good character. The Judge acknowledged the considerable good work that the Appellant had done on the island and his positive good character but said that they were of little weight as 'you abused your high reputation in order to commit these offences with, as you thought, impunity'. This is in accordance with the Sentencing Guidelines for rape which says *where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed and such conduct may constitute an aggravating factor.* In the present case the Appellant abused his position as a lay advocate to commit this offence against GB which we view as an aggravating factor. The Judge discounted the Appellant's age as mitigation but said that his ill health did count. He said it mitigated the sentence as it 'means that the effect…of a prison sentence will be greater than it would be on a healthier man'.
18. The Judge's starting point for the attempted rape was 5 years imprisonment but he discounted that by 6 months to take account of totality.
19. The careful analysis of the way the sentence has been made up by the Judge has helped us define the issues in clear terms.
20. In our judgment the issues in this case are:
    - Is the total sentence too long? Should all the sentences have been made consecutive?
    - Are the sentences for the individual sentence too long and, in the case of the attempted rape, has insufficient reduction been made from the sentence which the Judge would have passed for the completed offence?
    - Has the Judge in fact made any meaningful reduction to reflect the ill health of the Appellant and the additional hardship that he will suffer from imprisonment as compared with a younger and healthier man?
21. The Court of Appeal have access to the following information which was not available to the trial Judge. We requested a prison report to describe

how the Appellant is coping with prison life. That report has been provided by Heidi Murray the Prison Manager. In addition we have letters from Dr. Juliane Kause and Ian Rummery CPN which deal with the Appellant's health. We are very grateful for all those reports. The Appellant has suffered from ischaemic heart disease, hypertension, type 2 diabetes and gastric reflux. Since he has been in prison he has had to be admitted to hospital twice for chest pains. He was released within a short period of time on both occasions. Those pains are related to his heart condition and he seems now to be coping with them without requiring hospital admission. In general the Appellant is coping well with prison life; is making the best of his predicament and joining in with prison activities. He does find some things difficult to do physically which is not surprising at his age. The Appellant is now 84 years old. As he gets older he will find more things difficult and one or more of his medical conditions may get worse. He will get the appropriate medical treatment but it will nevertheless make his life in prison harder.

22. Should all the sentences all have been ordered to run consecutively to one another? These are all individual sentences and there is no reason subject to the issue of totality why the appropriate sentence for each offence should not be served by the Appellant. In considering the issue of totality, courts have the assistance of the guidance of the Sentencing Council. The general principles set out in the Guidance are that *1. All courts when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate…….. 2. It is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.* Depending on the circumstances this can either be done by passing concurrent sentences thus reducing the overall length or by passing consecutive sentences and reducing the length of one or more of the sentences to ensure that the total sentence is just and proportionate.

23. In this case the Judge decided to reflect the principle of totality by reducing the sentence for the attempted rape by 6 months. In our judgment this was a perfectly appropriate way of reaching a just and

proportionate sentence and is in line with the principles set out in the guidance.

24. Were the sentences for the individual offences too long? In relation to the first sexual assault which was classified as category 3A because it involved a breach of trust, the sentence of 6 months reflects the starting point in the Guidance. There can be no proper criticism of this sentence. In relation to other two sexual assaults which are category 3B offences, it is arguable, in our judgment, that slightly shorter sentences could have been passed but we have concluded that sentences of 6 months were not manifestly excessive. There were aggravating features to the offences. In particular the Appellant held a position as a lay advocate and took advantage of both women who had come to him for help.
25. In relation to the attempted rape, the Judge was correct to regard the offence as serious. There is no specific guideline for attempted rape and so the Judge was correct to look for guidance to the rape guidelines. We also agree with his analysis that, had the offence been completed, it would have been a category 3B offence with significant aggravating features. The starting point for a 3B rape is 5 years with a range of 4 to 7 years. Had the Judge considered that the aggravating features took the sentence outside the range, then he would have said so. The maximum sentence that he could have had in mind therefore is 7 years. The Judge reduced that to 5 to reflect the fact that the completed offence was not committed.
26. Was that a sufficient reduction? This was a reduction of under one third. Clearly the appropriate reduction varies with the facts. How close to the completed offence did the offender get? How persistent was he in pursuing the offence? In some cases the sentences of attempted rape, particularly where significant violence is used, can be close to the sentence for the completed offence, but in many cases in our judgment a substantial reduction from the sentence for the completed offence would be justified.
27. The only possible guidance which can be found comes from the attempted murder sentencing guidelines. There a starting point for the reduction is that the sentence is one half of that for the completed offence. Of course there are significant differences between the offences of murder and rape but it doesn't seem unreasonable in our judgement to take as a starting point a reduction of between one half

and one third for attempted rape as compared with the completed offence.

28. There is one other matter which the Judge mentioned as mitigation which he has not specifically factored into the sentence. That does not mean that he hasn't taken account of it, but it must have been included in the sentence he imposed for the attempted rape. The Judge accepted, correctly in our judgment, that ill health could reduce the sentence, as it makes a sentence of imprisonment more difficult to cope with.
29. While the Appellant is coping reasonably at the moment, he does suffer from various complaints which, particularly as he gets older, are likely to make prison life more difficult for him than for a fitter man.
30. Taking all those matters into account and taking into account the principle of totality, we do think that the Judge should have reduced his apparent starting point of 7 years if the rape had been completed, to one of 3 ½ years.
31. Making all the sentences consecutive, that gives a total of 5 years. We have then looked at the overall sentence and asked ourselves whether that is a proportionate and just sentence to reflect the overall offending. In our judgment it is and accordingly we reduce the sentence on count 3 from 4½ years to 3½ and to that extent the appeal is allowed. The total sentence is 5 years rather than 6 years.