

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 15 of 2012

BETWEEN:

CARL ROBERT MALONEY Appellant

AND

THE QUEEN Respondent

Before: The Hon. Sir Marston C.D Gibson, KA, Chief Justice, The Hon. Sandra P. Mason and The Hon. Kaye C. Goodridge, Justices of Appeal.

**2014: September 18
November 24**

**2015: March 16, October 14
December 9**

2016: March 30, May 18

Ms. Rita Evans for the Appellant.

Mrs. Donna Babb-Agard QC and Mr. Oliver Thomas for the Respondent.

DECISION

GOODRIDGE JA

Introduction

[1] On 2 February 2012, the appellant appeared before **Reifer J** charged with the offence of rape, contrary to **section 3(1)** of the **Sexual**

- Offences Act, Cap.154.** He pleaded guilty to that charge. On 30 August 2012 he was sentenced to life imprisonment and on the next day the appellant signed a notice of appeal against that sentence.
- [2] The appeal was first listed for hearing on 20 May 2014 but was adjourned to 18 September 2014 at the appellant's request in order for him to obtain counsel. On that date Ms. Rita Evans, attorney-at-law, entered an appearance on the appellant's behalf and requested an adjournment because she had been recently retained. The matter was adjourned until 24 November 2014. On 23 September 2014 Ms. Evans filed grounds of appeal.
- [3] Ms. Evans, who had encountered certain difficulties which impeded her preparation of the matter, requested some further adjournments. The appellant's written submissions were filed on 9 December 2015 and the respondent's submissions were filed on 28 March 2016. The appeal was finally heard on 30 March 2016.

The Facts

- [4] The facts were outlined to the court by Mr. Alliston Seale, counsel for the respondent and were accepted by Ms. Evans, counsel for the appellant. They revealed that the complainant was an elderly lady, 80 years old, who had suffered a stroke some six years earlier. She was

previously a pastor, had never married and was a virgin. Her mobility was affected and she needed the assistance of a walker to move around. The complainant was provided with assistance from the National Assistance Board, and a relative would visit on evenings and sometimes stay overnight. However, shortly before the offence was committed, that relative had suffered a fall and was unable to visit regularly.

- [5] On 3 September 2011, the complainant awoke around 7.00 am, opened the windows of her house and unlocked the front door but kept it closed. She received no visitors that day. Shortly before 6.00 pm, she closed the windows. The complainant tried to secure the front door but was only able to turn the lock half way. She engaged the latch, watched television and went to bed around 8.00 pm.
- [6] Sometime during the early hours of 4 September 2011, the complainant was asleep in bed when she was awakened by the sound of her front door being opened. She saw a shadow and then a naked man jumped on top of her. The complainant tried to fight him off and screamed for help. Despite the fact that the complainant begged for mercy, the appellant violated her (her adult brief was pulled off and she was penetrated per vaginam and anum). During the attack which

lasted for about an hour, the appellant told the complainant "Don't talk, don't talk. I got to do this, I got to do this. I went to prison, you know, and I does do this to old people. I was watching you...I love you. You sweet, you sweet." The complainant felt severe pain and eventually lost consciousness. After the complainant regained consciousness, she reported the matter to the police.

[7] On 5 September 2011, police officers went to the residence of the appellant during the course of their investigations into the matter. The appellant told them "I know that wanna did coming for me, I know that it 'bout the old woman 'cause I rape she". The appellant was taken to the police station where he was interviewed under caution. He made several oral statements. When asked why he had committed the offence, the appellant replied "I did want some sex, though. I rape one old lady before you know. I really don't know why, I just like doing it". The appellant also told the officers that he had consumed some alcohol earlier that night but was not drunk and that he knew exactly what he was doing all the time.

[8] Subsequently, the appellant gave a written confession statement in which he related in graphic detail the sexual violence which he

perpetrated against the complainant. It is not necessary for the purposes of this appeal to set out the contents of that statement.

The Sentencing Process

- [9] After the appellant had pleaded guilty, it was revealed that he had four previous convictions: (i) theft (1995); (ii) entering a dwelling house (1996); (iii) theft (1996) and (iv) rape of a 65 year old woman (2009) for which he was sentenced to three years in prison. It is to be noted that three of these offences had been perpetrated against women.
- [10] By consent of counsel, it was agreed that given the availability of a pre-sentence report which had been prepared in 2009, it was unnecessary to obtain another report. However, the court ordered that an updated psychiatric evaluation of the appellant be undertaken and a report submitted to the court. That report was prepared by Dr. Beresford Connell, Senior Consultant Psychiatrist (Dr. Connell), who gave evidence and was cross-examined by Ms. Evans at the hearing. Ms. Evans then mitigated on behalf of the appellant. Counsel for the Crown then responded to Ms. Evans' submissions.

Sentencing Remarks

- [11] The judge considered that the offence was serious, violent and of a sexual nature and concluded that a long custodial sentence was

merited. She next adverted to the facts which she found to be distasteful and shocking.

[12] In seeking to arrive at the appropriate sentence, **Reifer J** then addressed her mind to the twin concepts of offence seriousness and proportionality and looked at the aggravating and mitigating factors. The judge took into account the mitigation of counsel, the contents of the pre-sentence report, Dr. Connell's evidence and the authorities which had been cited by counsel. She noted that when the appellant was apprehended the next day, he quickly admitted his guilt, cooperated fully with the police and pleaded guilty at the earliest opportunity. However, she concluded that these factors counted for little in the context of the case.

[13] The judge concluded that the circumstances of the case fell within the criteria for the imposition of a life sentence. In her opinion, the appellant, then 36 years old, posed a real threat to society and it was her duty to protect society from him.

The Appeal

[14] Ms. Evans acknowledged that the offence of rape is a very serious offence for which parliament has prescribed a maximum penalty of life imprisonment. With commendable candour, Ms. Evans readily

conceded that the offence committed by the appellant was an atrocious one, and that the judge was hard pressed to find any mitigating factors except for the early guilty plea of the appellant. Counsel noted that the appellant had expressed remorse for his actions.

[15] In her written submissions, Ms. Evans had contended that there was no indication from the trial judge that a sentence of life imprisonment was being considered and there was no real opportunity for counsel to make further representations on behalf of the appellant. However, this complaint was not pursued by Ms. Evans at the hearing.

[16] Counsel also submitted that, having assessed the seriousness of the offence and bearing in mind the court's role in protecting the vulnerable members of the society together with the court's special protective role in relation to the elderly, women and girls, the court could have considered a sentence of 25 years as appropriate. Ms. Evans invited this Court to hold that the sentence was excessive and impose a sentence of lesser severity.

[17] In response, Mrs. Donna Babb-Agard, QC, counsel for the respondent, submitted that in every criminal trial where a custodial sentence is to be considered, the court should judge the seriousness of the individual

case on its own merits and decide which particular circumstances either favour or weigh against an offender before imposing a sentence. She conceded that the criminal courts do not lightly or frequently impose life sentences and when such a sentence is imposed, the circumstances which have led to such a severe sentence must be carefully examined.

[18] It was counsel's submission that the judge considered the relevant sections of the **Penal System Reform Act, Cap.139 (Cap.139)** as well as the aggravating and mitigating factors before handing down the sentence.

[19] Counsel stressed the seriousness of the offence and submitted that a determinate sentence of 25 years would not serve the interests of justice or protect the vulnerable category of elderly persons from the appellant. Counsel's final submission was that the circumstances of the case properly attracted a sentence of life imprisonment.

Discussion

[20] There is no doubt that the offence of rape is a grave offence. It not only exposes the complainant to physical harm but to significant psychological and emotional trauma. It is an offence which calls for

the imposition of a custodial sentence other than in wholly exceptional circumstances: per Lord Lane CJ in **R v Billam [1986] 1 WLR 349**.

[21] An examination of cases which have come before this Court has revealed that, generally speaking, those who commit this type of offence are given long terms of imprisonment and in some instances a sentence of life imprisonment has been imposed.

[22] The circumstances in which a sentence of life imprisonment is merited engaged the attention of the English court of appeal in **Hodgson (1967) 52 Cr. App. R 113 (Hodgson)**. That case established that a sentence of life imprisonment is justified, if the following criteria are satisfied:

- (i) the offence must be grave enough to warrant a very long sentence;
- (ii) the nature of the offence or the defendant's history must show that he is unstable and likely to commit such offences in the future; and
- (iii) the consequences of the offence to others may be especially injurious, as in the case of sexual offences or crimes of violence.

Hodgson was followed in **R v Dempster (1987) 85 Cr. App. R 176**.

[23] The principles outlined in **Hodgson** were applied by this Court in **Oral Cummins v R, Criminal Appeal No. 56 of 1995 (unreported decision of 13 July 2004) (Cummins)** where the appellant was given

three life sentences for the kidnapping, wounding and raping of a ten year old girl who was left for dead in some bushes. The appeal was dismissed, the Court being satisfied that the criteria in **Hodgson** had been met.

[24] We turn now to the facts in this case. There can be no doubt that this was a grave offence which merits the imposition of a long sentence of imprisonment. In our opinion, the first criterion in **Hodgson** has been satisfied.

[25] As to the other criteria, the report of Dr. Connell is instructive. The doctor reported that the appellant has been diagnosed with mental sub-normality; anti-social personality disorder and substance abuse. The appellant has been classified as a recurrent sexual offender, and there is nothing to suggest that his sexual deviance is driven by any identifiable psychiatric illness. Dr. Connell also stated that the appellant is a high risk offender and society needs to be protected from him at this time, and that he will require ongoing psychological counselling and psychiatric management as necessary.

[26] Further, at pages 29 and 30 of the record while under cross-examination by Ms. Evans, Dr. Connell testified as follows:

"since he is an established repeat offender, there is every reason to believe that...or there is no reason not to

believe that he would not continue to offend...in this part of the world we move in the direction of medical castration where he is given medication which reduces his libido to subliminal levels and therefore reduces the urge for sexual activity...So I think it is safe to say that as long as he is institutionalised his sexual deviance does not manifest itself especially if he is institutionalised in a setting that does not expose him to females and in this case elderly females.”

[27] In response to a query from the trial judge as to whether there was any other way that society could be protected from the appellant other than by medical treatment (medical castration, which the law presently does not allow), Dr. Connell had this to say:

"I think that society can be protected from Mr. Maloney by at this point keeping Mr. Maloney away from society. That is the only sort of safeguard and 100 per cent protection that I can offer...one of the most difficult things to deal with, one, is a personality disorder, worse is an anti-social personality disorder and worst yet is an anti-social personality disorder that has sexual deviance as a manifestation."

[28] It is clear to us that the other criteria outlined in **Hodgson** have been met for when one considers Dr. Connell's testimony, there are good grounds for believing that the appellant, because of his mental sub-normality and his anti-social personality disorder, may remain a danger to the public, particularly elderly females, for a period which we cannot reliably estimate.

[29] In seeking to arrive at an appropriate sentence, the judge dutifully followed the provisions of **Cap. 139**. She noted that the circumstances of the case were so grave that there was no question of a discount being applied for the early guilty plea. We agree. We have therefore concluded that the imposition of a life sentence on the appellant was justified, having regard to the seriousness of the offence.

[30] The facts of this case are particularly disturbing. The complainant was an elderly lady, vulnerable and partially incapacitated. She was defiled in the worst way. The rape was premeditated and violent. It was carried out in the early hours of the morning while she was asleep. The sanctity of the complainant's home was violated. Force was used against her. The emotional and psychological trauma which she suffered is evident in her pleading with the appellant to have mercy on her and not to do that to her at her age. All this is compounded by the fact that the appellant had only been recently released from prison for a like offence.

[31] In conclusion, we can do no better than to repeat the words of **Sir**

David Simmons CJ in **Cummins** which we consider apposite:

"[33] The facts in this case are exceptional and horrendous. They would outrage the sensibilities of members of the public. We take account of the appellant's previous and most recent mental state. But, we think that a consideration of greater relevance is whether the appellant would represent a serious danger to the public. This Court must have regard to the protection of the public, especially the need to protect women from violence and sexual abuse.

[34] We have had to balance the need to protect the public with the need to consider the totality of the sentences, always trying to ensure that the totality of the sentences is not disproportionate to the nature and extent of these crimes. Ultimately, we must consider all of the circumstances as known to the Court and make an assessment of future possibilities always remembering that the ingenuity of the mind is infinite. We have taken into account the totality of the circumstances of these crimes, the personal circumstances of the appellant as well as his criminal history. It is plain that this appellant is a dangerous man. It is impossible to say if or when his dangerousness will subside.

[35] Having regard to all of the circumstances, an indeterminate sentence is appropriate in the interests of public safety. In our opinion, the sentences imposed by the trial judge were and are proportionate to the gravity of the offences."

Disposal

[31] For the foregoing reasons the appeal is dismissed and the sentence is affirmed.

Chief Justice

Justice of Appeal

Justice of Appeal