IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Application No GY/A/CR2023/001
Criminal Appeal No 25 of 2018

BETWEEN

A B **APPLICANT**

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

Before: **Mme Justice Rajnauth-Lee**
Mr Justice Barrow
Mr Justice Jamadar

Date of Judgment: **21 June 2023**

On Written Submissions

Mr C A Hughes, Mr Ronald Daniels, Ms Savannah Barnwell, Ms Kiswana Jefford and Mr Shawn Shewram for the Applicant

Mrs Diana Kaulesar-O'Brien and Mrs Teshana Lake for the Respondent

Practice and Procedure – Appeal – Leave to Appeal – Special Leave – Criteria for granting Special Leave – Sentence – Applicant convicted of sexual activity with a child and sentenced to life imprisonment – Applicant appealing against sentence – Whether sentence manifestly excessive – Whether sentencing process met acceptable fair hearing standards – Sexual Offences Act, Cap 8:03.

SUMMARY

The Applicant was charged and convicted of two counts of sexual activity with a child contrary to the Sexual Offences Act of Guyana. It was alleged that he engaged in sexual

penetration with the child between 1 January 2016 and 31 December 2016, and on 6 January 2017. At the material times, the child was seven and eight years old respectively. Upon conviction, he was immediately sentenced by the trial judge to two concurrent life sentences without the possibility of parole before the expiry of twenty (20) years. On appeal to the Court of Appeal, he contended that the sentences imposed, including the non-eligibility for parole requirements, were manifestly excessive. The Court of Appeal affirmed the imposition of his sentences.

Before this Court, the Applicant applied for special leave to appeal the judgment of the Court of Appeal. He contended that the combined effect of manifestly excessive sentences and a flawed approach to the sentencing process including the Court of Appeal's failure to review and correct them, amounted to a serious miscarriage of justice and justified the granting of special leave.

The principal question for determination by the Court was whether the Applicant satisfied the requirements of special leave. According to the Court, the questions to be answered to a standard of arguability were: (i) was the sentence imposed manifestly excessive? and (ii) did the judicial sentencing process sufficiently meet acceptable fair hearing standards to avoid any serious miscarriages of justice?

Examining the sentencing process of the trial judge, the Court noted that in *Pompey v DPP,* guidance was provided to trial judges on the best practice approaches to be taken on sentencing in cases involving sexual violence on minors. In *Ramcharran v DPP,* the Court affirmed these best practices with an expectation that they will be applied as and when appropriate. Ideally, this guidance ought to be followed to ensure that constitutional fair hearing standards are satisfied. However, failure to do so was not fatal.

In this case, the trial judge did not receive a victim impact statement, sentenced the Applicant immediately after the verdict was given, and did not consider a social services report. However, it was evident that the trial judge considered the aggravating factors placed before her including the age of the complainant, the special relationship of trust

between the Applicant and the complainant, the lack of a guilty plea, the Applicant's attempt to shift blame, the repeated course of conduct, and the consequential emotional damage to the complainant. Based on these, and after having heard and considered the Applicant's plea in mitigation, the trial judge determined that in the exercise of her discretion that she could not be lenient. Her approach demonstrated an intention to consider and balance relevant sentencing factors, though not necessarily as fully as advised in *Pompey* and *Ramcharran.* Her sentencing remarks also showed that the Applicant's rehabilitation and re-integration into society were taken into account.

With respect to the sentence, the Court noted that life imprisonment was the maximum penalty under the relevant section of the Sexual Offences Act and was available within the range of punishment options available to the sentencing judge, where the sexual activity included sexual penetration. The Court noted as well that the circumstances of the crime were well placed before the trial judge, who found no mitigating circumstances. Additionally, what made this case distinct in its severity, was the special relationship of trust between the victim-survivor and the perpetrator and the young age of the victim-survivor.

Considering several precedents in which the crime of sexual activity with a minor was perpetrated by an adult in a position of trust, it was therefore fair to say that the choice of concurrent life imprisonment sentences in this case was neither extraordinary nor manifestly excessive. Indeed, it was reasonably arguable, that life imprisonment in the circumstances of this case was within the starting range of sentences that ought to be considered. Furthermore, it was also fair to say that the imposition of a 20-year period of ineligibility for parole was well within the existing range for similar cases. Considering the guidance in *Alleyne v R*, it was open to the trial judge to conclude that the Applicant deserved a sentence of life imprisonment. The crimes committed were among the most serious, and in this case included premeditation and involved coercion. The trial judge found no mitigating circumstances capable of lessening such a life sentence, and the Applicant never offered an apology or showed any remorse. The psychological trauma to the victim-survivor, though not investigated, can be presumed. While imprisonment for life

was considered sufficient to punish and deter, the opportunity for eligibility for parole after serving twenty years (with the necessary rehabilitation through counselling and therapeutic facilities available in prison) provides the possibility for rehabilitation and reintegration into society within the Applicant's lifetime, and so meets those sentencing objectives.

So, while the sentencing approaches and recommendations made in *Pompey* and *Ramcharran* were not precisely followed, it did not necessarily mean that the trial judge in the exercise of her sentencing discretion and the Court of Appeal in its review of the process, erred in law and in fact so as to create any serious manifest injustice or miscarriage of justice.

Accordingly, the application for special leave was dismissed. Each party was ordered to bear their own costs.

Cases referred to:

Alleyne v R [2019] CCJ 06 (AJ) (BB), (2019) 95 WIR 126; *Cadogan v R (No 2)* [2006] CCJ 4 (AJ) (BB), (2006) 69 WIR 249; *Doyle v R* [2011] CCJ 4 (AJ) (BB), (2011) 79 WIR 91; *Fraser v The State* [2019] CCJ 17 (AJ) (GY), [2020] 1 LRC 457; *Pinder v R* [2016] CCJ 13 (AJ) (BB), (2016) 89 WIR 181; *Pompey v DPP* [2020] CCJ 7 (AJ) GY; *Ramcharran v DPP* [2022] CCJ 4 (AJ) GY; *The State v Daniels* (2018); *The State v Jamil* (2018); *The State v Kewley* (2018).

Legislation referred to:

Guyana - Sexual Offences Act, Cap 8:03.

Other Sources referred to:

Gray A, 'The Role of Sexual Offence Courts in Furthering the Feminist Project of Eliminating Sexual Violence and Women's Subordination' in Ramona Biholar, Dacia L Leslie (eds), *Critical Caribbean Perspectives on Preventing Gender-Based Violence* (Routledge 2022); Judicial Reform and Institutional Strengthening (JURIST) Project, *Revised Model Guidelines for Sexual Offence Cases in the Caribbean Region* (2022); Simpson J B, *Simpson's Contemporary Quotations* (Houghton Mifflin 1988).

JUDGMENT

Jamadar J (Rajnauth-Lee and Barrow JJ, concurring)

JAMADAR J:

'Child abuse casts a shadow the length of a lifetime.'[1]

[1] The Applicant has filed an application for special leave to appeal the judgment of the Court of Appeal of Guyana. The Court of Appeal affirmed the imposition of two concurrent life sentences without the possibility of parole before the expiry of twenty years. The Applicant had been convicted of two counts of sexual activity with a child contrary to the Sexual Offences Act[2].

[2] The principal question for determination is whether the Applicant has satisfied the requirements for special leave to appeal to this Court. The Applicant contended before the Court of Appeal that the sentences imposed, including the non-eligibility for parole requirements, were manifestly excessive. Before this Court, the contention is that the combined effect of manifestly excessive sentences and a flawed approach to the sentencing process including the Court of Appeal's failure to review and correct them, amount to a serious miscarriage of justice and justifies the granting of special leave. The challenge is therefore both substantive and procedural.

Background

[3] The Applicant was indicted for two counts of sexual activity with a child. It was alleged that the Applicant engaged in sexual penetration with the child between 1 January 2016 and 31 December 2016, and on 6 January 2017. At the material times, the child was seven and eight years old respectively.

[4] On 10 December 2017, the Applicant was committed, by way of Paper Committal, to stand trial at the Demerara Assizes. He was convicted on 24 April 2018 before a 12-member jury. On that same date, he was sentenced by the Honourable Madam

[1] Herbert Ward, in James B Simpson, *Simpson's Contemporary Quotations* (Houghton Mifflin 1988) 92.
[2] Cap 8:03.

Justice Jo-Ann Barlow ('the trial judge') to two concurrent life sentences, with twenty years to be served before eligibility for parole.[3]

[5] By Notice of Appeal dated 9 May 2018, the Applicant appealed to the Court of Appeal against his conviction and sentence. On the 19 December 2022, the Court of Appeal delivered a unanimous oral judgment dismissing his appeal and affirming his conviction and sentence. A written judgment was subsequently published.

The Victim-Survivor's Ordeal

[6] The scourge of sexual violence against minors in Guyana has been pronounced upon by this Court. In *Pompey v DPP*[4] this Court stated:

> … Sexual offences against children, of which rape may be one of the most vicious, and rape by a person in a relationship of trust in the sanctity of a family home the most damaging, is anathema to the fabric of society.[5]

[7] The victim-survivor is at the centre of these proceedings and hearing her voice in this case is important.[6] The providing and use of victim impact statements is a practice that this Court encourages in appropriate cases.[7] Sentencing without regard to the victim-survivor's ordeal is unjust. Therapeutic approaches to sentencing should be adopted wherever viable.[8]

[8] The offences were committed by the Applicant between January and December 2016 and on 6 January 2017, on the complainant, a child, when she was seven and eight years old.

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[3] ibid. Section 16(3) (a) provides that the punishment liability on indictment is imprisonment for life.
[4] [2020] CCJ 7 (AJ) GY.
[5] ibid at [45].
[6] *Ramcharran v DPP* [2022] CCJ 4 (AJ) GY at [52] and see also [88] addressing the value of therapeutic approaches to sentencing.
[7] See Judicial Reform and Institutional Strengthening (JURIST) Project, *Revised Model Guidelines for Sexual Offence Cases in the Caribbean Region* (2022) para 5.3. Giving voice/agency to victim-survivors of sexual violence is empowering, healing, and restorative.
8 See Anika Gray, 'The Role of Sexual Offence Courts in Furthering the Feminist Project of Eliminating Sexual Violence and Women's Subordination' in Ramona Biholar, Dacia L Leslie (eds), *Critical Caribbean Perspectives on Preventing Gender-Based Violence* (Routledge 2022) ch 5, which illustrates how these specialised courts can, by increasing survivor participation and offender accountability, contribute to eliminating gender-based violence and ultimately, women's subordination.

[9] In her testimony, the complainant testified that the Applicant vaginally and anally penetrated her using his penis and sexually molested her. She stated that it would hurt her when the Applicant committed these acts and she felt sad. She testified that the Applicant told her that if she told anyone of the abuse, she would get lashes. Consequently, she did not tell anyone out of fear. The second count was committed on 6 January 2017 when she was eight years old and was anally penetrated. The Applicant has continuously denied that he committed these acts as alleged or at all and has never expressed any remorse for them at any stage in these proceedings.

[10] Three days later, on 9 January 2017, the complainant went after school to the office of a Probation and Social Services Officer and reported the abuse. A report was made to the police and an investigation launched.

[11] In this case, the now unchallenged facts are indescribably egregious. The virtual complainant was a young child in a special relationship of trust with the Applicant, when these heinous predatory acts were committed against her. She was exceptionally vulnerable and taken advantage of in the worst possible manner, by the Applicant. These traumatic experiences will remain with her for life. The facts are relevant to the sentencing process and outcome, particularly as imprisonment for life is the maximum punishment for this type of crime under the Sexual Offences Act.

Does the Applicant Satisfy the Special Leave Test?

[12] Framed simply, the questions to be answered to a standard of arguability at this stage, are: (i) was the sentence imposed manifestly excessive? and (ii) did the judicial sentencing process sufficiently meet acceptable fair hearing standards to avoid any serious miscarriages of justice?

[13] This Court has explained that the grant of special leave is discretionary. This Court in *Fraser v The State*[9] reaffirmed the test for special leave in criminal appeals such as this one, referring to the dicta of Hayton J in *Cadogan v R (No 2)*[10] and Nelson J in *Doyle v R.*[11] The test requires an applicant to show that (a) there is a realistic possibility that a (potentially) serious miscarriage of justice may have occurred, and/or (b) a point of law of general public importance is raised (that is genuinely disputable) and the court is persuaded that if it is not determined, a questionable precedent might remain on the record.[12] The standard to be met for special leave to be granted is that of arguability, and grounds advanced must be supported by relevant and cogent evidence.

[14] In our opinion, the Applicant has not met these threshold requirements. The application for special leave to appeal to this Court is therefore dismissed. There are however some matters of jurisprudence that the Court has determined need to be addressed.

The Sentencing Process of the Trial Judge

[15] In *Pompey*, this Court provided guidance to trial judges on the best practice approaches to be taken on sentencing in cases involving sexual violence on minors. In *Ramcharran v DPP*[13] this Court affirmed these best practices with an expectation that they will be applied as and when appropriate. This guidance is apposite in this matter and ought ideally to have been followed to ensure that constitutional fair hearing standards are satisfied.[14] However, failure to do so is not fatal.

[9] [2019] CCJ 17 (AJ) (GY), [2020] 1 LRC 457.
[10] [2006] CCJ 4 (AJ) (BB), (2006) 69 WIR 249.
[11] [2011] CCJ 4 (AJ) (BB), (2011) 79 WIR 91.
[12] In *Pinder v R* [2016] CCJ 13 (AJ) (BB), (2016) 89 WIR 181 at [4], Nelson J stated that: 'The applicant must therefore persuade this court that a potential miscarriage of justice or a genuinely disputable point of law arises out of the decision appealed from in order to qualify for the grant of special leave.'
[13] *Ramcharran* (n 6).
[14] We note that both *Pompey* and *Ramcharran* were decided subsequent to the sentencing of the trial judge.

[16] On one hand, it is apparent from the transcript (and which the Respondent admits) that the trial judge did not receive a victim impact statement (separate from the complainant's testimony). The judge proceeded to sentencing immediately after the verdict was given, so that a separate sentencing hearing was not conducted at which mitigating and aggravating factors, including mental health or psychological assessments could have been comprehensively sought, investigated and/or better advanced and considered. Further, no social services report was completed.[15]

[17] On the other, the trial judge considered the aggravating factors placed before her.[16] Based on these, and after having heard and considered what the Applicant's attorney had submitted in mitigation,[17] the trial judge determined that in the exercise of her discretion she could not be lenient with the Applicant.

[18] The trial judge's approach demonstrated an intention to consider and balance relevant sentencing factors, though not necessarily as fully as advised in this Court's jurisprudence in *Pompey* and *Ramcharran*. Thus, the trial judge heard and considered a plea in mitigation before sentencing. And also gave the Applicant an opportunity to address the Court before imposing a sentence.[18] As well, the trial judge's sentencing remarks show that rehabilitation and re-integration into society were taken into account.[19]

The Sentence

[19] Life imprisonment is the maximum penalty under the relevant section of the Sexual Offences Act. Its imposition is available within the range of punishment options available to the sentencing judge, where the sexual activity included sexual

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[15] *Pompey* (n 4) at [52].
[16] These aggravating factors included the age of the complainant, the special relationship of trust between the Applicant and the complainant, the lack of a guilty plea, the Applicant's attempt to shift blame, that the acts came about from a repeated course of conduct, and the emotional damage to the complainant.
[17] These included his age, his occupation, that he was the sole bread winner of the family, that he had children, that he was an active and contributing member of his society and his community, and that he was a first-time offender.
[18] The Applicant professed his innocence and showed no evidence of remorse.
[19] This can be deduced from the trial judge's remarks about the need for the Applicant to engage in counselling and other programmes available in the prisons that facilitate reform.

penetration. In this case, all of the circumstances of the Applicant's crime were before the trial judge. The judge found no mitigating circumstances. However, what makes this case distinct in its severity, was the special relationship of trust between the victim-survivor and the perpetrator and the young age of the former.

[20] In Guyana, there are several precedents in which for the crime of sexual activity with a minor, perpetrated by an adult in a position of trust, life imprisonment has been imposed.[20] In all of these, eligibility for parole was fixed for periods in excess of 20 years.[21] It is therefore fair to say that the choice of concurrent life imprisonment sentences in this case is neither extraordinary nor manifestly excessive in Guyana. Indeed, it is reasonably arguable on the available precedents, that life imprisonment in the circumstances of this case is within the starting range of sentences that ought to be considered. Furthermore, it is also fair to say that the imposition of a 20-year period of ineligibility for parole is well within the existing range for similar cases. In this latter regard, it is also noteworthy that the 20-year period is among the lower periods that have been imposed![22]

[21] In *Alleyne v R*[23], Saunders P usefully explained how a court could approach the questions involved in imposing life sentences:

> [79] Life sentences fall into a unique category of sentences. If, after considering all of the aggravating and mitigating circumstances of the offence (as distinct from those of the offender), a judge is initially disposed to impose a life sentence, that disposition can be softened, in appropriate cases, upon a consideration of the mitigating circumstances that relate to the offender. That would be because matters such as the offender's early guilty plea or his age or level of remorse or social or economic circumstances, cause the judge to moderate his or her original disposition in favour of a lesser sentence measured in terms of years or months.
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> [80] Alternatively, however, a) the circumstances relating to the offence may be so ghastly that the judge is inclined to regard life imprisonment as being eminently appropriate and therefore *commensurate* notwithstanding the mitigating circumstances the offender put forward. In other words, the

[20] See *Pompey* (n 4) at [73]: *The State v Daniels* (2018); *The State v Kewley* (2018); *The State v Jamil* (2018).
[21] *The State v Daniels* (2018) – 40/30 years; *The State v Kewley* (2018) – 45 years; *The State v Jamil* (2018) – 45 years.
[22] ibid.
[23] [2019] CCJ 06 (AJ) (BB), (2019) 95 WIR 126.

> judge may consider that a particular offence and its consequences are so serious that neither an early guilty plea nor any other mitigating factor can, in that particular case, serve to reduce the life sentence. Or, having found that the circumstances of the offence initially suggest that life imprisonment might be appropriate, in considering next the aggravating and mitigating factors relating to the offender, the judge may b) conclude that the mitigating factors put forward are outweighed by aggravating ones. In this regard, the judge may find that, despite the existence of some mitigating factors, the offender has, for example, such an appalling record that it cancels out the mitigating circumstances. In either of these two situations, that is a) or b), the sentence of life imprisonment is 'commensurate'.

[22] In this case it was open to the trial judge to conclude that the Applicant deserved a sentence of life imprisonment. The crimes committed were among the most serious, and in this case included premeditation and involved coercion. The trial judge found no mitigating circumstances capable of lessening such a life sentence, and the Applicant never offered an apology or showed any remorse. The psychological trauma to the victim-survivor, though not investigated, can be presumed. As can public abhorrence towards the offences. The guidance in *Alleyne's case* has been demonstrated. While imprisonment for life was considered sufficient to punish and deter, the opportunity for eligibility for parole after serving twenty years (with the necessary rehabilitation through counselling and therapeutic facilities available in prison) provides the possibility for rehabilitation and reintegration into society within the Applicant's lifetime, and so meets those sentencing objectives.

[23] This case may be thought of as difficult to reconcile with this Court's earlier decisions in *Pompey* and *Ramcharran*, and to a certain extent it is. However, in those cases the sentences imposed were clearly manifestly excessive and erroneous (as explained). In this case that is not so. This Court, like the Court of Appeal, will not readily interfere with the exercise of a judicial sentencing discretion that is justifiable, procedurally and substantively. What these three cases demonstrate therefore, are indicators for a range of sentences for sexual assaults on minors (in this case and in *Pompey*) and young adults (in the case of *Ramcharran*) by persons in positions of trust, that this Court considers appropriate in their respective

circumstances. This decision is, for that reason, of important precedential value and may be of guidance in similar cases.

Conclusion

[24] There is therefore in our considered opinion no realistic possibility that a potentially serious miscarriage of justice may have occurred in the sentencing of this Applicant. While the sentencing approaches and recommendations made in *Pompey* and *Ramcharran* were not precisely followed, it does not necessarily mean that the trial judge in the exercise of her sentencing discretion and the Court of Appeal in its review of the process, erred in law and in fact so as to create any serious manifest injustice or miscarriage of justice. In the circumstances there is no proper basis upon which to grant special leave to the Applicant.

Disposition

[25] The Applicant has not satisfied the test for special leave and this Court orders that –

a) The application for special leave be and is hereby dismissed.

b) Each party shall bear their own costs.

/s/ M Rajnauth-Lee

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Mme Justice Rajnauth-Lee

/s/ D Barrow

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Mr Justice Barrow

/s/ P Jamadar

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Mr Justice Jamadar