[2017] JMCA Crim 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 57/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

LINDELL HOWELL v R

Ian Wilkinson QC and Lenroy Stewart for the appellant

Mrs Karen Seymour-Johnson for the Crown

3 and 17 March 2017

BROOKS JA

[1] Mr Lindell Howell, on 17 July 2015, pleaded guilty to the offence of arson. He had set fire to the dwelling house of Mrs Monica Bailey-Smith, while she and other persons were inside the building. That was on 13 June 2013. The learned sentencing judge ordered him to serve 18 years imprisonment at hard labour. This was in the Circuit Court for the parish of Saint Mary in July 2015. There is some uncertainty on the record as to whether it was 23 or 24 July 2015. The earlier date will be used to give Mr Howell the benefit of the doubt. Mr Howell's application for permission to appeal against the sentence was granted by a single judge of this court.

[2] The case, as revealed by the material before this court, was that Mr Howell, who was 59 years old at the time of the offence, had a cordial relationship with Mrs Bailey-Smith. It seems that they did many favours for each other. Their relationship even caused Mrs Bailey-Smith's husband to accuse Mr Howell of having an affair with Mrs Bailey-Smith.

[3] On 12 June 2013, Mr Howell confessed to Mrs Bailey-Smith that he had a romantic attraction toward her. She, however, expressed disinterest in such a situation. The following night, after she and the other occupants of her house had turned in, Mr Howell blocked the doors to her house with wood, in order to prevent an exit, and set the house afire. Fortunately, the occupants escaped unhurt. Mrs Bailey-Smith fled the building through a window.

[4] On 14 June 2013, the police accosted Mr Howell and he admitted having set the house afire. He accused Mrs Bailey-Smith of having used him and having people laugh at him.

[5] There was no explanation for the extended time that it took for the case to be committed to the circuit court. Mr Howell was in custody during the entire period.

[6] A social enquiry report into Mr Howell's character and circumstances showed that he was industrious. The community was, however, not sympathetic toward him. In fact, his house had been burned after his arrest for this offence. The report indicated that Mr Howell seemed to have tried to justify his offence. He made vicious allegations against

Mrs Bailey-Smith. The probation officer, who prepared the report, stated that "Mr Howell did not seem to express remorse".

[7] In the sentencing exercise, it was revealed that Mr Howell had three previous convictions for violence, but the learned sentencing judge did not take them into account because of the length of time that had elapsed since the last one. He did take into account, however, that Mr Howell had expressed a reason for setting the house afire. The learned sentencing judge, in assessing the appropriate sentence, considered the antecedents, the social enquiry report, defence counsel's submissions on behalf of Mr Howell, the time Mr Howell spent in custody and the guilty plea.

[8] The learned sentencing judge was of the view that Mr Howell was not genuinely remorseful. That seemed to be a factor that was influential in the sentence.

[9] In this appeal, Mr Wilkinson QC submitted, on behalf of Mr Howell, that the sentence was manifestly excessive. He argued that the learned sentencing judge:

a. did not give sufficient weight to the fact that Mr Howell had pleaded guilty;

b. failed to recognise that the plea of guilt was an indication of remorse; and,

c. failed to demonstrate that he had given Mr Howell full credit for the time that he had spent in custody.

Mrs Seymour-Johnson, for the Crown, who also assisted the court in regard to the appeal, did not resist the main thrust of the appeal. She did, however, indicate that there was material which suggested that Mr Howell did not plead guilty at the first opportunity.

[10] Mr Wilkinson did not stress ground one of Mr Howell's supplemental grounds of appeal. That ground dealt with the learned judge's comment that Mr Howell may not have pleaded guilty at the first opportunity. This was an aspect of the issue of the weight to be granted to the plea of guilt. Learned Queen's Counsel pointed out, however, that Mr Howell admitted to the police the very day after the fire, that it was he who had set it.

[11] In respect of the point that a guilty plea should be treated as an expression of remorse, Mr Wilkinson pointed to **Meisha Clement v R** [2016] JMCA Crim 26 in support of his submissions. He argued that the learned sentencing judge's failure to recognise that principle of law resulted in a miscarriage of justice.

[12] On the issue of the credit to be afforded for the time spent in custody prior to the sentencing, Mr Wilkinson also relied, in part on **Meisha Clement v R**. He submitted that the authorities now suggest that full credit must be given to a convicted person for the time that has been spent in custody prior to sentencing. Learned Queen's Counsel also relied on the decision of the Caribbean Court of Justice in **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 in support of his submissions. He argued

that the learned sentencing judge did not demonstrate that he had taken into account the two years that Mr Howell had spent in custody prior to the date of sentencing.

[13] Mr Wilkinson also submitted that the learned sentencing judge had failed to use the right starting point in considering the appropriate sentence for Mr Howell. As a result, learned counsel submitted, the sentence imposed was out of range with the sentences normally given for such offences. He relied, in part, on **R v Marcellous Robinson** SCCA No 47/1997 (delivered 7 July 1998) and **Anthony Atkinson and Paulston Mairs v R** [2016] JMCA Crim 4, as for support of these submissions.

Analysis

[14] It is agreed that the learned sentencing judge did not accept that Mr Howell's guilty plea was a true expression of remorse. He dealt with the point on two occasions. At page 19 of the transcript the learned judge assessed the very strong evidence against Mr Howell suggesting that he had no option but to have pleaded guilty. The learned judge then said:

> "So one wonders in the fact of that [evidence], how sorry he really could have had [sic] in deciding whether to plea [sic] guilty or not guilty."

[15] At page 20 of the transcript the learned sentencing judge again dealt with issue of remorse. He said:

> "...although a plea [of guilty] has been entered, it really does not appear from the reading of the Social Enquiry Report, that there is any genuine remorse. I can't say that there is."

[16] It is clear, however, that there were bases upon which the learned sentencing judge had arrived at that position. The first was the strength of the evidence and second was the fact that the social enquiry report had so indicated.

[17] It must first be pointed out that, the general principle is that where an offender pleads guilty, he is entitled to expect some credit for having taken that stance. This was reiterated by Morrison JA (as he then was) in **Bertell Myers v R** [2013] JMCA Crim 58. The learned judge of appeal said at paragraph [10] of the judgment in that case:

> "...There is no want of authority for the proposition that a person who pleads guilty 'may expect some credit, in the form of a reduction in the sentence which would have been imposed if he had been convicted by the jury on a plea of Not Guilty' (Archbold, Pleading, Evidence and Practice in Criminal Cases, 1992, para. 5-152). Because a guilty plea, particularly at an early stage of the proceedings, invariably results in some public advantage by avoiding the expense and trouble of a trial, **the court encourages such pleas where appropriate by offering in exchange a discount on the sentence usually imposed for the particular offence**." (Emphasis supplied)

[18] Taking the point a little further, this court, in **Meisha Clement v R**, opined that a plea of guilty may be treated as an expression of remorse. Morrison P, at paragraph [37] of the judgment in that case, so stated:

> "The view that a plea of guilty may be treated as an expression of remorse on the part of the offender has been adopted by this court on more than one occasion. In **R v Everald Dunkley** [RMCA No 55/2001 (delivered 5 July 2002)], for instance, P Harrison JA characterised the plea of guilty as 'an indication of repentance and a resignation to the treatment of the court'. And, most recently, in **Kurt Taylor v R** [[2016] JMCA Crim 23], F Williams JA reiterated that 'the authorities have observed that a plea of guilty in

and of itself may very well be regarded as an indication of remorse'."

[19] Similarly, in **Christopher Brown v R** [2014] JMCA Crim 5, the judgment, at paragraph [13], cited an authority from Barbados on the point:

> "The aim of imprisonment in the concept of prevention involves ensuring that the offender does not re-offend. In considering the element of prevention, the court must take into account the fact that the offender has pleaded guilty. **That plea, by itself may be indicative of remorse**. Sir Denys Williams CJ, in delivering the judgment of the Court of Appeal of Barbados, commented on this aspect in **Keith Smith v R** (1992) 42 WIR 33. He said at pages 35-36:
>
> > 'It is accepted that a plea of 'Guilty' may properly be treated as a mitigating factor in sentencing **as an indication that the offender feels remorse for what he has done**. It is also clear that an offender with a good or relatively good record may have his sentence reduced to reflect that record.'"
>
> (Emphasis supplied)

[20] Similar sentiments were expressed in the cases of **R v Collin Gordon** SCCA No 211/1999 (delivered 3 November 2005), **R v Everald Dunkley** and **Kurt Taylor v R**, which Mrs Seymour-Johnson cited in her written submissions.

[21] The Court of Appeal, in **Regina v Harper, Regina v De Haan** [1968] 2 QB 108 at page 110, stated that it is "of course proper to give a man a lesser sentence if he has shown genuine remorse, amongst other things by pleading guilty".

[22] Whereas the authorities suggest that the guilty plea should be treated as an indication of remorse, they do not suggest that actual remorse be vocalised or

otherwise evidenced. Kevin Boyle and Michael Allen, the learned authors of *Sentencing Law and Practice*, suggest that credit should be given for the guilty plea even if there is no indication of remorse. They state, at pages 277-278:

> "The most frequently arising indication of remorse is the guilty plea. While this does not always indicate remorse or repentance on the part of the offender, it is given credit in sentencing (*Meade* (1982) 4 Cr. App. R. (S.) 193*; Skilton and Blackham* (1982) 4 Cr. App. R (S.) 339) **even if the offender has no possible defence to the charge** (*Davies* (1980) 2 Cr. App. R.(S) 168)." (Emphasis supplied)

The learned authors indicate that the saving of the court's time, by avoiding a trial, is an element to be considered in the offender's favour. It will be noted too, that they suggest that the credit may be given even in the face of compelling evidence of guilt.

[23] There is, however, a range that may be accorded to the discount that is to be attributed to a guilty plea. Undoubtedly, expressions of contrition and remorse will attract a greater discount than circumstances where the evidence is compelling and there is no expression of regret. It appears, however, that even in the latter circumstance, some discount should be given, if there is a real saving of judicial time and the expense of a trial.

[24] Similarly, where the guilty plea is not entered on the first occasion, but at some later point, a discount will still be given, in recognition of the saving of time and expense, but that discount will be less than if it were entered at an earlier point. This principle was recognised in **Joel Deer v R** [2014] JMCA Crim 33. In that case Phillips JA, in considering the case of an offender who "caved in as the trial got closer", found

that he was "not entitled to full credit for his guilty plea". She said at paragraph [7] of the judgment:

> "...Thus, in each case there is a presumption that the later the stage of the proceedings that the accused pleads guilty the less will be the discount applied to the sentence."

[25] It could be said that there was a different view expressed by P Harrison JA (as he then was) in **R Collin Gordon**. The learned judge of appeal expressed an opinion that conveys a nuance to the principles set out above. In that case, the offender entered a guilty plea, during the course of his trial, and after the prosecution had closed its case. Harrison JA recognised the principle of a discount being awarded to an offender who pleads guilty, but took the view that the discount was only available when the plea is given at the first opportunity and when there was an expresssion of remorse. He said at page 5 of the judgment:

> "The rationale in affording to an offender the consideration of discounting the sentence because of a guilty plea on the first opportunity is based on the conduct of the offender. He has thereby frankly admitted his wrong, has not wasted the court's time, thereby saving valuable judicial time and expense, has thrown himself on the mercy of the court and may be seen as expressing some degree of remorse."

[26] The view of the learned judge of appeal must however be considered in the context of the facts of that particular case. His comments were understandable. He explained them immediately after the paragraph set out above. He said:

> "In the instant case, there was no guilty plea entered 'on the first opportunity'. The plea of 'not guilty' was changed to 'guilty' after the close of the prosecution's case. The

> applicant may then well have viewed the prosecution's proven case as overwhelming. It was not a case of an offender frankly admitting his guilt. He was capitulating to the inevitable. Neither can he be seen, as it were, as saving judicial time or saving expense."

[27] It may properly be said, therefore, that if an offender pleads guilty at a very late stage, such as during the trial, where there has really been no saving of time or expense, that there is no discount to be provided in such a case. If the plea is given only when the trial is about to begin, similarly, the discount must be very minimal.

[28] Although it was passed by Parliament after the sentence was handed down in this case, the Criminal Justice (Administration) (Amendment) Act, 2015 gives credence to the use of a graduated scale of discount, according to the stage at which the guilty plea is entered. Section 42D(2) of that Act states that an offender may benefit from a discount of as much as 50% where he pleads guilty at the "first relevant date", a discount of up to 35% if he pleads guilty after that date, but before the trial commences, and a discount of up to 15% if he pleads guilty after the trial commences, but before the verdict is given.

[29] Based on the above discussion, it does appear that the learned sentencing judge did err in his failure to give credit for the aspect of remorse in the context of the guilty plea. This court is, therefore, entitled to review the sentence (**R v Kenneth Ball** [1951] 35 Cr App R 164).

[30] The starting point for determining an appropriate sentence for any offence is to determine the normal range of sentences for that offence. The determination of that range for the offence of arson was somewhat hampered by the limited number of cases provided to us on the point. Mr Wilkinson pointed us to **R v Marcellous Robinson**, **Anthony Atkinson and Paulston Mairs v R** and **R v George Frankham** [2007] EWCA Crim 1320.

[31] In the absence of sufficient guidance, as to a range, from previously decided cases, it is helpful, in determining the appropriate sentence for arson, to bear in mind that the offence, which is a breach of section 3 of the Malicious Injuries to Propery Act, attracts a maximum penalty of imprisonment for life. The various elements of the nature of the offence, its effect on the society and the threat to life that it poses, should also be considered. The relevant principles were enunciated by the Court of Appeal for England and Wales in the case of **R v Regan** [2007] EWCA Crim 2343. In that case, the offender had set fire to a bed in a house which she shared with her partner. The fire spread and damaged other items which were mostly her property. Simon J, who delivered the judgment of the court explained the implications of the offence of arson. He said at paragraph [30] of the judgement:

> "As has been said frequently in this court, the seriousness of the crime of arson is the risk of danger to others. An act of arson done out of spite or resentment against a particular person can endanger the life and property of, not just that person but the lives and property of many others: neighbours, the fire services and all that have a duty to respond to a fire. **It is for this reason that deterrent sentences must be passed for this crime**." (Emphasis supplied)

[32] In England, a range of sentences for arson is said in certain circumstances to be between eight and 10 years after a trial. This is reported in *Blackstone's Criminal Practice 2017* at paragraph B8.45, where the learned editors state, in part:

> "In *A-G's Ref (No. 66 of 1997)* [2000] 1 Cr App R (S) 149, a case of arson with intent to endanger life, the Court of Appeal said that a sentence within the range of eight to ten years following a trial would have been appropriate in a case where the offender set fires in a bungalow in which several members of his family were asleep."

[33] In our jurisdiction, the Criminal Justice (Administration) (Amendment) Act, 2015 mentioned above is also helpful in giving a numerical context to the term life imprisonment. In section 42F, it deems that term to be a term of 30 years. For the offence of arson, therefore, if a custodial sentence is deemed appropriate, a starting point, at the high end, of somewhere between 12 and 15 years' imprisonment should not be considered unreasonable.

[34] Based on the principles stated above, an examination of the available cases will now be conducted.

[35] In **R v Marcellous Robinson**, the appellant was convicted of setting fire to a house and a shop using "bottle bombs". He was sentenced, at first instance, to 12 years imprisonment. The conviction was, however, set aside on appeal, as a result of issues to do with the jurisdiction of the Gun Court. Sentence was, therefore, not a consideration in this court.

[36] In **Atkinson and Mairs v R**, the offenders had set fire to a shop and a bird coop. They did so in the presence of the owner of the structures and also threatened him with violence. Mr Atkinson was sentenced to four years' imprisonment and Mr Mairs, to five years' imprisonment. The convictions were upheld on appeal and the sentences remained undisturbed.

[37] Mr Wilkinson went further afield in search of authorities. In **George Frankham v R** (a case from the Court of Appeal of England and Wales), the appellant was, after a trial, convicted for arson with intent to endanger life. He had poured petrol against the front door of the complainant's house and set it afire. There were people inside the house at the time. Fortunately, the damage was confined to the door and door frame and no one was injured. The offender was sentenced to 12 years' imprisonment at hard labour. He appealed against the sentence.

[38] The English Court of Appeal considered authorities that suggested that the usual range of sentences for that offence, in that jurisdiction, was eight to 10 years' imprisonment, as was alluded to above. Having considered the circumstances of the appellant's case and the limited amount of damage it held that seven years' imprisonment was the appropriate penalty.

[39] In **R v Regan**, mentioned above, the offender was held to be a woman of good character, but was the subject of domestic abuse, which it seemed had led to her, as a result of an altercation with her partner, to set fire to the bed in their house. It does not

appear that there was any damage to the structure of the building. She was convicted, after a trial, and sentenced to 12 months' imprisonment. The Court of Appeal, after considering all the circumstances, reduced the sentence to six months.

[40] In the Cayman Islands, in **R v Wellington** (2013) (1) CILR 364, a young woman, also involved in an abusive relationship with a man, set fire to his living quarters. The sentencing judge, Quinn J, took into account that she had no previous convictions, but that her temper was an issue of concern. He also took into account that she had immediately admitted to the police that she had committed the offence but that she showed little remorse. He ruled that a custodial sentence was required, and sentenced her to three years' imprisonment. He, however, suspended one half of that term, so that she would only have served 18 months.

[41] It would seem from the material cited above, if a custodial sentence is considered appropriate, that where dwelling houses are concerned, the range of sentences that should be considered appropriate for the ordinary cases of arson should be from a high of 15 years to a low of three years depending on the circumstances of the case. The sentencing judge may go higher than 15 years or lower than three years depending on the peculiarities of the offender before the court and the features of the offence.

Application of the principles

[42] In applying those principles to the instant case, it must also be remembered that the four cardinal principles of sentencing, namely, retribution, deterrence, prevention

and rehabilitation, must also be applied. Mr Howell's individual circumstances and the circumstances of the particular offence must also be considered.

[43] In this case, Mr Howell set fire to the house while it was occupied. His action of barring the door in order to prevent exit, was an aggravating feature of this case. It certainly places his offence to the higher portion of the applicable range of sentences for arson. A starting point of 15 years should be applied. There is nothing which justifies a starting point in excess of 15 years.

[44] Since he did confess at an early stage to the police, and since he did plead guilty, a discount of one-third, which is the usual figure where a plea of guilt is entered, could be considered. That figure could be tempered by the fact that Mr Howell sought to justify his actions and there was no express remorse on his part, over and above the guilty plea. Taking all those factors into consideration a discount of three years should be applied.

[45] There is still another factor to be considered. It is the period spent in custody prior to sentencing. The learned sentencing judge stated that he considered that period and referred to the case of **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ) in addressing the point. The principle to be derived from the case is that an offender should be credited with the full period spent awaiting custody. In **Meisha Clement v R** this court gave the offender full credit for the time spent in custody prior to the date of sentencing. The time was deducted from the sentence that was deemed appropriate. In **Shirley Ruddock v R** [2017] JMCA Crim 6, a different approach was used to give

credit for the period spent in custody prior to sentencing. This court awarded a portion of that period, but instead of deducting it from the sentence it found appropriate, stipulated that the starting date for the sentence should be deemed to be one prior to the date of sentencing. It would seem that the better approach, as to applying the discount, is the one used in **Meisha Clement v R**, as it better accords with what the learned sentencing judge would be more likely to do at the time of sentencing. It is also more in accord with the decision of the Privy Council in **Carlos Hamilton and Jason Lewis v R** [2012] UKPC 37, which was an appeal from this jurisdiction.

[46] Judges should demonstrate that that credit has been applied.

[47] In this case Mr Howell had spent two years in custody before sentencing, that is, from 14 June 2013 to 23 July 2015.

[48] Considering all those matters the appropriate sentence would be one of 10 years' imprisonment. The sentence should be deemed to have commenced on 23 July 2015.

[49] Accordingly, the appeal is allowed, the sentence imposed by the learned sentencing judge is set aside and a sentence of 10 years imprisonment is substituted therefor. The sentence is to be reckoned as having commenced on 23 July 2015.