[2017] JMCA Crim 38

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 129 and 130/2010

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE STRAW (AG)

TROY JARRETT
JERMAINE MITCHELL v R

Ms Melrose Reid for the appellants

Leighton Morris for the Crown

20, 24 and 14 November 2017

MORRISON P

[1] On 30 June 2010, the appellants appeared before Thompson-James J (the judge) in the Circuit Court for the parish of Portland held in Port Antonio. They were both charged with capital murder, contrary to section 2(1)(d) of the Offences Against the Persons Act. The particulars of the offence were that, on 13 July 2009, the appellants murdered Mr Martin Brown (the deceased) in the course and furtherance of a robbery in the parish of Portland.

[2] When pleaded on their first appearance before the court, the appellants entered pleas of not guilty to the charge of capital murder, but guilty of murder. On 26 November 2010, the judge sentenced each of them to a term of imprisonment for life, with a stipulation that they should each serve a period of 30 years in prison, from the date on which they had pleaded guilty, before becoming eligible for parole.

[3] The appellants both sought leave to appeal against their sentences. Each of them relied on the following identical ground of appeal:

> "1. **Unfair Trial**: - That base [sic] on the fact as presented the sentence is harsh and excessive and cannot be justified when the evidence is taken into consideration.
>
> (A) That the court did not fully temper justice with mercy as the sentence did not reflect my guilty plea and remorse."

[4] The applications were considered on paper by a single judge of this court on 14 March 2016, when they were refused. The single judge considered that, "[a]lthough the sentences are in the higher section of the range for sentences for offences of that nature, they cannot be said to be manifestly excessive".

[5] As is their right, the appellants renewed their applications for leave to appeal before the court. When the applications came on for hearing on 17 October 2017, the appellants were unrepresented. However, in response to an enquiry from the court, Mr Leighton Morris for the Crown quite properly indicated an area of concern as regards the question whether any or any sufficient weight had been given by the judge to the appellants' early pleas of guilty in fixing the period to be served before they would

become eligible for parole. Sharing that concern, we granted leave to appeal, whereupon Ms Melrose Reid, who happened to be in court on other business, generously agreed to undertake the representation of the appellants. We gratefully acknowledge this salutary display of proper professional conduct by both Mr Morris and Ms Reid.

[6] We heard submissions from Ms Reid and Mr Morris on 20 October 2017 and on 24 October 2017 we announced that the appeal would be allowed in part. We accordingly varied the sentence imposed by the judge on each appellant to one of life imprisonment, with a stipulation that he should serve 19 years' imprisonment before becoming eligible for parole. These are the promised reasons for this decision.

[7] It is first necessary to give a brief outline of the facts presented to the judge after the appellants' pleas were taken. At about 9:15 am on 13 July 2009, three men, armed with firearms, went to the Buff Bay branch of the Portland Credit Union. There, they held up and robbed the deceased, who was an armed security guard on duty at that location. In addition, the men shot and killed the deceased and took away his firearm. The men then ran away. However, they were accosted by the police close by. An exchange of gunfire ensued, in which all three men were shot and injured, one of them fatally. The deceased's firearm, which was dropped to the ground by one of the men, was recovered by the police. The two who survived were admitted to hospital under police guard.

[8] The appellant Jarrett was subsequently pointed out at an identification parade as one of the men and both appellants were seen, with the appellant Mitchell's face clearly observable, on video footage recorded at the credit union. Further, the appellant Jarrett's hands were swabbed and tested positive for the presence of gunpowder residue at intermediate and trace levels.

[9] As has been noted, the appellants were taken into custody very shortly after the deceased was murdered on 13 July 2009, and remained there until the matter first came before the court on 30 June 2010. After their pleas were taken on that date, they remained in custody until they were sentenced on 26 November 2010. But in sentencing the appellants, the judge ordered that their sentences should take effect from the date upon which the appellants pleaded guilty (30 June 2010). Accordingly, the period spent by the appellants on remand pending trial was, in effect, 13 July 2009 to 30 June 2010, that is, 11 months, two weeks and three days.

[10] As an aid to sentencing, the judge ordered psychiatric and social enquiry reports in respect of both appellants. Neither appellant, whose ages were 21 and 20 years respectively, had any previous convictions. It appears that their psychiatric reports, which we have not seen, were unremarkable. In interviews with the probation officers, both appellants emphasised that it was their companion, the third man, who had shot the deceased and they expressed remorse for their part in the robbery. The community assessment in respect of each of the appellants was favourable.

[11] In passing sentence on the appellants, the judge stated that she took into account the aggravating and mitigating factors, including the contents of the psychiatric and social enquiry reports, their ages, the nature and gravity of the offence to which they had pleaded guilty, the fact that they had pleaded guilty and appeared to have accepted responsibility for what they had done, and their expressions of remorse.

[12] Ms Reid submitted that the appellants' sentences of life imprisonment, with 30 years to be served before eligibility for parole, were manifestly excessive. She contended that, in addition to not having any or any sufficient regard to the appellants' early pleas of guilty at the first reasonable opportunity, the judge gave them no credit for the time spent by them in custody pending trial, and also failed to take into account their previous good character and antecedents. More generally, Ms Reid complained that, while stating that she took certain sentencing factors into consideration, the judge failed to demonstrate the effect which she gave to each by outlining the factors and putting figures to each.

[13] Ms Reid therefore submitted that, despite the well-known general rule that this court will not lightly reduce a sentence unless there has been a demonstrable failure on the part of the sentencing judge to apply the correct principles, this was an appropriate case in which to do so. In this regard, Ms Reid referred us to the oft-cited decision in **R v Alpha Green** (1969) 11 JLR 283, in which this court held that:

> "This Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence ... It is only when a sentence appears to err in principle that this Court will alter

> it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene."

[14] In a brief, but equally helpful, submission, Mr Morris urged us to conclude that, save in respect of the effect of the appellants' guilty plea and the time spent by them in custody pending trial, the judge had taken into account all relevant factors in arriving at appropriate sentences. Accordingly, he submitted that, given the court's traditional reluctance to interfere with a sentencing judge's exercise of her discretion, the court ought not otherwise to interfere with the sentences in this case.

[15] Despite Ms Reid's admirable efforts, we preferred Mr Morris' approach. Given the judge's careful sentencing remarks, we had no reason to suppose that, generally speaking, she did not have in mind the accepted principles of sentencing. In relation to the appellant Jarrett, for instance, the judge said this:

> "Mr. Jarrett you are twenty-one years old. For me this is one of the most difficult thing [sic] that I have to do to pass sentence on someone your age. Now, in arriving at an appropriate sentence, my duty is to weigh the mitigating circumstances and the [aggravating] circumstances that might be present. I have to take into evidence your character, as indicated by the reports and records I have to take into account the nature and gravity of the offence. I have looked at the Social Enquiry Report, I have looked at the Psychiatric Report, I have listened to your attorney, and I am not sure what would have influenced your conduct at the time of the incident but, even though I am not sure what could have influenced you that I have to look at the manner in which this offence was committed, from what was outlined. Three of you armed with guns went into a certain place held up and robbed the deceased. He was shot. The

police intervened later and during the ensuing exchange what it seem [sic] like, a firearm was recovered. It was indicated to me that there was video footage also. I must take into consideration the fact that you pleaded guilty; you did not waste my time. Looking at the probation report you explained to the officer your roll [sic] in the incident. It seems to me that you have accepted the responsibility and indicated a certain amount of remorse.

Mr. Jarrett this is what the report has indicated that you are aware that you have done wrong and the possible consequences and that you're sorry for this. You, as I said before, pleaded guilty you did not waste my time the community report is good that they were shocked when they learned that you are involved in a robbery and they seem to belief [sic] that you must have been influenced by negative peers. You were involved in sports in the community who represented Jamaica Public Service Football League.

Now this is a serious offence. I don't think that it can get any more serious than that. You're sorry; you're twenty-one, not a threat to your community involved in sports, not that the community saying that, you saying that you should not be there. In arriving at the sentence I have to look at you, as well as the offence as I said before it can't be any more serious in my opinion than it is in terms of what has happened to Mr. Brown. As I said before I have to look at your character you are not a threat to your community at all. Based on what they are saying, I have looked at the reports, I see no particular bad things on this report and then I must take into consideration the responsibility of reform, social adaptation and whether or not there is a reasonable prospect of such. From the reports, it does not seem the prospect does not seem, negative. I have given grave and serious consideration to the issue of your sentence and this is something that I have been doing from as far back as June. This is why I requested a Psychiatric Report to assist me to guide me in sentencing.

I take into account all the factors that I have outlined and in the circumstances it seems to me that a just and appropriate sentence, is life imprisonment and I am directing that you do not become eligible for parole within a period of thirty years from the date you pleaded guilty."

[16] And, in relation to the appellant Mitchell, the judge said this:

> "Mr. Mitchell, twenty years, that is the age that is indicated on the Social Enquiry Report only twenty years, as I have said in arriving at a just and appropriate sentence, I have to look at you the offender and I also have to look at the offence the nature and seriousness of the offence in arriving at that sentence. My duty is to weigh the mitigating circumstances, to look at the mitigating circumstances and the aggravating circumstances I have to look at you in individual circumstances and this is as indicated by the report. I appreciate that you seem to have been not in such a stable situation in terms of a home, I take that into consideration. I have looked at your Social Enquiry Report. I have looked at the Psychiatric Evaluation. I have listen [sic] to your attorney I am not sure, I am not sure even though the factors have been outlined what might have influenced you even with the guidance of the Psychiatric Report that day. I am not sure what could have caused such a desire and the manner in which this type of offence was committed. But the fact is that the offence was committed. The police became involved after that, a gun was recovered there was video footage in the institution of what transpired. I have to take into consideration also that you did not waste my time, you pleaded guilty and based on the probation report you were sorry for what you did. Of course, there is a particular emphasis, but you see I don't know how what transpired that afternoon can relate to what you said in the interview that despite your circumstances you had hoped for a better life. I cannot see how what transpired could given [sic] you a better life. Your community report is that your actions were surprising never displayed any of those tendencies probation officer said you have expressed remorse for your roll [sic] in the incident I take all of that into consideration I have to consider also the social adaptations. I said rehabilitation I am guided by the Psychiatric Report in arriving at a just and appropriate sentence. I have given grave and serious consideration to your sentencing and I have taken into consideration, as I said before all the factors outlined. The fact that you pleaded guilty you didn't waste my time you admitted your

> roll [sic] to the probation officer, you indicate the remorse and I have looked at the social adaptation and rehabilitation. I find that a just and appropriate sentence is life imprisonment, and I am requesting that you not be eligible for parole within a period of thirty years from date that you entered the plea of guilty."

[17] In our view, these passages amply demonstrate that the judge gave careful consideration to almost everything that could possibly have been relevant to the sentencing exercise in respect of both appellants. As regards Ms Reid's submission that the judge ought to have gone further by attributing a specific value to each of the factors, no authority was cited for that approach and we know of no such general requirement. The important consideration for this court on an appeal against sentence is whether the judge applied the known and accepted principles of sentencing and arrived at a sentence within her powers and within the normal range of sentences for the particular offence (see **Meisha Clement v R** [2016] JMCA Crim 26, para [43]).

[18] Having said this, however, we were concerned about two things. First, we were not able to dispel our initial doubt as to whether the sentences imposed by the judge reflected sufficiently the appellants' pleas of guilty. It is clear that, had this case been governed by the provisions of the Criminal Justice (Administration) (Amendment) Act, 2015, the appellants' early pleas of guilty would have obliged the judge to consider giving a discretionary discount of up to one third of the sentence which she would ordinarily impose after a contested trial (see section 42E(2)(a)). But, as is well known, the common law also entitled a defendant who pleaded guilty at the earliest reasonable

opportunity to similar consideration (see **Meisha Clement v R**, paras [38]-[39] and the cases there cited).

[19] So, in **Maurice Lawrence v R** [2014] JMCA Crim 16, for instance, upon the appellant's plea of guilty to a murder by shooting, the minimum period before eligibility for parole of 20 years' imprisonment stipulated by the trial judge was reduced on appeal to 15 years. For present purposes, this decision may usefully be compared with **Kevin Young v R** [2015] JMCA Crim 12, in which, after a contested trial on a charge of murder by shooting, the applicant was ordered to serve a minimum period before parole of 30 years. But when it emerged on appeal that the applicant had subsequently confessed his guilt to the probation officer, this court reduced the period before eligibility for parole to 20 years' imprisonment.

[20] Even on the basis of this meagre comparison, therefore, it seemed clear that the judge's stipulation of 30 years to be served before eligibility for parole in this case would have been appropriate had the appellants been convicted after a contested trial. In our view, the appellants' early pleas of guilty would have entitled them to the maximum allowable discount, which we took to be one third. It is on this basis that we concluded that the case for interference with the judge's exercise of her sentencing discretion had been made out.

[21] The second area of concern related to the judge's apparent disregard of the period – almost a year – spent on remand by the appellants pending trial, given that it is now fully accepted that accused persons should generally receive full credit for this

period (see **Meisha Clement v R**, para [34]). It is on this basis that we reduced the period to be served by the appellants before parole, from the 20 years arrived at by applying the one third guilty plea discount, to 19 years.