[2013] JMCA Crim 58

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 19/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

BERTELL MYERS v R

Delano Harrison QC for the appellant

Mrs Karen Seymour-Johnson and Miss Kerri-Ann Gillies for the Crown

18 and 22 November 2013

MORRISON JA

[1] On 12 January 2012, the appellant pleaded guilty to the offence of manslaughter at the sitting of the Circuit Court held at May Pen in the parish of Clarendon. On 26 January 2012, after considering a social enquiry report and a report on the appellant's antecedents, F Williams J sentenced him to 15 years' imprisonment at hard labour. With the leave of a single judge of this court, the appellant now appeals against this sentence. The single issue which arises on the appeal is whether the sentence imposed by the learned judge is manifestly excessive.

[2] After the appellant's plea was taken, the facts of the case were briefly outlined to the judge by counsel for the prosecution as follows. On 12 October 2011, the appellant and the deceased were together at the home which they shared with each other. A dispute developed between them, during which they both struggled for a knife which was in the hand of the deceased. During the struggle, the deceased was stabbed and, after he had wrested the knife from the deceased, the appellant stabbed her a second time. The deceased succumbed to her injuries. A few days later, a post mortem examination would reveal that she had received a laceration in the brain and that the cause of her death was hemorrhagic shock resulting from the stab wound.

[3] On the very day of the incident, the appellant made a statement under caution to the police and, just over a week later, he participated in a question and answer interview session in the presence of a justice of the peace. On both occasions, the appellant gave details of the altercation which had occurred between himself and the deceased and the manner in which she had received the stab wounds.

[4] It appears that very soon afterwards the appellant indicated a willingness to plead guilty and, on 12 January 2012, he was accordingly brought before the Circuit Court on a voluntary bill of indictment for the offence of murder. On that date, he pleaded not guilty to the offence of murder but offered a plea of guilty to the offence of manslaughter. Crown counsel indicated to the court that the plea to the lesser offence would be accepted, "primarily on the basis that on the facts of the case, as gleaned from various documents on file, the issue of provocation is one which is live".

[5] The matter was postponed for sentencing on 26 January 2012 and on that date the appellant's antecedents were read to the court. It appeared from them that the appellant, who was 33 years of age at the time of the offence, had been in more or less continuous employment since leaving school. Unmarried, he was the father of five dependent children. He had one previous conviction (on 1 July 2005) in the Resident Magistrate's Court for the offence of unlawful wounding, for which he had been sentenced to pay a fine of $40,000.00 or, in default of payment, six months' imprisonment. Although we were not shown a copy of a social enquiry report on the appellant, it is clear from the record that one was in fact made available to the court below, the judge describing it as "for the most part positive".

[6] In his remarks before sentencing the appellant, the judge observed that it was necessary for the court to "strike some kind of balance in the sentence". On one side, there were the appellant's circumstances and his plea of guilty, while on the other, there was the fact that "the life of [the deceased] has been snuffed out":

> "Mr Myers, although raised in a community in which there are high levels of crime has somehow managed to keep himself out of that, so that is something that should be taken into account as well in deciding how to dispose of this matter.
>
> However, having regard to the principles of sentence there is no denial that there is too much loss of life in our country today and I speak, of course, not just of lost [sic] of life of [sic] natural causes but too many instances of murder and manslaughter, too many instances of unlawful killing. Even in relation to the allegations that were outlined to me and in relation to the circumstances, it seems to have something to do with a love affair gone sour or feelings of jealousy, and that too seems to be something that is already too prevalent

> or becoming prevalent in our country. But the Court has to consider that. The Court has to, as I indicate [sic] before, strike some kind of balance in the sentence; the punitive aspect on one hand and also the aspects of deterrent [sic] and also the Court has to bear in mind that any sentence which it has to pass in the Court's view that sentence must be passed [sic] should not be so long that it deprives Mr Myers of an opportunity to rehabilitate himself in some way. He is not a very young man, he is 32 years of age and depend on how you look at it but as I indicate previously [sic] rehabilitation is usually reserved for younger persons those in their teens, twenties and thirties. Striking the balance as best I can in what is a difficulty [sic] decision, the Court is of the view that the appropriate sentence in this case will be 15 years imprisonment at hard labour."

[7] In his grounds of appeal, the appellant complained that this sentence was "harsh and excessive" and did not reflect his "guilty plea and remorse". These grounds were supplemented by the single ground which Mr Harrison QC sought and was given leave to argue when the appeal came on for hearing before us:

> "The learned trial judge erred in principle for his failure to take into account, sufficiently/adequately, certain critical factors available to him in sentencing the appellant. In the event, the sentence of 15 years' imprisonment at hard labour is manifestly excessive."

[8] In support of this ground, Mr Harrison submitted that, although the judge did take into account certain factors that were favourable to the appellant (his plea of guilty "at the earliest opportunity"; his "for the most part positive" social enquiry report; and his having "somehow managed to keep himself out of" really serious criminal activity), he had nevertheless failed to consider others. These were (a) the appellant's prompt guilty plea, coupled with (b) "his prior ready cooperation with the police"; and (c) the element

of provocation under which he acted. These factors, it was submitted, "weigh in favour of the appellant's cause", thus making the sentence imposed by the judge manifestly excessive.

[9] Mr Harrison very helpfully referred us to the decision of this court in ***R v Icilda Brown*** (1990) 27 JLR 321, in which the appellant was convicted of manslaughter after a trial on an indictment for murder. The brief facts of the case were that the appellant and the deceased lived together as man and wife. During some kind of altercation between them at home, the appellant inflicted a stab wound on the deceased, causing his death. Her defence was one of accident and, upon her conviction for manslaughter, the trial judge imposed a sentence of 10 years' imprisonment at hard labour. By a majority, the court accepted a submission that this sentence was manifestly excessive, Downer JA observing (at page 322) that "[t]his was a domestic incident and in our experience…the range of sentences in these instances vary from five to seven [years]". The court accordingly varied the sentence imposed at trial by reducing it to one of seven years' imprisonment at hard labour.

[10] In the instant case, of course, the appellant pleaded guilty to manslaughter. 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.

[11] In ***Daniel Robinson v R*** [2010] JMCA Crim 75, the applicant pleaded guilty to the offence of manslaughter, on an indictment which charged him with murder. The facts were that the applicant and the deceased had formerly been involved in an intimate relationship. At 2:30 one morning, the applicant set upon the deceased, who was asleep in bed with her daughter and grandchild, armed with a knife. While the deceased held on to the applicant's hand and begged him not to kill her, he pushed her onto a couch and sat next to her. He told her that, whilst hiding in the ceiling, he had overheard a conversation between her and some other persons earlier that day and that they were "dissing" him. He then ordered the deceased out of the house, before strangling her to death.

[12] In considering the appropriate sentence, the learned judge stated that he took into account the fact that the applicant had pleaded guilty, had shown remorse, had a previous conviction for a minor offence over 20 years previously, and had no previous history of violence recorded against him. In sentencing him to a term of 20 years' imprisonment at hard labour, the judge stated that –

> "…not only must I give a sentence that deter [sic] you but I must give a sentence that deter [sic] other men in the society when they see this sentence they know that basically you are not supposed to touch a woman at all."

[13] The applicant appealed successfully to this court on the ground that the sentence of 20 years' imprisonment in these circumstances was manifestly excessive. In the judgment of the court, Harrison JA referred to the well-known decision of this court in ***R v Sydney Beckford and David Lewis*** (1980) 17 JLR 202, 203, in which Rowe JA (as he then was) observed that while "[t]here is no scientific scale by which to measure punishment, yet a trial judge must in the face of mounting violence in the community impose a sentence to fit the offender and at the same time to fit the crime". Rowe JA went on to quote extensively (at pages 203-205) from the judgment of Lawton LJ in ***R v Sergeant*** (1975) 60 Cr App 74, 77, in which judges were reminded of "the four classical principles which they must have in mind and apply when passing sentence", *viz*., retribution, deterrence, prevention and rehabilitation. As regards the element of deterrence, Lawton LJ had pointed out that this fell to be considered both with respect to deterrence of the offender and deterrence of likely offenders:

> "Experience has shown over the years that deterrence of the offender is not a very useful approach, because those who have their wits about them usually find the closing of prison gates an experience which they do not want again. If they do not learn that lesson, there is likely to be a high degree of recidivism anyway. So far as deterrence of others is concerned, it is the experience of the courts that deterrent sentences are of little value in respect of offences which are committed on the spur of the moment, either in hot blood or in drink or both. Deterrent sentences may very well be of considerable value where crime is premeditated. Burglars, robbers and users of firearms and weapons may very well be put off by deterrent sentences."

[14] Applying these principles in ***Daniel Robinson v R***, this court reduced the applicant's sentence to one of 15 years' imprisonment at hard labour. Harrison JA observed (at para. [18]) that, although the judge said he had also taken into account the factors referred to at para. [11] above, "it is quite clear to us that…in considering an appropriate sentence, he seemed to have focused his attention in the end, solely on the deterrent aspect of punishment".

[15] In ***Tafari Johnson v R*** [2012] JMCA Crim 18, the applicant pleaded guilty to manslaughter on an indictment charging him with murder. The trial judge sentenced him to life imprisonment, with a stipulation that he should serve 15 years before becoming eligible for parole. That being the sentencing formula appropriate to a conviction for murder only (see section 3(1)(c) of the Offences Against the Person Act), this court substituted a sentence of 15 years' imprisonment.

[16] In ***Durrant Morris v R*** [2012] JMCA Crim 42, the applicant was sentenced to 15 years' imprisonment after a guilty plea for the offence of manslaughter. As in ***R v Icilda Brown***, that was a case of an apparent "domestic incident" and counsel for the applicant on that basis urged the court to say that the sentence was manifestly excessive. This court did not agree, observing (at para. [11]) that "in a case such as this, in which there was a completely unprovoked killing of the deceased, it cannot be said that a sentence of 15 years' imprisonment is manifestly excessive".

[17] It will be recalled that the sentence of seven years' imprisonment imposed by a majority of this court in ***R v Icilda Brown*** was one imposed after a full trial. On the

basis of this highly selective review of a few recent decisions of this court in cases involving guilty pleas (among them, cases with a domestic dimension), we are bound to say that the range of five to seven years approved by the majority in that case appears to be significantly below the current level of sentencing in not wholly dissimilar circumstances approved by this court.

[18] In this case, we consider that a similar point to that made by Harrison JA in ***Daniel Robinson v R*** (para. [14] above) can be made of the learned trial judge's approach to sentencing the appellant. Although the judge spoke more than once to the need to strike a balance in imposing sentence, it seems to us to be clear that in the end the deterrence prevailed over not only rehabilitation, but also over the appellant's particular circumstances. In our view, in addition to the appellant's early plea of guilty, it was also necessary for the court to take into account his obvious remorse and his willing cooperation with the police. Further, and importantly, there was the element of provocation, since, on the appellant's account of the fatal incident, the only one available, the deceased was the person who had first been armed with the knife. And then further still, there was also the real possibility of his rehabilitation, given that, again on the exiguous evidence available, the appellant acted on the spur of the moment, in the grips of a domestic altercation. We accordingly consider that, in deciding the appropriate sentence to impose on the appellant in the circumstances of this case, the learned judge failed to take into account all the relevant factors.

[19] The question which therefore remains is what would be an appropriate sentence in this case. In ***Daniel Robinson v R***, in which this court imposed a sentence of 15

years' imprisonment, the evidence revealed a significant element of premeditation in the applicant's early morning attack on the deceased. This is a factor which, in our view, clearly distinguishes that case in the appellant's favour. Taking this and all the other factors which we have identified into account, we consider that in this case, a case of a truly domestic incident, the appellant has made good the contention that the sentence of 15 years' imprisonment imposed by the judge is manifestly excessive. The appeal is therefore allowed, the sentence imposed in the court below is set aside and a sentence of 12 years' imprisonment at hard labour is substituted in its place. This sentence is to be reckoned from 26 January 2012.