**[2017] JMCA Crim 6**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 33/2010**

**ON REFERRAL FROM HER MAJESTY IN COUNCIL**

**BEFORE: THE HON MR JUSTICE BROOKS JA**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA**
**THE HON MISS JUSTICE EDWARDS JA (AG)**

**SHIRLEY RUDDOCK v R**

**Miss Nancy Anderson for the appellant**

**Miss Kathy-Ann Pyke for the Crown**

**11, 12 July 2016 and 3 February 2017**

**BROOKS JA**

[1] Mr Shirley Ruddock appealed to Her Majesty in Council from a decision of this court dismissing his appeal from a conviction for murder. Based on the recommendation of the Privy Council, Mr Ruddock's conviction was quashed and the case was remitted to this court, for it to consider whether to order a retrial, or to substitute a conviction for manslaughter. The relevant part of the referral to this court reads as follows:

> "1…

2. there appearing to be a prima facie case of murder, alternatively of manslaughter, the question whether a re-trial on the count of murder or manslaughter should be ordered or (if not) whether a conviction for manslaughter ought to be substituted, should be remitted to the Court of Appeal of Jamaica for determination in accordance with local law and practice…"

[2] The evidence adduced before the jury, by the prosecution, that led to Mr Ruddock's conviction was straightforward. The dead body of Mr Pete Robinson, a taxi driver, was found on a beach in Saint James on 1 July 2007. His throat had been cut, with his oesophagus, trachea and the major blood vessels in his neck, severed. Three days later, on 4 July 2007, the police accosted Mr Ruddock and two other persons, Mr O'Neil Hudson and Mr Hudson's girlfriend, in Mr Robinson's car. On the police telling them, shortly thereafter, that the owner of the car had been killed, Mr Ruddock is said to have turned to Mr Hudson and said "[y]ou think a mi tell you fi cut di man throat" (page 39 of the transcript). This statement was made although the police had not informed them of the manner of Mr Robinson's death.

[3] At a later date, Mr Ruddock is said to have told the investigating officer, after being cautioned, that "he tied up the foot and the hand of the deceased and Hudson used a rachet [sic] knife to cut his throat" (page 60 of the transcript). He told the police officer that he and Mr Hudson then left the scene in Mr Robinson's car. A woman left with them. He said he was then threatened, presumably by Mr Hudson.

[4] Mr Hudson pleaded guilty at the beginning of the trial. Mr Ruddock pleaded not guilty. His defence was that he knew nothing about the incident in which Mr Robinson

had been killed. He made an unsworn statement in which he said that he had started working with Mr Hudson on a Monday and by the Wednesday of that same week the police took him into custody in relation to the car that Mr Hudson had.

[5] Mr Ruddock said that he was, at various stages, while being in custody, beaten, cajoled and offered a bribe in an effort to have him give evidence against Mr Hudson. He said that, despite those efforts, he had insisted in telling the police that he had not seen Mr Hudson commit any murder and that he knew nothing about the killing.

[6] He was found guilty by the jury and was sentenced, on 27 January 2010, to imprisonment for life. He was not to be eligible for parole before 25 years had expired. That conviction and sentence was upheld by this court.

[7] When his case was considered by the Privy Council, their Lordships, in their judgment (**R v Jogee**; **Ruddock v The Queen** [2016] UKSC 8; [2016] UKPC 7), ruled that the learned trial judge's summation on the issue of common design, although along the lines of the guidance set out in **Chan Wing-Siu v R** [1985] AC 168, was defective. In their Lordships' ruling, the summation, in assessing the prosecution's case, had equated foresight that Mr Robinson might be injured by Mr Hudson in an attempt to rob him of his car, with intent that Mr Robinson would suffer grievous injury or be killed in the course of the transaction. That guidance, their Lordships, decided, was incorrect.

[8] Their Lordships identified two other defects in the summation. The first, was that the learned trial judge failed to tell the jury that if they accepted that Mr Ruddock was a party to carrying out the robbery, it did not automatically mean that he was a party to

the killing. The second defect, they said, was that the learned trial judge failed to warn the jury to ignore evidence about what the woman, who had been depicted in a photograph on Mr Ruddock's cellular telephone, had allegedly said to the police. This is because she had not been called to give evidence in the case. It was on those three bases that their Lordships quashed the conviction.

[9] Two issues arise from their Lordships referral of the case to this court. The first, is whether a retrial should be ordered, or instead, a conviction for manslaughter substituted. The second is, in the event of an order for a conviction for manslaughter, what would be the appropriate sentence in the circumstances.

**Retrial or conviction for manslaughter**

[10] Both Miss Anderson, for Mr Ruddock, and Miss Pyke, for the Crown, contended that a retrial would not be appropriate in the circumstances. Between both learned counsel, they identified the items they said militated against an order for a retrial. These items were:

a. the time that had elapsed since the offence had been committed;
b. the length of time that it would take for the matter to come on for retrial, if that were ordered;
c. the fact that Mr Ruddock has been in custody since 4 July 2007;

d. the declining likelihood that Mr Ruddock would be able to produce evidence of the injuries he said that he suffered at the hands of the police; and

e. the absence of the notebooks, in which the police officers had testified that they wrote Mr Ruddock's various statements to them.

Miss Anderson cited the cases of **Dennis Reid v R** (1978) 16 JLR 246; (1978) 27 WIR 254 and **Beres Douglas v R** [2015] JMCA Crim 20, in support of her submissions on this point.

[11] Miss Anderson and Miss Pyke seemed to veer apart in respect of the consequence of a refusal to order a retrial. It seemed that Miss Anderson leaned toward substituting a verdict of acquittal, in that she insisted that the prosecution's case was weak and that it should not be given an opportunity to strengthen that case on a retrial. Miss Pyke submitted that the case warranted a conviction for manslaughter. She submitted that the evidence that Mr Ruddock continued to associate with Mr Hudson, even after he had killed Mr Robinson, was further evidence of Mr Ruddock's approval and encouragement of the killing.

[12] Miss Pyke pointed to the decision of **R v Dennie Chaplin, Howard Malcolm and Peter Grant** SCCA Nos 3 and 5/1989 (delivered 16 July 1990), in which Mr Malcolm's conviction for murder was upheld on appeal although the evidence against him was that he had watched while the killing took place. His continued presence in the

company of the principal actors, after the killing was, however, held, at page 11 of the judgment, to indicate that:

> "...far from being accidentally present, [he] was in fact voluntarily and purposely present at the scene, and his conduct during and after the commission of the murder, is sufficient evidence upon which the jury could correctly find that he was present aiding and abetting the others in the act and therefore a participant in the common design to the murder."

[13] Miss Anderson, "[o]ut of an abundance of caution" (paragraph 19 of her written submissions), made submissions on the issue of substituting a conviction of manslaughter. On this issue, both she and Miss Pyke submitted that the facts of this case, as adduced by the prosecution, were consistent with the law concerning a conviction for manslaughter. Learned counsel submitted that the principle to be gleaned from the authorities is that if persons venture out together to commit robbery with violence, and during the robbery the victim is killed, there is a basis for a conviction for manslaughter for the person who did not actually commit the act that caused death.

[14] Miss Pyke, in particular, stressed that, on the prosecution's case, in binding Mr Robinson's legs and hands, Mr Ruddock had participated in a robbery enterprise in which the victim would have been hurt. The fact that the victim was in fact killed, the submission continued, meant that there was evidence for Mr Ruddock to have been convicted for manslaughter. It was accepted that the learned trial judge did not give any directions to the jury in this regard.

[15] Miss Pyke submitted that a conviction for manslaughter should be recorded in this case. She noted that their Lordships' recommendation, in their referral, indicated that there appeared to be "a prima facie case of murder, alternatively of manslaughter". She submitted that this court had the authority to substitute a conviction for manslaughter. Learned counsel pointed out that that is what had been done in **R v Rudolph Dodd, Karl Wauchorpe and Billy West** SCCA Nos 184, 185 and 186/1999 (delivered 8 October 2001).

[16] In analysing these submissions, it is accepted that the submissions against the ordering of a retrial are well founded. In cases such as this, where a conviction is quashed, this court is empowered, by section 14(2) of the Judicature (Appellate Jurisdiction) Act, to order a new trial. The subsection states as follows:

> "Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[17] The decision whether or not to order a retrial is dependent on the facts of the particular case. There is, however, some general guidance that was provided by their Lordships in **Dennis Reid v R**. In that case, the headnote, set out in the West Indian Reports, accurately sets out their Lordship's guidance:

> "(ii) The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury.

> (iii) It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case.
>
> (iv) Where the evidence against the accused was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso and dismiss the appeal.
>
> (v) Among the factors to be considered in determining whether or not to order a new trial are: the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial; (f) the strength of the case presented by the prosecution, but this list is not exhaustive."

Those principles were applied by this court in **Beres Douglas v R**, which was cited by Miss Anderson.

[18] In balancing the considerations stated in **Dennis Reid v R**, it must be acknowledged that Mr Ruddock has been in custody for nine years and that, with the current state of the Circuit Court's list, it may take some time before the trial would actually be commenced. Assuming the evidence at a retrial to be as it was at the first trial, the jury there having rejected Mr Ruddock's complete denial about his involvement in the killing of Mr Robinson and accepted that his presence at the scene was to rob Mr Robinson of his car, there is a strong likelihood that there would be a conviction of at least manslaughter. In the circumstances a retrial would not be the most appropriate option to be pursued. He would have had to undergo the rigours of two trials, and, at

the end of the second, be subject to the risk of being sentenced to a further period of imprisonment.

[19] It is now necessary to consider whether a conviction for manslaughter should be substituted in these circumstances.

[20] This court, where it is satisfied that a conviction for a particular offence is wrong in law or on the facts, is authorised by section 24(2) of the Judicature (Appellate Jurisdiction) Act to substitute a verdict of guilty for another offence for which the jury could have convicted the appellant. The subsection states:

> "Where an appellant has been convicted of an offence and the Resident Magistrate or jury could on the indictment have found him guilty of some other offence, and on the finding of the Resident Magistrate or jury it appears to the Court that the Resident Magistrate or jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the judgment passed or verdict found by the Resident Magistrate or jury a judgment or verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

[21] This court has substituted convictions for manslaughter for verdicts for the offence of murder in several cases over the years, including in **R v Aaron Scott** (1971) 12 JLR 625 and **R v Rudolph Dodd et al**, the latter of which was cited by Miss Pyke. Such substitutions often take place where it is found that the trial judge ought to have given the jury the option to convict for manslaughter but had failed to do so. The rationale for the substitution was set out in **Joseph Bullard v The Queen** [1957] AC

635. In **Dwight Wright v R** [2010] JMCA Crim 17, this court adopted the approach of Lord Tucker in **Bullard**. The court, at paragraph [27] of its judgment in **Dwight Wright v R**, said:

> "...We adopt the words of Lord Tucker in **Bullard** as being entirely appropriate to this case:
>
> > 'Every man on trial for murder had the right to have the issue of manslaughter left to the jury if there was any evidence on which such a verdict could be given. To deprive him of that right must of necessity constitute a grave miscarriage of justice and it was idle to speculate what verdict the jury would have reached.'"

[22] Based on the assessment set out above, the evidence on the prosecution's case, suggests that Mr Ruddock was voluntarily involved in a robbery where violence was intended, but possibly lacked the intent to kill. In those circumstances, where the intended victim was killed during the transaction, a conviction for manslaughter should have been left as an alternative verdict for the jury's consideration. Had the learned trial judge directed the jury along those lines, the jury would have been entitled to convict Mr Ruddock for manslaughter, instead of murder. In the circumstances, the prospect of a re-trial being excluded, a verdict of manslaughter should be substituted for the conviction for murder, which had been quashed by their Lordships.

**The sentence for manslaughter**

[23] On the matter of sentence, Miss Anderson submitted, as part of her alternative position, that although the range of sentences for the offence of manslaughter is from a fine to life imprisonment, the usual range of sentences for the offence was between

three and 15 years. She submitted that the starting point for considering the appropriate sentence was between seven and 10 years, with aggravating or mitigating factors either increasing or decreasing the starting figure as was appropriate.

[24] In this case, Miss Anderson submitted, there was the aggravating factor of the violence involving the cutting of Mr Robinson's throat while he was bound and defenceless. On the other hand, she argued, Mr Ruddock was not the person who wielded the knife. Learned counsel also pointed out that in the social enquiry report, which had been produced in respect of Mr Ruddock, he was "described by his family members as a very hard working person who wants to do well in life".

[25] Miss Anderson submitted that in balancing all the relevant factors, a sentence of 10 years was the appropriate sentence. She argued however, that since Mr Ruddock has been in custody for nine years and that since he is entitled to have that time in custody taken into account, he should be released immediately on the basis that his sentence has been served. She cited the case of **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ) in support of her submissions.

[26] Miss Pyke, when asked for submissions on the matter of sentence, pointed out that the Crown did not usually make an input on the matter of sentence. She, nonetheless, argued that this was a case, in the light of the method of killing and the fact that it was connected to a robbery, which called for a penalty at the higher end of the range of sentences for the offence of manslaughter.

[27] Miss Anderson did not propose that a fine would have been appropriate in these circumstances. She was right not to have done so. The circumstances of this killing would not have allowed such an option. A custodial sentence would have been the only option that would be appropriate. In considering the submissions of counsel and conducting a review of a number of cases decided in this court over the past six years, it seems that the most common sentence passed for convictions for manslaughter involving personal violence has been one of 15 years. Although there have been exceptions, the typical range has, however, been from seven to 21 years.

[28] It was in **Raphael Russell v R** [2010] JMCA Crim 85, that the sentence of 21 years imprisonment was imposed. Mr Russell pleaded guilty to manslaughter during a trial in which he had been charged with murder in the course or furtherance of burglary. The facts of the case indicated that he invaded the home of his former girlfriend and there killed the deceased, who was at the time asleep in the company of that lady. Mr Russell struck the man with a piece of lumber, resulting in his death.

[29] The case at the lower end of that range is **Dwight Wright v R**. In that case, Mr Wright stabbed a man once in his chest, resulting in his death. The stabbing occurred during an argument between the two at a street dance. This court overturned his conviction for murder and substituted a sentence for manslaughter. It found that a verdict of manslaughter, on the basis of provocation, ought to have been left to the jury as an option. The court imposed a sentence of seven years in the circumstances.

[30] Among the cases in which sentences of 15 years' imprisonment for manslaughter were imposed, a common feature was the fact that the offender and the victim were either known to each other or had some mutual connection, and the incident giving rise to the killing arose from that situation. In **Daniel Robinson v R** [2010] JMCA Crim 75, the offender strangled a woman with whom he formerly had an intimate relationship. He accused her of disrespecting him. He pleaded guilty to the offence. In **Carlos Benjamin v R** [2012] JMCA Crim 4, a jury found that the offender had fatally stabbed the victim, who had sought to rebuff the offender's aggression toward a young lady, in whose company the victim was at the time. In **Ketey Lawrence v R** [2012] JMCA Crim 15, the offender was convicted by a jury for the death, by stabbing, of the victim, who was in the company of the offender's former girlfriend. In **Tafari Johnson v R** [2012] JMCA Crim 18, the offender fatally stabbed his female victim after she went to remove her belongings from a house, with which he, apparently, had a connection. He pleaded guilty to the killing. In **Durrant Morris v R** [2012] JMCA Crim 42, the offender also pleaded guilty. He had strangled his female friend with his hands during an argument between them. The killing was described as arising from a "domestic incident" (see paragraph [16] of **Bertell Myers v R** [2013] JMCA Crim 58). As was mentioned above, the sentence in all those cases was one of imprisonment for 15 years for the offence of manslaughter.

[31] **Bertell Myers v R** was a case in which the sentence was less than 15 years. In that case, the offender pleaded guilty to killing his common law wife. Although the court considered several of the cases mentioned in the last paragraph, this court was

more inclined to the reasoning in **R v Icilda Brown** (1990) 27 JLR 321, in which a female offender, who had killed her common law husband, had been sentenced to imprisonment for seven years. On that basis, the court reduced Mr Myers' original sentence of imprisonment for 15 years to one of 12 years.

[32] **Emilio Beckford and Kadett Brown v R** [2010] JMCA Crim 26 is a case in which there was no "domestic" connection. In that case, the killing took place during the course of a robbery in which Mr Brown was a perpetrator. He was convicted by a jury for the offence of murder. This court set aside that conviction and substituted a conviction for manslaughter. The substitution was done on the basis that the trial judge had failed to give the jury instructions on the issue of an accidental discharge of a firearm during the robbery. A sentence of imprisonment for 18 years was imposed on Mr Brown as a consequence of the conviction for manslaughter.

[33] The present case is more consistent with the circumstances in **Emilio Beckford and Kadett Brown v R**. In both cases, the killing was done in connection with a robbery. In those circumstances, a sentence at the higher end of the range of sentences would be more appropriate. Both involved convictions after a full trial, unlike some others in the 15-year range, where there were pleas of guilty entered. One distinction between the present case and **Emilio Beckford and Kadett Brown v R** is that, unlike Mr Brown, Mr Ruddock is not the person who personally carried out the action that caused death. It is true, however, that while Mr Brown's conviction was on the basis of the possibility that the gun had gone off accidentally, there is no likelihood of accident in the gruesome cutting of Mr Robinson's throat.

[34] Another factor to be taken into account is the fact that Mr Ruddock was in custody for 30 months before he was convicted. In recent times, their Lordships in the Privy Council have held that an offender should receive, in mitigation of his sentence, a recognition of the time spent on remand pending trial. Their Lordships held in **Dookee v The State of Mauritius** [2012] UKPC 21 that, except for unusual cases, an offender should be given credit of 80% of the time spent in custody prior to trial (paragraph 17).

[35] In **Dookee**, their Lordships applied the principle so that they ordered that the date for that appellant's sentence to commence, was actually before the appellant was first sentenced (paragraph 19).

[36] Mr Ruddock should receive the benefit of this direction. Applying that approach to Mr Ruddock's case, he should get the benefit of a credit of 24 months (30 months x 80%) prior to the date that he was actually sentenced.

[37] Based on all the circumstances, the appropriate sentence in Mr Ruddock's case should be one of imprisonment for 17 years.

**Summary and conclusion**

[38] The circumstances outlined in the prosecution's case suggest that Mr Ruddock was voluntarily involved in a robbery enterprise where violence was intended, but that he possibly lacked the intent to kill. In those circumstances, where death occurs, a conviction for manslaughter should have been left as an alternative verdict for the jury's consideration. Had the learned trial judge directed the jury along those lines the jury in

those circumstances would have been entitled to convict Mr Ruddock for manslaughter instead of murder.

[39] The length of time that has passed since the commission of the offence, the time for which Mr Ruddock has been in custody and the time that it would take for a new trial to come on for hearing are among the factors that militate against a new trial being ordered in this matter. In the circumstances, the prospect of a re-trial would be excluded and a verdict of manslaughter should be substituted for the conviction for murder which has been set aside by their Lordships.

[40] On the matter of sentence, a review of sentences for the offence of manslaughter, involving personal violence, reveals that the most frequent sentence for that offence in recent years was one of 15 years. Those cases were, in the main, cases that involved some domestic connection and in some instances, a guilty plea. Where an unlawful act, such as robbery, was contemplated, the sentence was increased. The gruesome nature of this killing was an aggravating factor. The appropriate sentence in this case is one of imprisonment for 17 years at hard labour.

[41] It is noted that when the case was originally considered by this court, it ordered that the sentence should be reckoned as having commenced on 27 April 2010, which was three months after the date that the sentence was imposed in the court below. The difference of three months was in accordance with the practice of this court at that time.

[42] Since then, the court has amended its practice. The change has resulted from the decision of the Privy Council, in **Carlos Hamilton and Jason Lewis v R** [2012] UKPC 37, in which their Lordships queried the validity of the previous practice. The new approach is such that, if the appeal is not seen to be one which resulted in an abuse of the process of this court, the offender would be given the benefit of the entire time that he has been in custody since conviction. In the light of the decision of their Lordships in this case, Mr Ruddock could not be said to have abused his right to appeal. Subject to the application of the principle emanating from **Dookee**, his sentence should therefore be reckoned from the date of his original sentence, namely 27 January 2010. In applying the **Dookee** principle, however, the starting date of his sentence should be 24 months earlier, namely, 27 January 2008.

**Order**

1. Having considered the reference from Her Majesty upon the advice of the Privy Council, a judgment and verdict of manslaughter is substituted for the conviction for murder which was set aside by their Lordships.

2. The appellant is hereby sentenced to 17 years' imprisonment at hard labour.

3. The sentence is to be reckoned as having commenced on 27 January 2008.