[2022] JMCA Crim 64

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE FRASER JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CRIMINAL APPEAL NO 36/2017

JOWAYNE ALEXANDER v R

Robert Fletcher and Sanjay Smith for the appellant

Miss Ruth-Anne Robinson for the Crown

7 December 2022

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] Mr Jowayne Alexander ('the appellant') was convicted on 2 March 2017 in the Circuit Court for the parish of Saint Ann. He was charged on an indictment that contained two counts for the murders of Mr Stephen Hall and his wife, Mrs Normalyn Hall. On 5 April 2017, the appellant was sentenced to life imprisonment with the stipulation that he serves 26 years' imprisonment on both counts before becoming eligible for parole. The sentences were ordered to run consecutively.

[2] The prosecution's case was built on the evidence of an accomplice, Mr Steve Stewart. At the time of the trial, Mr Stewart was serving a sentence for his participation in the murders to which he had pleaded guilty. In summary, his evidence was that on 23 August 2011, at about 4:00 pm, he and the appellant went to the home of Mr and Mrs Hall in Discovery Bay, Saint Ann. They waited in nearby bushes from about 4:00 pm until

11:00 pm when Mr Hall arrived home. Mrs Hall had already arrived home at about 8:00 pm.

[3] When Mr Hall arrived home, the appellant, who was masked, pounced on him and held him up with a plastic gun. Mr Stewart, who was also masked, was armed with a knife, which he said the appellant gave him. A struggle ensued between Mr Hall and the appellant, and the appellant was unmasked. Mr Hall was later led inside his house, where the appellant and Mr Stewart armed themselves with knives. They tied up Mr and Mrs Hall. At some point, Mr Hall got hold of the knife Mr Stewart was holding and used it to stab him several times. Mr Stewart ran from the house.

[4] Whilst outside, Mr Stewart saw the appellant strangling Mrs Hall with a long sleeve shirt until she fell motionless to the floor. The appellant then went back inside the house. Mr Stewart heard banging sounds coming from the house and later saw the appellant leading Mr Hall out of the house. The appellant then began to strangle Mr Hall until he, too, was motionless. The men stole a Toyota Rav 4 belonging to Mrs Hall, which they used to transport the bodies to a pond where they dumped the bodies. Mr Stewart said it was the appellant who drove the Toyota Rav 4 and disposed of the bodies because he (Mr Stewart) was weak due to the stab wounds he had received from Mr Hall.

[5] Post-mortem reports showed that Mrs Hall died from strangulation, while Mr Hall died from the combined effects of blunt force trauma to the head and heart failure.

[6] Mr Stewart surrendered to the police within days of the killing and confessed his involvement. The appellant was arrested shortly after that. While the appellant was in custody, the police showed him Mr Stewart's confession statement. The appellant responded that Mr Stewart "waan gwan like him no know what happen" and "him wan come push everything up on me".

[7] The appellant gave evidence in his defence at trial. He testified that he barely knew Mr Stewart and did not go anywhere with him. He denied involvement in the killings and dumping of the bodies. The appellant also testified that he is illiterate and that, on

one occasion, the police served him with a statement they did not read to him. He denied reading the document and making a statement about any involvement with Mr Stewart.

[8] The jury rejected the appellant's defence and returned a guilty verdict on the prosecution's case. On 12 April 2017, the appellant sought leave to appeal his conviction and sentence. His grounds of appeal that supported the application were, in short, misidentification by the witness; lack of evidence; unfair trial; and miscarriage of justice.

[9] The court notes that although the application was for leave to appeal conviction and sentence, there was no ground setting out the challenge to the sentence. In any event, the appellant's application for leave to appeal both conviction and sentence was considered by a single judge of this court, who refused the application for leave to appeal conviction but granted the application for leave to appeal sentence.

[10] The learned single judge found that the learned trial judge's directions to the jury were unimpeachable; therefore, there was no basis in law to argue that the conviction ought to be quashed. The learned single judge also opined that although these were brutal murders committed at the victims' home, it may be said that the "consecutive aspect of the sentences imposed" warrants examination by this court.

[11] The appellant renewed his application before the court for leave to appeal his conviction. However, when his counsel appeared before the court, they indicated that the appellant was no longer pursuing an appeal against conviction. Counsel advised that these instructions were received from the appellant in writing and so proceeded, with the leave of the court, to abandon the original grounds of appeal challenging the conviction.

[12] The court was satisfied that there was no basis in law upon which the appellant's conviction could have been successfully challenged.

[13] Concerning the appeal against sentence, the single ground of appeal is that the sentence is manifestly excessive. Counsel for the appellant contended that, having regard to the facts of the case and the applicable law (statutory and case law), the learned judge

erred in handing down consecutive sentences instead of concurrent sentences. Counsel relied, in particular, on section 14 of the Criminal Justice (Administration) Act and para. [57] of the case of **Kirk Mitchell v R** [2011] JMCA Crim 1 to argue that the imposition of consecutive sentences was inappropriate in this case.

[14] In arguing that the sentences should have been ordered to run concurrently, Mr Fletcher also brought to the court's attention the case of **Garland Marriott v R** [2012] JMCA Crim 9, and several authorities from this court, which were reviewed in the case of **Paul Brown v R** [2019] JMCA Crim 3. These included **Alton Heath, Desmond Kennedy, Marlon Duncan and Chadrick Gordon v R** [2012] JMCA Crim 61, and **Jeffrey Perry v R** [2012] JMCA Crim 17. All these cases involved multiple counts of murder, but the sentences were ordered to run concurrently.

[15] Mr Fletcher argued that the objective of sentencing involves balancing many factors. He contended that the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') have affirmed the principle expressed by Rowe JA in **R v Sydney Beckford and David Lewis** (1980) 17 JLR 202, that a just sentence is one which promotes respect for the law and its processes by reflecting adequately and proportionately an appropriate mix of all the relevant factors. Such a sentence, counsel argued, is expected to fit the crime as well as the offender.

[16] Counsel submitted that the usual minimum pre-parole periods for offences of this nature are confirmed in the case of **Paul Brown v R**, which would be between 25 to 30 years. In the case of **Jeffrey Perry**, which involved three counts of murder of children, the stipulated period was 45 years. On this premise, counsel asked the court to consider imposing a pre-parole period of 26 years on each count and that the sentences run concurrently from the date of conviction.

[17] Counsel for the Crown conceded that the imposition of consecutive sentences in the circumstances of this case is wrong in principle. She relied on the decision of the

Caribbean Court of Justice ('CCJ') in **Linton Pompey v The Director of Public Prosecution** [2020] CCJ 7 (AJ) GY ('**Linton Pompey**'). Counsel also highlighted several cases from this court, which dealt with the treatment of consecutive sentences on appeal, including **Kirk Mitchell v R**, **Jermaine Barnes v R** [2015] JMCA Crim 3, and **R v Delroy Scott** [1989) 26 JLR 409. She also reminded the court of the sentencing principles laid down in **Meisha Clement v R** [2016] JMCA Crim 26, which would have been available when the appellant was sentenced.

[18] Counsel proposed that the sentences of life imprisonment be affirmed and the appellant be ordered to serve a minimum pre-parole period of 20 years on each count, to run consecutively. This would result cumulatively in a minimum pre-parole period of 40 years. Counsel relied on several cases to show that the minimum pre-parole period of 40 years would have been within the range of sentences in similar circumstances. These cases include **Lincoln Hall v R** [2018] JMCA Crim 17, **Troy Jarrett and Jermain Mitchell v R** [2017] JMCA Crim 38, **Calvin Powell and Lennox Swaby v R** [2013] JMCA Crim 28, **Separue Lee v R** [2014] JMCA Crim 12, **Pasmore Millings and Andre Ennis v R** [2021] JMCA Crim 6 and **Roderick Fisher v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 49/2006, judgment delivered 21 November 2008.

[19] The court has considered the submissions of counsel against the background of the applicable law and the circumstances of the case and the appellant. We note that the appellant has not challenged the life sentences imposed on him nor the minimum pre-parole period specified on each count. He has challenged the order that the sentences are to run consecutively instead of concurrently, resulting in a minimum pre-parole period of 52 years.

[20] With respect to the minimum pre-parole period, the court accepts the submissions of both counsel that the stipulation by the learned judge that the appellant should serve a minimum of 26 years' imprisonment on both counts of murder, to run consecutively is, indeed, manifestly excessive. When the court examined the case, the appellant was

ordered to serve 52 years' imprisonment before becoming eligible for parole, in addition to the six years he spent in pre-sentence custody. This would, in effect, bring the appellant's minimum time in custody before eligibility for parole to 58 years. This period is outside the usual range of pre-parole periods for this type of offending.

[21] It is not unreasonable to argue that the learned judge seemed not to have considered the principles governing the imposition of consecutive sentences, especially the totality principle.

[22] As it relates to the totality principle, the authorities have established that it is the totality of the sentences that should be considered. The elucidation of the principle by D A Thomas, in his work, the Principles of Sentencing, has gained judicial endorsement and expression in two cases cited before us: **Kirk Mitchell v R** at para. [46]; and **Linton Pompey** at para. [17]. Brooks JA (Ag) (as he then was), speaking for the court in **Kirk Mitchell v R**, noted the words of the learned author as follows:

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentence, to review the aggregate sentence and consider whether the aggregate is just and appropriate."

[23] In **Linton Pompey**, Saunders P at para. [16] puts it this way:

> "…The totality principle requires that when a judge sentences an offender for more than a single offence, the judge must give a sentence that reflects all the offending behaviour that is before the court. But this is subject to the notion that, ultimately, the total or overall sentence must be just and proportionate. This remains the case whether the individual sentences are structured to be served concurrently or consecutively."

[24] Additionally, both this court in **Kirk Mitchell v R** and the CCJ in **Linton Pompey** embraced the further guidance of D A Thomas that in cases involving a multiplicity of

offences, the court "must not content itself by doing the arithmetic and passing the sentence that the arithmetic produces". Instead, the court must "look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences". Saunders P then sums up the principle this way:

> "[17] If, therefore, a judge is minded to order that two or more sentences should be served consecutively, before pronouncing the order, the judge must factor the totality principle by considering the effect of the total sentence. The judge must ensure that the total is proportionate and not excessive..."

[25] As it relates to the circumstances in which consecutive sentences may be appropriate, it is a long-established principle of law, accepted by this court over the years, that consecutive sentences are not usually imposed when the offences arise out of the same transaction. In **Kirk Mitchell v R** at para. [57], this court, through Brooks JA (Ag), considered several relevant authorities from which the governing principles were distilled and helpfully delineated. We consider it necessary to repeat the court's guidance, which is that:

> "[57] …
>
> a. Where offences were all committed in the course of the same transaction, including the average case where an illegally held firearm is used in the commission of an offence, the general practice is to order the sentences to run concurrently with each other - ([***R v Walford Ferguson*** SCCA No 158/1995 delivered 26 March 1999]).
>
> b. Where the offences arise out of the same transaction and the appropriate sentence for each offence is a fine, only one substantial sentence should be imposed - ([***Director of Public Prosecutions v Stewart*** (1982) 35 WIR 296]).
>
> c. Where the offences are of a similar nature and were committed over a short period of time against the same victim, sentences should normally be made to

run concurrently - (***R v Paddon*** [(3 March 1971) Current Sentencing Practice A5.2(b)]).

d. If offences were committed on separate occasions or were committed while the offender was on bail for other offences, for which he was eventually convicted, and in exceptional cases involving firearm offences, there is no objection, in principle, to consecutive sentences – (***Delroy Scott, R v Rohan Chin*** (SCCA No. 84/2005 (delivered 26 July 2005) and ***R v Gerald Hugh Millen*** (1980) 2 Cr. App. R. (S) 357).

e. In all cases, but especially if consecutive sentences are to be applied, the 'totality principle' must be considered, in application of which, the aggregate of the sentences should not substantially exceed the normal level of sentences for the most serious of the offences involved - (***Delroy Scott, DPP v Stewart***, D.A. Thomas – ***Principles of Sentencing*** – cited above).

f. Even where consecutive sentences are not prohibited, it will usually be more convenient, when sentencing for a series of similar offences, to pass a substantial sentence for the most serious offence, with shorter concurrent sentences for the less serious ones - (***Walford Ferguson***).

g. Although it is unlikely to be the case, in matters being tried in the superior courts, if the maximum sentences allowed by statute, do not adequately address the egregious nature of the offences, then consecutive sentences, still subject to the 'totality principle', may be considered – (***R v Wheatley*** [(1983) 5 Cr. App R (S) 417; ***R v Harvey*** [2006] 2 Cr. App. R (S) 47])."

[26] Regarding the cases brought to the court's attention by counsel on both sides, we also conclude that the learned judge did not demonstrate that she had borne in mind the parity principle. This principle requires that notwithstanding the individualised nature of the sentencing process, there should be parity of sentences between those convicted of similar offences committed in similar circumstances.

[27] Having considered the relevant sentencing principles highlighted above and the objectives of sentencing that must be considered and balanced, it is our view that the stipulation that the appellant must serve a cumulative minimum period of 52 years' imprisonment before becoming eligible for parole ought to be set aside.

[28] In arriving at this conclusion that the sentences should be disturbed, we have also applied the well-known standard of review that an appellate court must deploy in reviewing a sentence (see **R v Ball** (1951) 35 Cr App Rep 164). To this oft-cited standard of review is added the authoritative and highly persuasive pronouncements of Saunders P, in **Linton Pompey**, that:

> "[2] Appellate courts reviewing sentences must steer a steady course between two extremes. On the one hand, courts of appeal must permit trial judges adequate flexibility to individualise their sentences. The trial judge is in the best position to fit the sentence to the criminal as well as to the crime and its impact on the victim. But a reviewing court *must* step in to correct discrepancies, reverse excesses or aberrations, secure consistency and promote observance of the rule of law." (Italics as in the original)

[29] We find a justifiable basis for this court to step in and reverse what may be regarded as excesses or aberrations and secure consistency. In setting aside the sentence, this court must exercise its discretion in determining the appropriate minimum pre-parole period to be imposed in the circumstances of the case and of the offender. In doing so, we note the different approaches recommended by the authorities that the learned judge should have considered in deciding whether the sentences should run consecutively or concurrently.

[30] The court bears in mind the circumstances in which the murders were committed as well as the circumstances of the victims. The victims were elderly persons who were pounced upon in the night, tied up, and murdered in the sanctity of their home. Their bodies were then taken from their home and dumped some distance away. These circumstances are significant aggravating features in this case. However, we disagree

with the position of the learned judge that the appellant's insistence that he is innocent should also be considered an aggravating feature. The fact that the appellant went to trial and insisted on his innocence cannot be treated as an aggravating feature. What it means is that the appellant would be hard-pressed to convince the court to treat remorse on his part as a mitigating feature in the absence of any evidence of it.

[31] Having considered the submissions and authorities relied on by counsel, the court cannot accept Mr Fletcher's proposition that this court should remove the stipulation that the sentences be served consecutively and order, in its stead, that the sentences run concurrently so that the appellant would be required to serve a minimum term of 26 years before becoming eligible for parole. We cannot lose sight of the fact that this was a double murder, and pursuant to the provisions of the Offences against the Person Act ('OAPA'), the prosecution could have asked for the death penalty with respect to the second murder, but they did not do so. The appellant was thus spared from having the death penalty considered as a sentencing option with respect to the second murder. We, therefore, reject the argument that the same pre-parole period should be given on both counts. The court must ensure that the punishment is proportionate to the overall criminality, having regard to similar cases in similar circumstances and the personal characteristics of this offender.

[32] In relation to count one, the statutory minimum of 15 years is used as the guide in selecting the starting point for the pre-parole period. We select a starting point of 18 years, having regard to the nature of the murder. Having taken into account the aggravating and mitigating factors and the overall guidance provided by the sentencing principles and arithmetical formula expressed in the case of **Meisha Clement v R**, we believe that a minimum pre-parole period of 28 years should be specified for count one. When full credit is given for the period the appellant spent in pre-sentence custody, as the learned judge was obliged to do, the sentence would be reduced by six years. Accordingly, the pre-parole period to be specified with respect to count one is 22 years.

[33] However, concerning count two, which relates to the killing of Mrs Hall, a more substantial punishment must be imposed. We find that the overall criminality warrants a minimum pre-parole period in excess of 26 years on count two, particularly in light of the fact that a subsequent murder conviction is treated differently, pursuant to section 3(1A)(b) of the OAPA. This section allows for a person convicted of another murder done on the same occasion to be sentenced to death or imprisonment for life. We have borne in mind the statutory minimum pre-parole period in respect of murders committed in circumstances to which section 3(1)(a) of the OAPA applies. In those circumstances, the statutory minimum pre-parole period is a term of 20 years' imprisonment (see section 3(1C)(a) of the OAPA). This statutory minimum is used as a guide. We find a suitable starting point in the circumstances of this case, with respect to count two, to be 25 years. Having regard to all the circumstances of the case and of the offender, and upon an application of the relevant sentencing guidelines and principles to the commission of the second murder, we believe a minimum pre-parole period of 38 years is reasonable and proportionate with respect to count two. This would have fallen within the broad range of pre-parole periods that existed at the time the appellant was sentenced in 2017, thereby ensuring consistency.

[34] However, full credit must be given for the time the appellant was deprived of his liberty awaiting trial and sentencing, which amounted to six years. Accordingly, the minimum pre-parole period to be specified on court two would be 32 years, having taken into account the time the appellant spent in pre-sentence custody.

[35] The sentences imposed are to run concurrently in keeping with the totality, proportionality and parity principles. It is worth noting that the global sentence would still be less than that imposed by the learned judge. It, therefore, cannot reasonably be said that the appellant would be prejudiced by the minimum pre-parole period determined by this court after an application of the relevant sentencing principles.

[36] Based on the foregoing, we would allow the appeal against sentence.

Disposition

[37] Accordingly, the court orders as follows:

1. The application for leave to appeal conviction is refused.

2. The conviction is affirmed.

3. The appeal against sentence is allowed.

4. The sentences of life imprisonment with the stipulation that the appellant serves 26 years' imprisonment on both counts, consecutively, before eligibility for parole, are set aside and substituted therefor are the following sentences:

    (a) on count 1, life imprisonment at hard labour with the stipulation that the appellant serves 22 years before being eligible for parole.

    (b) on count 2, life imprisonment at hard labour with the stipulation that the appellant serves 32 years before being eligible for parole.

5. The sentences are ordered to run concurrently and are to be reckoned has having commenced on 5 April 2017.