[2020] JMCA Crim 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME CRIMINAL APPEAL NO 84/2017

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA (AG)

MICHESTON BURKE v R

Ian Wilkinson QC and Lenroy Stewart for the appellant

Miss Natallie Malcolm and Miss Tamara Merchant for the Crown

29 January and 20 July 2020

SIMMONS JA (AG)

[1] By this appeal, the appellant, Mr Micheston Burke, seeks to challenge the sentence that was imposed on him on 31 July 2017, in the Circuit Court for the parish of Saint Thomas for the offence of manslaughter. He was sentenced to 22 years' imprisonment with a stipulation that he serves 18 years before being eligible for parole. The appellant was granted leave to appeal against sentence on 8 July 2019, by a single judge of this court.

Background

[2] On the night of 26 February 2015, the appellant and the deceased, Miss Lola Brown, who were romantically involved, were heard quarrelling. At about 4:30 am, they

left the house and went in the direction of Buckingham in the parish of Saint Thomas. The following morning, the mother of the deceased made enquiries of the appellant as to the whereabouts of the deceased. He told her that the deceased had gone to Kingston and had not yet returned. Later in the evening, the deceased's mother reported to the police that her daughter was missing. On Saturday, 28 February 2015, the police were summoned to Danvers Pen where they saw the appellant laying in the road. He ran on their approach. The body of the deceased was found in the same area. The post mortem report stated the cause of death as asphyxia and manual strangulation.

[3] On 1 March 2015, family members of the appellant, who was reported to have ingested Gramoxone in an attempt to take his life, contacted the police. The appellant was subsequently charged with murder. On 12 July 2017, when the matter was set for trial, he pleaded guilty to manslaughter. The plea was accepted by the learned trial judge on the basis that there was no independent witness who could negative provocation. There are no recorded facts in the transcript of the proceedings showing the basis on which the plea was taken and accepted. We use this opportunity to once again remind judges of the importance of recording the basis on which guilty pleas are accepted. This could be in the form of an agreed basis of plea arrived at between the prosecution and the defence; the findings of facts following a Newton Hearing, if any; or the facts advanced by the defence in pleading not guilty to murder charged in the indictment but guilty to manslaughter, the lesser offence.

[4] This court is placed at a disadvantage in the absence of facts relating to the commission of the offence which would have informed the acceptance of the plea and the sentences imposed. The court was left to glean the possible facts on which the guilty plea was based from the appellant's account given to the probation officer who prepared the social enquiry report. There is nothing to indicate that these facts were the same which were outlined to the court below.

[5] The appellant's version of the events, as contained in the social enquiry report, was that on the morning of the incident he and the deceased went to an abandoned farm to pick coconuts. Whilst there, an argument developed about him being in court for maintenance of his youngest child, which culminated in a fight. Both of them fell and he observed that the deceased was lifeless. He panicked and ran home. Interestingly, there is nothing on these facts indicating the commission of a crime of passion, which the learned trial judge considered it to have been. It seems that the learned trial judge may have arrived at that conclusion based on counsel for the appellant's plea in mitigation. According to counsel, the appellant's actions may have been the result of "his friends, mockingly, indicating to him that [the deceased] was being unfaithful", as indicated in the community report segment of the social enquiry report.[1] Interestingly, there was nothing from the appellant himself verifying these facts. Counsel had based his submissions on what was indicated in the social enquiry report to have been stated by persons in the community, which would have been

[1] Page 14

hearsay. It is clear that this issue of the killing being a crime of passion did not emanate from the appellant's version of the facts.

[6] In the interests of justice, the omission in the transcript regarding the basis of the guilty plea should enure to the appellant's benefit on the appeal (see **Lamoye Paul v R** [2017] JMCA 41). It means that this court will have to approach the issue of sentencing by having regard to his unchallenged version of the events, even if it may appear to be vague or incredulous.

The grounds of appeal

[7] On 12 September 2017, the appellant filed a notice of appeal in which he sought to challenge the sentence imposed on him on the basis that it was excessive and his guilty plea was not taken into consideration by the learned trial judge. He also sought to challenge the sentence on the basis that he had been coerced to plead guilty and did not know what it meant to plead guilty. As stated previously, he was granted permission to appeal his sentence.

[8] Three supplementary grounds of appeal were filed on 17 January 2020. At the hearing of the appeal, permission was sought by learned Queen's Counsel to abandon the original grounds and to argue instead, those supplementary grounds. There was no objection from the Crown and permission was granted to proceed in that manner. The supplementary grounds read as follows:

> "1. The learned trial judge erred in law in choosing twenty-five (25) years as the starting point in considering the sentence to be imposed on the Appellant. This was outside of the usual starting

> point in cases of manslaughter and was inappropriate in the circumstances of the case. Consequently, this led to the Appellant receiving a sentence that was manifestly excessive.
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> 2. The learned trial judge erred in failing to make sufficient allowance, or give to the Appellant the appropriate credit, for the time the Appellant spent in custody, thereby depriving the Appellant of the proper reduction to which he was entitled.
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> 3. The learned trial judge erred in law in sentencing the Appellant by failing to give the proper discount, or sufficient credit, to the Appellant for his guilty plea. This resulted in a much higher sentence being imposed on the appellant and, consequently, resulted in a miscarriage of justice."

Submissions

The learned trial judge erred in law in choosing twenty-five (25) years as the starting point in considering the sentence to be imposed on the Appellant. This was outside of the usual starting point in cases of manslaughter and was inappropriate in the circumstances of the case. Consequently, this led to the Appellant receiving a sentence that was manifestly excessive (Ground one).

[9] Queen's Counsel for the appellant, Mr Wilkinson, submitted that the usual starting point for the offence of manslaughter is seven years and the normal range of sentence is three to 10 years. He relied on the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ("the Sentencing Guidelines"). It was submitted that in arriving at an appropriate starting point, the aggravating and mitigating factors were to be taken into account and the learned trial judge failed to consider some of the mitigating factors. For example, the fact that the appellant received a good community report, his remorse and the pressures under which the offence was committed. In this regard, reference was also made to **Meisha Clement v R** [2016] JMCA Crim 26, in which Morrison P set out the procedure which should guide the sentencing judge.

[10] Reference was also made to **R v Romario Brown** [2019] JMSC Crim 1 in which the deceased was stabbed 25 times. The defendant pleaded guilty to manslaughter and in arriving at the sentence, a starting point of 20 years was used by the learned trial judge. Mr Wilkinson pointed out that in the instant case no weapon was used and the offence was not premeditated. The appellant, he said, appeared to have been provoked by the alleged unfaithfulness of the deceased.

[11] The Crown conceded that the learned trial judge erred in choosing 25 years as the starting point which was outside of the usual starting point in cases of manslaughter and was inappropriate in the circumstances of the case. This led to the sentence imposed being manifestly excessive.

[12] Whilst mindful of the fact that the Sentencing Guidelines were not yet in place at the time, it was submitted that those guidelines were derived from the range of sentences for similar offences at the time.

[13] It was suggested that 15 years would be an appropriate starting point. In this regard, reference was made to **Daniel Robinson v R** [2010] JMCA Crim 75, in which the appellant's sentence for manslaughter was reduced from 20 years' imprisonment to 15 years.

[14] Reference was also made to **Clive Barrett v R** [2018] JMCA Crim 27, in which the sentence was reduced to 15 years' imprisonment. In that case, the appellant who had pleaded guilty to manslaughter was previously convicted of murder. In setting aside the sentence, this court used a starting point of 12 years.

The learned trial judge erred in failing to make sufficient allowance, or give to the Appellant the appropriate credit, for the time the Appellant spent in custody, thereby depriving the Appellant of the proper reduction to which he was entitled (Ground two)

[15] Mr Wilkinson submitted that based on the fact that the appellant had spent two years and six months in custody the learned trial judge erred when she reduced his sentence by one year and six months for time spent.

[16] The Crown conceded that this was clearly an error in the learned trial judge's calculations and that full credit ought to have been given for the time the appellant spent in custody.

The learned trial judge erred in law in sentencing the Appellant by failing to give the proper discount, or sufficient credit, to the Appellant for his guilty plea. This resulted in a much higher sentence being imposed on the appellant and, consequently, resulted in a miscarriage of justice (Ground 3)

[17] Learned Queen's Counsel having referred to sections 42D(2) and 42H of the Criminal Justice (Administration) (Amendment) Act ("the Act") submitted that it was unclear how the trial judge arrived at a discount of three years for the appellant's guilty plea. He stated that bearing in mind the learned trial judge's starting point of 25 years, the three years was less than 20% of the sentence. Reference was made to **R v Romario Brown** in which, due to several aggravating factors, the defendant was given a 25% discount on his sentence, having pleaded guilty. It was submitted that based on the stage of the proceedings when the plea was given, a discount of 35% would have been appropriate (see section 42 D (2)(b) of the Act). At the very least, he should have received a 25% discount as was done in **R v Romario Brown** .

[18] With respect to the learned trial judge's approach to the issue of remorse, it was submitted that she failed to consider the appellant's attempt to take his own life in the proper context. That act, it was argued, was the appellant's first act of contrition.

[19] In conclusion, Mr Wilkinson indicated that a sentence of 15 years would be appropriate in the circumstances.

[20] The Crown conceded that the learned trial judge should have indicated the basis on which she arrived at a discount of three years for the guilty plea.

Discussion and analysis

[21] Section 14(3) of the Judicature (Appellate Jurisdiction) Act provides:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case, shall dismiss the appeal."

[22] However, as indicated by Hilbery J in **R v Ball** (1952) 35 Cr App Rep 164, 165:

> "…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. The trial Judge has seen the prisoner and heard his history and any witnesses as to character he may have chosen to call. **It is only when a sentence appears to err in principle that the 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**." (Emphasis added)

The learned trial judge erred in law in choosing twenty-five (25) years as the starting point in considering the sentence to be imposed on the Appellant

[23] The usual starting point for the offence of manslaughter is seven years' imprisonment. The learned trial judge chose a starting point of 25 years' imprisonment.[2] The serious nature of the offence, the appellant's previous conviction for a similar offence and her finding that it was pre-meditated seems to have informed her decision. The learned trial judge indicated:

> "in this case, you have a previous conviction for wounding with intent which indicates to my mind that you are a violent offender. There is no going backwards in terms of sentencing, sentencing can only go higher. The next time an offender is before the court for an offence involving violence, in terms of deterrence, the expectation is that the deterrent sentences are going to cause would be offenders or unlikely offenders to stay away from crime but I find that a deterrent sentence is perhaps best used when the crime is premeditated and this is one of those. This is a case in which, the deceased would have had no idea that she was going to meet her demise on the day; that she didn't…even though it is being called a crime of passion. The court, would wish to send a very strong message to those who wish to engage in crimes of passion, that a deterrent sentence may be imposed."[3]

[24] The basis on which the learned trial judge concluded that the actions of the appellant were pre-meditated is unclear as there was no material in the transcript which supported that conclusion. She also expressed the view that based on his prior conduct, it did not appear that he could be rehabilitated. The learned judge's opinion that the

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[2] Page 31 lines 7 and 8 of the transcript
[3] Page 27 lines 1-21 of the transcript

killing was premeditated, however, is not supported on any facts disclosed to this court and so she would have erred in treating it as a factor in setting the starting point.

[25] The procedure to be adopted in arriving at an appropriate starting point was set out in the Sentencing Guidelines and given further clarity in **Meisha Clement v R**. In that case Morrison P stated:

> "[26] Having decided that a sentence of imprisonment is appropriate in a particular case, the sentencing judge's first task is, as Harrison JA explained in **R v Everald Dunkley**, to 'make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any other factors that will serve to influence the sentence, whether in mitigation or otherwise'. More recently, making the same point in **R v Saw and others** ([2009] 2 All ER 1138, 1142), Lord Judge CJ observed that 'the expression 'starting point' ... is nowadays used to identify a notional point within a broad range, from which the sentence should be increased or decreased to allow for aggravating or mitigating features'.
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> [27] In seeking to arrive at the appropriate starting point, it is relevant to bear in mind the well-known and generally accepted principle of sentencing that the maximum sentence of imprisonment provided by statute for a particular offence should be reserved for the worst examples of that offence likely to be encountered in practice. By the same token, therefore, it will, in our view, generally be wrong in principle to use the statutory maximum as the starting point in the search for the appropriate sentence…
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> [29] **But, in arriving at the appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence. Although not a part of our law, the considerations mentioned in section 143(1) of the United Kingdom Criminal Justice Act 2003 are, in our view, an apt summary of the factors which will ordinarily inform the assessment of the seriousness of an offence. These are the offender's culpability in**

committing the offence and any harm which the offence has caused, was intended to cause, or might foreseeably have caused.

[30] Before leaving this aspect of the matter, we should refer in parenthesis, with admiration and respect, to the recent judgment of the Court of Appeal of Trinidad and Tobago in **Aguillera and others v The State** (Crim. Apps. Nos. 5,6,7 and 8 of 2015, judgment delivered on 16 June 2016). In that case, after a full review of relevant authorities from across the Commonwealth, the court adopted what is arguably a more nuanced approach to the fixing of the starting point. Explicitly influenced by the decision of the Court of Appeal of New Zealand in **R v Tauer** and others ([2005] NZLR 372), the court defined the starting point as '… the sentence which is appropriate when aggravating and mitigating factors relative to the offending are taken into account, but which excludes any aggravating and mitigating factors relative to the offender'. So factors such as the level of premeditation and the use of gratuitous violence, for instance, to take but a couple, would rank as aggravating factors relating to the offence and therefore impact the starting point; while subjective factors relating to the offender, such as youth and previous good character, would go to his or her degree of culpability for commission of the offence.

[31] We have mentioned **Aguillera and others v The State** for the purposes of information only. But it seems to us that, naturally subject to full argument in an appropriate case, the decision might well signal a possible line of refinement of our own approach to the task of arriving at an appropriate starting point in this jurisdiction.

[32] While we do not yet have collected in any one place a list of potentially aggravating factors, as now exists in England and Wales by virtue of Definitive Guidelines issued by the Sentencing Guidelines Council (SGC), the experience of the courts over the years has produced a fairly well-known summary of what those factors might be. Though obviously varying in significance from case to case, among them will generally be at least the following (in no special order of priority): (i) previous convictions for the same or similar offences, particularly where a pattern of repeat offending is disclosed; (ii) premeditation; (iii) use of a

> firearm (imitation or otherwise), or other weapon; (iv) abuse of a position of trust, particularly in relation to sexual offences involving minor victims; (v) offence committed whilst on probation or serving a suspended sentence; (vi) prevalence of the offence in the community; and (vii) an intention to commit more serious harm than actually resulted from the offence. Needless to say, this is a purely indicative list, which does not in any way purport to be exhaustive of all the possibilities.
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> [33] As regards mitigating factors, P Harrison JA (as he then was), writing extra-judicially in 2002, cited with approval Professor David Thomas' comment that '[m]itigating factors exist in great variety, but some are more common and more effective than others'. Thus, they will include, again in no special order of priority, factors such as (i) the age of the offender; (ii) the previous good character of the offender; (iii) where appropriate, whether reparation has been made; (iv) the pressures under which the offence was committed (such as provocation or emotional stress); (v) any incidental losses which the offender may have suffered as a result of the conviction (such as loss of employment); (vi) the offender's capacity for reform; (vii) time on remand/delay up to the time of sentence; (viii) the offender's role in the commission of the offence, where more than one offender was involved; (ix) cooperation with the police by the offender; (x) the personal characteristics of the offender, such as physical disability or the like; and (xi) a plea of guilty. Again, as with the aggravating factors, this is not intended to be an exhaustive list." (Emphasis added)

[26] In **Clive Barrett v R**, a starting point of 25 years was described as being "out of sync with sentences imposed by this court for similar offences".[4] Both the appellant and the Crown are *ad idem* in relation to this point.

[27] The learned trial judge would have erred when she chose a starting point of 25 years. It does seem, however, that although she referred to the sentence of 25 years'

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[4] Paragraph [33]

imprisonment as a starting point, it was, in actuality, the provisional sentence she had arrived at after taking into account aggravating factors, such as previous conviction and premeditation. It was that sentence to which the credit for the guilty plea was applied. Strictly speaking, therefore, it could not have been the starting point although the learned trial judge referred to it as such.

The learned trial judge erred in failing to make sufficient allowance, or give to the Appellant the appropriate credit, for the time the Appellant spent in custody

[28] In **Meisha Clement v R**, Morrison P, in addressing this issue, stated:

> "[34] … in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial. As the Privy Council stated in **Callachand & Anor v The State** ([2008] UKPC 49, para.9), an appeal from the Court of Appeal of Mauritius –
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> > '... any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing'.
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> [35] This decision was applied by the Caribbean Court of Justice in **Romeo DaCosta Hall v The Queen** ([2011] CCJ 6 (AJ), para. [32]), an appeal from the Court of Appeal of Barbados, in which Wit JCCJ, in a separate concurring judgment, remarked the emergence of '[a] worldwide view ... that time spent in pre-trial detention should, at least in principle fully count as part of the served time pursuant to the sentence of the court'."

[29] In the case at bar, the appellant's sentence was only reduced by one year and six months, although he had spent two years and six months in custody. This was clearly an error on the part of the learned trial judge. It is beyond dispute that the

appellant should have received full credit for the time spent in custody. The learned trial judge erred in law in sentencing the appellant by failing to give the proper discount, or sufficient credit, to the appellant for his guilty plea.

The learned trial judge erred in law in sentencing the appellant by failing to give the proper discount, or sufficient credit, to the appellant for his guilty plea.

[30] The importance of treating with a guilty plea as a mitigating factor was also addressed by Morrison P in **Meisha Clement v R**, where he stated thus:

> "[36] Next, as regards the plea of guilty, such a plea must, as P Harrison JA stated in **R v Collin Gordon** (unreported, Court of Appeal, Jamaica, Supreme Court Criminal appeal No 211/1999, judgment delivered 3 November 2005), 'attract a specific consideration by a court'. The rationale for this has been variously explained. In **Keith Smith v R** ((1992) 42 WIR 33, for instance, a decision of the Court of Appeal of Barbados, Sir Denys Williams CJ observed that '[i]t 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'. And in **R v Collin Gordon**, P Harrison JA said this (page 5):
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> > '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'."

[31] The extent of the discount is not rigidly fixed, although it has now been made the subject of legislation. The question of the extent of the discount to be allowed in a particular case is a matter for the discretion of the sentencing judge and is directly

related to the circumstances of each case. Section 42D of the Criminal Justice (Administration) (Amendment) Act, 2015 states:

> "(1) Subject to the provisions of this Part, where a defendant pleads guilty to an offence with which he has been charged, the Court may, in accordance with subsection (2), reduce the sentence that it would otherwise have imposed on the defendant, had the defendant been tried and convicted of the offence.
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> (2) Pursuant to subsection (1), the Court may reduce the sentence that it would otherwise have imposed on the defendant in the following manner –
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> (a) where the defendant indicates to the Court, on the first relevant date, that he wishes to plead guilty to the offence, the sentence may be reduced by up to fifty percent;
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> (b) **where the defendant indicates to the Court, after the first relevant date but before the trial commences, that he wishes to plead guilty to the offence, the sentence may be reduced by up to thirty-five percent**;
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> (c) where the defendant pleads guilty to the offence after the trial has commenced, but before the verdict is given, the sentence may be reduced by up to fifteen percent; …" (Emphasis added)

[32] The legislation also lists the factors which are to be taken into account in the determination of the appropriate discount. Section 42 H states:

> "Pursuant to the provisions of this Part, in determining the percentage by which a sentence for an offence is to be reduced, in respect of a guilty plea made by a defendant within a particular period referred to in 42D(2) and 42E(2), the Court shall have regard to the following factors namely-

(a) whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;

(b) the circumstances of the offence, including its impact on the victims;

(c) any factors that are relevant to the defendant;

(d) the circumstances surrounding the plea;

(e) where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;

(f) whether the defendant has any previous convictions;

(g) any other factors or principles the Court considers relevant."

[33] The learned trial judge considered the timing of the guilty plea and indicated that it was not done on the first relevant date, which was correct. There was, however, no indication of how she arrived at the three year discount. In addressing this issue, she merely stated:

> "I discount your guilty plea by three years because it is not the earliest plea and the Criminal Justice (Administration) act says it is up to the judge's discretion to discount up to fifty per cent. It is may, not a must if you plead guilty depending on the circumstances, you may not necessarily benefit from a reduction in that amount."

[34] She erred in that regard.

[35] In light of the learned trial judge's errors as identified and in accordance with the established practice of the court, we will proceed to consider the question of sentence afresh.

[36] The principles applicable to sentencing were recently revisited by this court in **Patrick Green v R** [2020] JMCA Crim 17, a case in which the appellant had pleaded guilty to all counts on an indictment which charged him with illegal possession of firearm (eight counts), robbery with aggravation (five counts), rape (eight counts) and grievous sexual assault (two counts).

[37] In considering the issue of sentence, the court noted that there was no indication in the learned trial judge's sentencing remarks that she had given any discount on account of the appellant's guilty plea. Morrison P, who delivered the judgment of the court stated:

> "Firstly, it is beyond controversy that the four 'classical principles of sentencin'", as this court described them in **R v Beckford & Lewis** ((1980) 17 JLR 202, 202-203), are retribution, deterrence, prevention and rehabilitation. Thus, the possibility of rehabilitation, even in a case calling for condign punishment, must always be considered by the sentencing judge. Accordingly, in **R v Errol Brown** ((1988) 25 JLR 400, 401), the court considered that, in imposing a well-deserved deterrent sentence, the sentencing judge ought to have kept in mind 'a possible rehabilitation of the prisoner'. And similarly, in **Michael Evans v R** ([2015] JMCA Crim 33), the court found that counsel's criticism that the sentencing judge, whose primary focus appeared to have been on the principle of deterrence, had failed to demonstrate that he had also taken into account the need to rehabilitate the offender, was 'not at all unjustified'."

[38] In addition to its consideration of the above principles, the court should also determine the usual range of sentences for the offence and the starting point within that range (see **Patrick Green v R**, at paragraph [22]). Having taken those factors into account the next step is the adjustment of the starting point upwards and/or downwards in light of the aggravating and/or mitigating factors (see **R v Evrald Dunkley** (unreported) Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered 5 July 2002).

[39] The approach of this court in appeals against sentence was addressed by the court in **Alpha Green v R** (1969) 11 JLR 283, 284, in which the court adopted the statement of principle by Hilbery J in **R v Ball** (see paragraph [22] above).

[40] This statement of the principle was approved by this court in **Meisha Clement v R** and recently in **Patrick Green v R**[5]. When considering an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge "(i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these

[5] Para. [23]

criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion".[6]

Was the sentence manifestly excessive?

[41] Mr Wilkinson relied on **R v Romario Brown**, in support of his contention that the sentence imposed on the appellant was manifestly excessive. In that case, where the deceased was stabbed 25 times, 20 years was used as the starting point and the defendant was ultimately sentenced to 12 years' imprisonment.

[42] The Crown in its submission that the sentence imposed was not manifestly excessive, referred to **Daniel Robinson v R** and **Clive Barrett v R**. In **Daniel Robinson v R**, in which the appellant strangled a woman with whom he had been intimately involved, the sentence was reduced from 20 years to 15 years. He, like the appellant in this case, had pleaded guilty. However, unlike the appellant, he did not have a previous conviction for a similar offence. The appellant in the case at bar was previously convicted of the offence of wounding with intent and was sentenced to nine years' imprisonment at hard labour. We have also noted that the complainant in that case was a former partner.

[43] In **Clive Barrett v R**, the appellant who had pleaded guilty to manslaughter was sentenced to 25 years having pleaded guilty at the first opportunity. The sentence was reduced to nine years having been found to be manifestly excessive. In that case, the

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[6] **Meisha Clement v R** at paragraph [43]

appellant had administered corporal punishment on the deceased infant who died as a result of injuries sustained during the beating. The appellant had been previously convicted for murder and had served his sentence. The court stated that a reasonable starting point in the circumstances of that case was 12 years and not 25 as utilised by the trial judge.

[44] Sinclair-Haynes JA, who delivered the judgment of the court, referred to **R v Kevin Grant** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 161/2004, judgment delivered 10 November 2006, in which the sentence of nine years' imprisonment imposed by the trial judge was confirmed by this court.

[45] The learned judge of appeal also referred to **R v Herron Spence** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 150/2004, judgment delivered 28 July 2006, in which the sentence of 10 years' imprisonment was affirmed.

[46] We have also found the case **Bertell Myers v R** [2013] JMCA 58 to be of great assistance in our consideration of this issue. In that case, Morrison JA (as he then was), in his consideration of whether the sentence of 15 years' imprisonment imposed on the appellant for the offence of manslaughter was excessive, referred to the following cases:

(1) **Daniel Robinson v R** [2010] JMCA Crim 75 – the appellant pleaded guilty to manslaughter having strangled the deceased with whom he was involved, was sentenced to 20 years' imprisonment. The sentence was reduced to 15 years;

(2) **Tafari Johnson v R** [2012] JMCA Crim 18 – the sentence was reduced to 15 years' imprisonment;

(3) **Durrant Morris v R** [2012] JMCA Crim 42 – The appellant who pleaded guilty to manslaughter was sentenced to 15 years' imprisonment. The sentence was upheld.

Morrison JA also stated:

> "[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."

[47] The sentence of 15 years' imprisonment was reduced to 12 years as there was no evidence of premeditation unlike the situation in **Daniel Robinson v R**. We have, however, noted that in **Daniel Robinson v R** the appellant's previous conviction was for a minor offence. That is certainly not the situation in the case at bar.

[48] By virtue of section 9 of the Offences Against the Person Act, a person who is convicted of manslaughter may be either imprisoned for life and/or fined. Bearing in mind the prevalence of similar offences in our society, the imposition of a fine would almost certainly "shock the public conscience". Mr Wilkinson has not sought to impress upon the court that the imposition of a non-custodial sentence would have been appropriate.

[49] In seeking to arrive at an appropriate starting point, it is acknowledged that the maximum penalty of life imprisonment is reserved for worst cases. The facts on which the appellant is being sentenced do not indicate that this is such a case, although a family has been deprived of their loved one. The normal range of sentences usually imposed for manslaughter is from 3 - 15 years. In **Dosane Jackson v R** [2020] JMCA Crim 3, F Williams JA indicated that a sentence of 15 years' imprisonment "would be nearer to the top of the range for a manslaughter sentence". [7] There are cases, however, which may fall outside the usual range.

[50] As stated by Morrison P in **Meisha Clement v R**, in order to arrive at an appropriate starting point, the seriousness of the offence must be taken into account. He also stated that in assessing the seriousness of the offence the provisions of the United Kingdom Criminal Justice Act, 2003 may be used as a guide. These provisions refer to the offender's culpability in committing the offence as well as any harm that the offence caused, was intended to cause or might have caused. Morrison P also stated that:

> "…in arriving at the appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence."[8]

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[7] Paragraph [19]
[8] Paragraph [29]

[51] A reasonable starting point would be 12 years' imprisonment in light of the serious nature of the offence and the circumstances of its commission, including, the appellant's effort at concealing the body of the deceased.

[52] The aggravating factors are: (i) the appellant's previous conviction for a violent offence against a person with whom he was intimately involved; (ii) the short period of time between his release from prison and the commission of this offence; (iii) the prevalence of similar offences; (iv) the absence of remorse; and (v) the appellant's attempt to flee upon the arrival of the police.

[53] Where the issue of remorse is concerned, Mr Wilkinson urged the court to treat the appellant's attempt to take his own life as an indication of remorse. This, however, was not borne out by any fact disclosed to the court. In his interview with the probation aftercare officer, the appellant had indicated that the plea was entered out of frustration. He had a subsequent "about turn" later in that interview and expressed remorse. We have observed, however, that in his application for leave to appeal his sentence, which was considered by the single judge, he stated that he was forced to plead guilty due to threats from the police that if he did not do so his family would be killed. At no time had the appellant indicate his reason for acting the way he did. The court can see no basis to treat his attempted suicide as evidence of remorse and, therefore, as a mitigating factor.

[54] We note that the learned trial judge had regard to premeditation as an aggravating factor. However, the plea was accepted on the basis of provocation and in

the absence of any facts which disclosed premeditation she fell into error. In the circumstances, premeditation or the lack of it is not a factor for our consideration in arriving at the appropriate sentence.

[55] The mitigating factors are (i) the emotional pressure under which the offence may have been committed; and (ii) his relatively favourable social enquiry report.

[56] There is also no indication that violence was used over and above that which resulted in the death of the deceased. However, the frequency with which similar offences have been committed in recent times cannot be ignored. As was stated in **R v Sidney Beckford and David Lewis** (1980) 17 JLR 202, 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".[9] We also bear in mind the following passage in **Bertell Myers v R**:

> "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

[9] Page 203

> 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'." (Emphasis added)

[57] When the aggravating factors are taken into account and balanced with the mitigating factors, we form the view that the aggravating factors far outweigh the mitigating factors. The appellant's previous conviction for violence against a person with whom he had an intimate relationship and the short time between his release from prison and the commission of this offence weighed significantly against him. We conclude that a sentence of 20 years' imprisonment would have been appropriate had he gone to trial. This would have taken his case outside the usual range for the offence of manslaughter because of his antecedent history.

[58] Where the guilty plea is concerned, the appellant was eligible for a discount of up to 35% as the plea was offered before the commencement of the trial. However, as indicated in **Meisha Clement v R,** where the plea is offered in the face of irresistible evidence, that factor may affect the level of discount applied in a particular case. In this regard, we bear in mind the following: the appellant was the last person with whom the deceased was seen; they were quarrelling; he was later seen with her suitcase and gave her mother an explanation as to her whereabouts; the next day he was seen lying in the road in the vicinity in which the body of the deceased was found.

[59] We also bear in mind the factors enumerated in section 42H of the Criminal Justice (Administration) Act in determining the most appropriate discount. At the invitation of the court, Mr Wilkinson made submissions on the considerations. enumerated in the section which he considered relevant. In outline, learned Queen's Counsel submitted that:

> (a) within the ambit of sub-section (a), there is a certain degree of latitude and flexibility for the tribunal, to ensure that it does not shock the public conscience;
>
> (b) the mother of the deceased was extremely traumatized, in light of the circumstances surrounding the death, including the fact that the appellant had, among other things, concealed the whereabouts of the deceased;
>
> (c) the community reports concerning the appellant were positive, in that, persons expressed support for him and indicated that he was a family man;
>
> (d) the circumstances surrounding the plea are nebulous; and
>
> (f) the question of whether the appellant had any previous convictions had already been taken into account as an aggravating factor in the process of determining what would have been an appropriate sentence had the matter proceeded to trial. However, the court would,

nevertheless, take it into account in considering the level of discount to be given.

[60] We are not satisfied that the appellant is as contrite as he ought to be, although he had pleaded guilty. His previous conviction for violence against another female with whom he has had an intimate relationship is a significant factor that cannot at all be ignored. Furthermore, his high risk of reoffending, in the light of the fact that he had committed this offence shortly after serving a sentence of nine years' imprisonment, is another factor which must be taken into account in determining the level of discount. We also take into account the effect the offence has had on the mother of the deceased.

[61] We form the view that a discount of 35 % would be disproportionate to the seriousness of the offence and inappropriate for this appellant, and as such, could shock the public conscience. Given the statutory guidance and the stage of the proceedings at which the plea was entered, a discount of 20%, on account of the guilty plea, is appropriate. This would be a discount of four years' imprisonment from the provisional sentence of 20 years. The sentence to be imposed on him would be 16 years' imprisonment.

[62] It is common ground that the appellant should also have received full credit for the two years and six months that he spent in custody. When this reduction is applied, the sentence would be 13 years and 6 months' imprisonment.

Conclusion and disposal of the appeal

[63] Applying the principles as set out above, we have concluded that a sentence of 16 years' imprisonment, less two years and six months' for pre-sentence remand would have been appropriate in this case. We agree with the appellant, that the learned trial judge erred in her approach to sentencing, thereby imposing a sentence that was manifestly excessive.

[64] In the circumstances, it is ordered as follows:

(1) The appeal against sentence is allowed.

(2) The sentence of 22 years' imprisonment with the stipulation that the appellant serves 18 years before being eligible for parole is set aside and the sentence of 13 years and 6 months (having awarded credit for 2 years and 6 months on pre-sentence remand) is substituted in lieu thereof.

(3) The sentence should be reckoned as having commenced on 31 July 2017.