[2023] JMCA Crim 61

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 46/2014

DWIGHT CAMPBELL v R

Oswest Senior Smith for the applicant

Miss Kathy-Ann Pyke and Sean Nelson for the Crown

6, 8, 10, 27 November and 15 December 2023

Criminal Law – Appeal against sentence- Murder- Guilty plea- Delay- Breach of section 16(7) and (8) of the Constitution- Redress for constitutional breach

FOSTER-PUSEY JA

[1] On 4 February 2013, the applicant, Dwight Campbell, pleaded guilty to murdering Rosan Jordan on 19 May 2009. This took place before E Brown J (as he then was) ('the learned judge'). On 4 February 2013 when the details of the charge were outlined to the applicant, and he was asked whether he was guilty or not guilty, the applicant stated "Your honour, mi nah waste no time. Guilty, Your honour". After the prosecution outlined the facts relating to the offence the learned judge requested the antecedents of the applicant and remanded the applicant to 6 February 2013 for sentencing.

[2] The sentencing remarks of the learned judge are not available to this court. However, according to the endorsement on the indictment, on either 6 or 8 February 2013, as there are conflicting dates on the papers available, the applicant was sentenced

to life imprisonment with the stipulation that he should serve 15 years' imprisonment before being eligible for parole. There are conflicting dates on the incomplete record that is available.

[3] The applicant applied for an extension of time within which to appeal and for leave to appeal his sentence on the following grounds of appeal:

> "**Unfair trial:**
>
> a. That the Learned Trial Judge did not temper justice with mercy as my guilty plea was not taken into consideration.
>
> b. That the sentence is harsh and excessive as based on circumstances, this cannot be justified under law.
>
> **Lack of Evidence:**
>
> (1) That the court fail [sic] to recognised [sic] the fact that the evidence and testimonies upon which the Learned Trial Judge relied on [sic] for the purpose to convict me lack facts and credibility thus rendering the verdict unsafe in the circumstances.
>
> (2) That the court failed to recognised that I only acted in self-defence after been [sic] intimidated and threatened by the deceased."

[4] On 21 January 2022, this court received only a part of the transcript of proceedings before the Circuit Court. These were the notes of the proceedings held on 4 February 2013, the indictment, and the applicant's antecedent report.

[5] The matter was referred to a single judge, who, on 4 November 2022, among other things noted:

> "Based on the Offences Against the Person Act and the Criminal Justice (Administration)(Amendment) Act, the applicant could not have received a lesser pre-parole period than that of fifteen (15) years.

> However, the only notes available (could [sic] appearance when he pleaded guilty) were not received by the registry until 21 January 2022. There are issues, therefore, of delay and nonproduction of document. I would, therefore, grant the legal aid certificate and order that the matter be placed before the Full Court for consideration.
>
> This matter requires an expedited hearing as the applicant is [sic] already served nine (9) years imprisonment."

[6] The matter is therefore before this court on the referral of the single judge. In light of the single judge's ruling, Mr Senior Smith was assigned as legal aid counsel representing the applicant.

The facts outlined by the prosecution

[7] On Tuesday, 19 May 2009 at 4:00 pm, the deceased, Mr Rosan Jordan, was sitting on a bicycle in front of premises in Newlands, Saint Catherine. He was in conversation with an individual, TR, when the applicant rode up on a bicycle, dismounted and approached the deceased with a firearm. The applicant discharged the firearm in the direction of the deceased. The deceased suffered two gunshot wounds, one to the back of his head and the other to the left side of his face and died later that day.

[8] On 18 April 2010, the applicant was apprehended at a home in Old Harbour, Saint Catherine. Having been taken into custody, a detective saw him at the lock-up and informed him of the investigation. At that time, he held his head down and did not speak.

[9] On 26 April 2010, TR pointed out the applicant at an identification parade. The following day, the applicant was charged for the murder of the deceased. When cautioned by the officer, the applicant held down his head and said "Yes, but I don't know what you are talking about".

Submissions for the applicant

[10] Mr Senior Smith sought and received the permission of the court to abandon all the original grounds of appeal filed by the applicant. Counsel emphasized that his request accorded with the written instructions that he received from his client.

[11] Counsel noted, however, the single judge's referral that raised issues for the full court to consider, concerning "delay and non-production" of the transcript of the applicant's sentencing hearing. In light of the referral, counsel formulated a ground of appeal encompassing those issues. He submitted that the nearly nine-year delay in the hearing of the applicant's appeal, arising from the "non-production" of the full transcript, breached the applicant's rights for a review of his conviction by a superior court within a reasonable time, as well as his right to have a copy of the record of his sentencing hearing (see sections 16(7) and 16(8) of the Constitution of Jamaica). Counsel noted that the authorities provide that in such instances, as redress for the breach of the applicant's rights, there are a number of options open to the court. These include the court publicly acknowledging the breach or reducing the sentence imposed on the applicant. Counsel submitted that, at the very least, the court should declare that the applicant's rights were breached. He emphasized that he was "cautious in urging a more momentous decision" as he was bearing in mind the circumstances of the offence and the instructions that he had received, which he described as "very particular".

[12] In later submissions, counsel for the applicant urged, though not forcefully, that the court could nevertheless consider the option of reducing the applicant's sentence as redress for the breach of his constitutional rights.

Submissions for the Crown

[13] Mr Nelson stated that, as ministers of justice, the Crown acknowledges that in the circumstances, the applicant's constitutional rights were breached. Counsel noted that nine years after the applicant filed his appeal he was not able to receive the full transcript of the proceedings before the Supreme Court.

[14] He agreed that this court may, among other things, as redress for the breach of the applicant's constitutional rights, publicly acknowledge the breach or reduce the applicant's sentence. Counsel submitted that the sentence imposed on the applicant on account of his guilty plea was not manifestly excessive and an acknowledgment of the

breach of his constitutional rights would be the most appropriate redress in the particular circumstances before the court.

Additional information provided to the court

[15] At the request of the court, counsel for the Crown searched their records for information as to whether the applicant was held in pre-sentence remand and, if yes, whether he was serving a term of imprisonment during the same period.

[16] On 9 November 2023, counsel for the Crown provided additional information indicating that the applicant was arrested on 18 April 2010 for two separate murder matters. When he was first before the Supreme Court on 27 April 2011 for both matters, he was remanded in custody, and remained in custody until he was sentenced in the case at bar on 8 February 2014.

[17] The Crown also made checks regarding the applicant's antecedents as at 14 November 2023, and these checks did not reveal any criminal conviction other than the one arising in the case at bar.

Further submissions by the Crown

[18] In further written submissions, filed on 9 November 2023, counsel for the Crown indicated that they found it necessary to bring to our attention case law that critically affected the court's resolution of this matter.

[19] One issue raised concerned whether this court had the jurisdiction to determine the applicant's "claim of breach" of his constitutional rights in light of the fact that applicant's counsel had withdrawn the original grounds of appeal on the basis that his client had instructed him to not pursue the appeal against sentence. The Crown submitted that, as a consequence, the applicant had in effect "abandoned" his appeal, and this left the court bereft of the jurisdiction to consider any issue concerning an alleged breach of his constitutional rights.

[20] Counsel submitted that the applicant's stance suggested that he was "willing to accept the sentence of life imprisonment, with eligibility for parole after serving fifteen years". Counsel highlighted the distinction between life imprisonment and determinate sentences for murder as well as the fact that when the court imposes a sentence of life imprisonment for the offence of murder, the minimum pre-parole period is 15 years.

[21] Counsel referred to matters concerning post-conviction delays and issues that have arisen as to when a sentence will begin to run when an applicant abandons his appeal. In support of these submissions, counsel for the Crown referred to a number of cases for the assistance of the court, including: **Techla Simpson v R** [2019] JMCA Crim 37, **Evon Jack v R** [2021] JMCA Crim 31, **Khoran Thomas v R** [2020] JMCA Crim 22, **Danny Walker v R** [2018] JMCA Crim 2, **Gawayne Thomas v R** [2022] JMCA Crim 11, **Quacie Hart v R** [2022] JMCA Crim 70, **Tafari Williams v R** [2015] JMCA App 36, **Omar Anderson v R** [2023] JMCA Crim 11 and **Solomon Marin Jr v R** [2021] CCJ 6(AJ) BZ.

Submissions in response by counsel for the applicant

[22] Mr Senior Smith responded, in writing, in submissions filed on 20 November 2023. Counsel submitted that this court was always "seized of the potential constitutional infringements arising from both the delay and non-production". Furthermore, as counsel for the applicant, he had orally formulated and advanced a ground of appeal concerning the "Charter violations".

[23] Mr Senior-Smith stated that there were two distinct issues that were potentially capable of affecting the applicant's sentence. These were the matter of a challenge to the sentence that was imposed on the one hand, and the "Charter derelictions" on the other. Counsel noted that the court could, on particular facts, find that the sentence that the court imposed at first instance was not manifestly excessive, but, nonetheless, determine that a reduction in the sentence is an appropriate remedy for the breach of an applicant's constitutional rights. He relied on **Techla Simpson v R** in support of this submission.

[24] Mr Senior Smith also urged that until the court grants an application for abandonment of an appeal, the appeal is not disposed of, and that was the case in the matter at bar. Counsel stated that in the event that the court was to direct the applicant to take the necessary steps to abandon the appeal, the court would nevertheless be in a position to address the constitutional issues. He relied on **Sheldon Pusey v R** [2016] JMCA App 26 and **Tafari Williams v R**.

Consideration of the further submissions made by the Crown

[25] In light of the nature of the points that counsel for the Crown made in their further submissions, we felt it necessary to address them as preliminary issues.

[26] The court is in entire agreement with the submissions that Mr Senior Smith made in response. In the case at bar, counsel for the applicant sought and received leave to abandon the grounds of appeal, challenging the applicant's sentence as manifestly excessive. After discussion as to whether it was necessary for him to do so, counsel sought permission and was allowed to argue a supplemental ground of appeal that the delay in the production of the transcript, the non-production of the record, and resultant delay in the hearing of the appeal constituted a breach of the applicant's constitutional rights.

[27] The respondent conceded that there is a continuing breach of the applicant's rights, and that the court is empowered to provide remedies to the applicant, including an acknowledgment of the breach and a reduction in sentence.

[28] The Crown raised concerns as to what would occur if the appeal had been abandoned insofar as the date from which the applicant's sentence would run is concerned. We note that even where an applicant abandons an appeal in accordance with the procedure outlined in the Court of Appeal Rules ('CAR'), this court has the discretion to order that the applicant's sentence runs from the date on which it was imposed (see **Tafari Williams v R**). It is also a similar position where counsel concedes that they see no arguable grounds in an appeal.

[29] In any event, while the respondent has posed the question as to whether the court has jurisdiction to deal with the constitutional ground "in light of the abandonment of the appeal", there has been no abandonment of the appeal. The procedure for such a course of action is well known, and it has not been engaged by the applicant. Rule 3.22 of the CAR provides:

> "(1) An appellant may at any time abandon his or her appeal by giving notice to the registrar in form B15.
>
> (2) The notice of abandonment must, subject to rule 3.5, be signed by the appellant even though he or she is represented by an attorney-at-law.
>
> (3) Upon receipt of the notice under paragraph (1)-
>
> a) The appeal is deemed to be dismissed;
>
> b) the registrar must give notice in form B 16 to-
>
> (i) the respondent;
>
> (ii) the registrar or clerk of the court below;
>
> (iii) in a criminal appeal where the appellant is in custody, the prison authority;
>
> (iv) in an appeal from a court-martial, the person in charge of any place where the appellant is in custody; and
>
> (v) (in the case of a conviction involving sentence of death) the Governor General's Secretary.
>
> c) The registrar must return to the registrar or clerk of the court below any original documents and exhibits received from that court."

See also **Lincoln Hall v R** [2023] JMCA App 21 and **Sheldon Pusey v R** in which reference is made to the necessary application and affidavit evidence when an applicant wishes to abandon his appeal.

[30] The issue of the admitted constitutional breach in the case at bar "arises in the appeal process" and relates to "circumstances directly affecting the appeal but also directly involving the issue of delay" See **R v Omar Anderson** in which **Solomon Marin Jr v R** was quoted and to which the respondent referred. This court is competent to address the issue and has done so in numerous cases.

[31] An appeal against a sentence that is manifestly excessive is distinct from a claim for constitutional redress as argued by counsel for the applicant.

[32] Note also that it is within the province of this court to grant redress for constitutional breach arising in the appeal process, even where it has not been raised as a ground of appeal. See **Jahvid Absalom et al v R** [2022] JMCA Crim 50, in which Brooks P stated:

> "**Issue h: the delay in hearing the appeal**
>
> [81] **None of the appellants raised the issue of the delay in the hearing of their appeals, as a ground of appeal. Mrs Reid raised it during her submissions and Miss Malcolm accepted that there have been cases where this court, in cases of a long delay, and by way of constitutional relief, has reduced the sentences of appellants who have been so affected. The court will, in the circumstances, take the delay into account.**
>
> [82] Section 16(1) of the Constitution, being part of the Charter of Fundamental Rights and Freedoms ('the Charter'), stipulates a right to a fair hearing within a reasonable time, by an independent and impartial court. The authorities, such as **Taito v The Queen** [2002] UKPC 15 and **Tussan Whyne v R** [2022] JMCA Crim 42 highlight that a remedy should be given where the State must have caused an unreasonable delay. Where there is a breach of the right to a fair hearing within a reasonable time, the court may grant a reduction in sentence as one of the remedies for the breach. In **Techla Simpson v R** [2019] JMCA Crim 37, there was a delay of eight years before Mr Simpson's case came on for trial. He was granted a reduction of two years from his sentence for that breach of the constitutional right to a fair trial. It has already been established that there is no distinction between

> trials and appeals in the context of assertions of such a breach (see **Carlos Hamilton and Another v The Queen** [2012] UKPC 37 at paragraph [15] and **Evon Jack v R** [2021] JMCA Crim 31 at paragraph [19]).
>
> [83] **In this case, the appeals were all filed in May 2014. The transcript of the trial was not produced until 15 June 2021.** There is no part of that seven-year delay that can be attributed to any of the appellants. Similarly, the additional year since that time was due to the normal processes and schedule of this court. There has therefore been a delay of eight years for the appeal to have come on for hearing.
>
> [84] These appellants are entitled to the benefit of similar constitutional redress for the breach. Two years' reduction in their respective sentences would also be appropriate."
> (Emphasis supplied)

[33] In light of all of the above we proceeded to consider how to redress the breaches of the applicant's constitutional rights.

Discussion of the constitutional breaches

[34] There is no dispute that there has been a breach of the applicant's rights to have his sentence reviewed by a superior court within a reasonable time, as well as to receive a record of the proceedings at the Supreme Court. Section 16 of the Constitution of Jamaica, states in part:

> "(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> ….
>
> (5) Every person charged with a criminal offence shall be presumed innocent until he is proven guilty or has pleaded guilty.
>
> (6) Every person charged with a criminal offence shall-

> (a) be informed as soon as is reasonably practicable, in a language which he understands, of the nature of the offence charged;
>
> (b) have adequate time and facilities for the preparation of his defence;
>
> ….
>
> (7) An accused person who is tried for a criminal offence or any person authorized by him in that behalf shall be entitled, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, to be given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court.
>
> (8) Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced." (Emphasis supplied)

[35] The constitutional right to a fair trial within a reasonable time also applies to appellate proceedings (see **Evon Jack v R**, para. [19]). In the case at bar, the applicant was sentenced in February 2013 and filed his application for leave to appeal in 2014. To date, over 10 years since he was sentenced, and over nine years since he applied for leave to appeal, this court has not received a full transcript of the sentencing hearing so as to allow for a full review of his sentence.

[36] Counsel have also correctly referred to two of the options that the court has in granting redress for the constitutional breaches in these circumstances - these being a reduction in sentence and an acknowledgment or declaration that the applicant's rights have been breached.

[37] In **Evon Jack v R**, Brooks P wrote at para. [44] of the judgment:

> "Redress for breaches of constitutional rights
>
> [44] Redress for breaches of constitutional rights may take a number of forms, ranging from a public acknowledgment of

> the breach to a quashing of the conviction. Public acknowledgment of the breach, reduction of the sentences and quashing of the convictions are remedies that this court can grant, in appropriate circumstances, without the appellants having to apply to the Supreme Court, pursuant to section 19 of the Constitution. This court has previously granted redress for delays in the hearing of appeals. It reduced the respective sentences in **Tapper v DPP**, in **Techla Simpson v R** [2019] JMCA Crim 37 and in **Alistair McDonald v R** [2020] JMCA Crim 38. In all those cases, however, it was possible to hear the respective appeals."

See also **Tapper v Director of Public Prosecutions of Jamaica** [2012] UKPC 26.

[38] We considered the fact that the applicant had pleaded guilty. In addition, he instructed his attorney to abandon all the grounds of appeal that he the applicant had originally filed, and did not require his attorney to advance any further grounds of appeal concerning the sentence that the court had imposed upon his guilty plea.

[39] The issue of the delay in this matter was, therefore, addressed by counsel for the applicant (who formulated a ground of appeal) and the Crown, because of the single judge's referral, arising out of this court's concern that the applicant's appeal was stymied due to the absence of a complete transcript.

[40] We noted that the applicant was sentenced to life imprisonment with a pre-parole period of 15 years and that this is the minimum pre-parole period that can be imposed in respect of a sentence of life imprisonment for the offence of murder.

[41] It is also significant to note that the guilty plea discount regime introduced by the Criminal Justice (Administration) (Amendment) Act 2015 was not in force at the time of the applicant's guilty plea to murder in 2013. It is therefore inapplicable.

[42] The question as to whether it was open to this court to convert the applicant's sentence of life imprisonment to a determinate sentence in order to reduce his sentence as a remedy for the breaches of his constitutional rights, was explored, though not in

much depth, in submissions before us. We noted that neither the research of counsel nor the court unearthed a decision in which such a step was taken by the court.

[43] Although the court asked for enquiries to be made as to whether the applicant had been in pre-sentence custody in order to take this into account in determining what redress would be best suited in these circumstances, the fact that he was in custody for two separate murder matters at the same time, made it challenging for the court to attempt a separation of the time spent in pre-sentence custody.

[44] Importantly, we also took into account counsel's instructions from his client, which he emphasized were "very particular" that he did not wish to challenge the sentence that the court imposed on him. It did appear, as the Crown has deduced, that the applicant has no difficulty with the sentence. In all the circumstances and in light of the matters highlighted above, we did not believe that this was an appropriate case in which to undertake serious consideration of such a ground breaking course of action.

[45] In light of all of the above, the court concluded that the most appropriate redress in the instant case is for this court to publicly acknowledge and apologize to the applicant for the egregious delay in the hearing of the appeal and the failure to produce the full transcript of his sentencing hearing.

[46] The court orders as follows:

i. The application for extension of time within which to appeal is granted.

ii. The application for leave to appeal sentence is refused.

iii. The sentence is to be reckoned as having commenced on 6 February 2013.

iv. Upon the single judge's referral of the matter for the consideration of the full court and the ground of appeal urged on this court:

a. It is declared that the right of the applicant under section 16(7) of the Constitution to be given a copy of the record of proceedings within a reasonable time after judgment, has been breached; and

b. It is declared that the applicant's right under section 16(8) of the Constitution to have his sentence reviewed by a superior court within a reasonable time has been breached by the excessive delay between his sentencing and the hearing of the appeal.