[2020] JMCA Crim 52

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 52/2012

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE FRASER JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

GAVIN CLARKE v R

Miss Zara Lewis instructed by Zara Lewis & Co for the appellant

Miss Patrice Hickson for the Crown

11 November and 11 December 2020

DUNBAR-GREEN JA (AG)

Introduction

[1] On 25 April 2012, Gavin Clarke ('the appellant') was convicted in the Home Circuit Court for the offence of murder, following a trial before Edwards J, as she then was, ('the learned judge'), sitting with a jury. The guilty verdict returned by the jury was unanimous.

[2] On 4 May 2012 the learned judge sentenced the appellant to life imprisonment at hard labour with the stipulation that he would not be eligible for parole before serving at least 40 years.

[3] Arising from his conviction, on 17 May 2012, the appellant sought leave to appeal against his conviction and sentence. His application for leave was considered on paper

by a single judge of this court. On 4 January 2019, leave to appeal against conviction was refused on the basis that the appellant was convicted on compelling evidence after unimpeachable directions from the trial judge. However, leave to appeal against sentence was granted in order to determine whether a sentence of life imprisonment with a minimum of 40 years to be served before parole, was manifestly excessive in the case of a 24-year-old offender, with no previous convictions. It is this appeal that the court now considers. Although the appellant renewed the application for leave to appeal conviction, this was not pursued.

The trial

[4] The evidence which led to the conviction of the appellant was given by three main witnesses: Misses Althea Hall, Daphne Garnett and Melina Bailey. The evidence of Miss Hall was that, at the material time, she was the appellant's ex-girlfriend and mother of their two-year-old daughter. Sometime in the morning of 19 January 2009, the appellant visited her residence. He asked her to accompany him out of the yard. Initially she refused. The appellant then told her that if she did not accompany him, he would shoot her in her foot. To reinforce that threat, the appellant showed Miss Hall a firearm in his waist. Having seen the weapon, Miss Hall was compelled to follow him. She took with her their two-year-old daughter. They went to 91 Lane, where the appellant lived. There, they had a conversation in which the appellant told her that she should leave her current boyfriend and the father of her then two-month old child, Orlando Hawthorne ('the deceased'), and get back with him. While they spoke, the appellant had the firearm in his

hand. He further threatened that if she did not leave the deceased, he would kill the deceased the next time he saw him at her house.

[5] Daphne Garnett, Miss Hall's mother, testified that on the same morning of the 19 January 2009, she went in search of her daughter and found her speaking to the appellant at 91 Lane. Upon her arrival, the appellant pointed a gun at her and told her to leave "out of his lane", which she did.

[6] Eventually, Miss Hall returned home, by which time the deceased was there. A disagreement arose between them about her leaving the house earlier and Miss Hall explained to him why she was not at home. The deceased then took her phone to dial the police. As he was doing so, Miss Hall noticed a friend of the appellant walking back and forth, proximate to her gate. On seeing this, she rushed to close the back door. When at the door, she heard gunshots and saw the appellant's hand through the grill of the verandah. The appellant was standing in front of the deceased and pointing a gun in his direction. She heard the deceased say "the bwoy shoot me". The deceased was taken to the hospital and was never seen alive again.

[7] Miss Hall's account of the circumstances under which the deceased was shot was supported by the evidence of her mother, Miss Daphne Garnett, and the deceased's aunt, Miss Melina Bailey, who were both at the home at the time the appellant attacked the deceased.

[8] Mr Vincent Hawthorne, the father of the deceased who attended the post-mortem examination and who also testified on behalf of the prosecution, indicated that the

deceased was 24 years old at the time he was killed and was pursuing a degree in engineering. The post-mortem examination, conducted by Dr S N Prasad Kadiyala, revealed that the deceased died from a gunshot wound to the abdomen involving the chest.

[9] The appellant gave an unsworn statement from the dock in which he denied being at the scene of the shooting and gave a defence of alibi. He stated further that when he heard that he was being accused of killing the deceased, he fled to Clarendon in an attempt to preserve his own life. The evidence of the police was that he was found in Clarendon, one year later.

The learned judge's sentencing remarks

[10] A brief antecedent report was given prior to the judge passing sentence. This report revealed that the appellant was just 16 days shy of his 25th birthday, on the date of his sentencing. Further, that he was schooled up to age 16, after which he pursued a career in music, whilst also working in a furniture shop. It was also noted that he did not have any previous convictions recorded against his name.

[11] There is no indication whether a social enquiry report was done. There was, however, a plea in mitigation by then counsel for the appellant, Mr Patrick Peterkin. Mr Peterkin urged the learned judge to consider the appellant's age, his ambitious pursuits in education and music, the "unfortunate" circumstances of the offence, and the absence of any previous conviction. Mr Peterkin failed, however, to mention the time that had already been spent by the appellant on remand.

[12] In these circumstances, the judge made the following remarks:

> "Mr. Clarke, this is indeed an unfortunate situation, and as your Counsel has said, all the parties involved are and were young – yourself, the deceased, and the young lady for whom – based on the evidence … was the subject for the motive of the killing.
>
> However, this case has no mitigating circumstances that I can see. You, Mr. Clarke, snuffed out the life of a young man with a promising future for no earthly reason other than jealousy it would appear. I've taken into consideration the fact of your age. Your education is not a mitigating factor, in my view, because one would expect that a person who has some amount of education would think before they act. The action of a person who simply reacts out of anger or ignorance is what one would expect from someone without education.
>
> …
>
> Unfortunately, Mr. Clarke, this is one of those cases where you will have to do the time. Certainly, when you do your time and come out, hopefully, you will still have the health and the strength to carry on with something or what would be left of your life. But, certainly, the sentence of [sic] this court must and is mandated to pass must be a long one.
>
> …"

The appellant's submissions

[13] In challenging the reasonableness of the sentence imposed, counsel for the appellant, Miss Zara Lewis, asserted that the learned judge fell into error when she failed to give adequate consideration to the factors relevant to sentencing. Miss Lewis essentially submitted that the learned judge failed to apply the principles set out by Morrison P in the case of **Meisha Clement v R** [2016] JMCA Crim 26. In particular, the learned judge is said to have failed to (a) identify a starting point for sentencing; (b)

adequately take account of mitigating factors; (c) direct her mind to the four classical principles of sentencing; and (d) credit the appellant for the time spent on remand, prior to the determination of the trial.

[14] Miss Lewis pointed out that the appellant's sentence of murder fell to be considered under section 3(1)(b) of the Offences Against the Person Act ('OAPA'), which prescribes that a person so convicted should be sentenced to "imprisonment for life or such other term as the court considers appropriate, not being less than 15 years". This section therefore demonstrates a very wide sentencing range for non-capital murder being 15 years to life.

[15] In the result, Miss Lewis submitted that taking account of section 3(1)(b) of the OAPA, together with the principles of **Meisha Clement v R**, the appropriate starting point in this case was life imprisonment without eligibility for parole before 25 years. Further, that the appellant's age, lack of previous convictions, and dedication to his young daughter, were compelling mitigating factors, notwithstanding the seriousness of the offence. Taking account of these mitigating factors and the need for rehabilitation, Miss Lewis concluded that a sentence of life imprisonment was not appropriate in this case and that the appropriate sentence was 25 years' imprisonment, from which should be deducted 27 months being the time the appellant spent in custody prior to the conclusion of the trial.

The Crown's submissions

[16] In response, the Crown, represented by Miss Patrice Hickson, properly pointed out that at the time the appellant was sentenced, neither the case of **Meisha Clement v R** nor the Sentencing Guidelines for use by Judges of the Supreme Court and the Parish Court, December 2017 ('Sentencing Guidelines') were in existence. Miss Hickson agreed, however, that in applying those principles, a reduction in the appellant's sentence may be warranted.

[17] Miss Hickson was astute to point out aggravating features, such as the fact that the appellant's actions were pre-meditated, and that the killing occurred during the day, at the home of the witnesses. Miss Hickson submitted that in using the principles of **Meisha Clement v R**, an appropriate sentence was life imprisonment without eligibility for parole before serving 23 years.

Discussion and Disposal

[18] In the recent judgment of **Jermaine McIntosh v R** [2020] JMCA Crim 28, at paragraph [29], Morrison P summarized the established principles that should guide a court in passing sentence, together with the approach to be taken by this court in reviewing a sentence that has been passed. The established principles the learned President stated are as follows:

> "(1) The four classical principles of sentencing are retribution, deterrence, prevention and rehabilitation.
>
> (2) It is for the sentencing judge in each case to apply these principles, 'or any one or combination of … [them], depending on the circumstances of the particular case'.

> (3) The now generally accepted practice is for the sentencing judge to identify a notional starting point within a broad range of sentences usually imposed for a particular offence, and then decide whether to increase or decrease the starting point to allow for aggravating or mitigating features of the particular offence.
>
> (4) Obtaining a social enquiry report as an aid to sentencing is generally regarded as good sentencing practice, though it will be for the sentencing judge in each case to determine whether to obtain a report in light of the circumstances of each case.
>
> (5) This court will not lightly interfere with a sentencing judge's exercise of his or her discretion to fix an appropriate sentence, and will only do so where it can be shown that the sentencing judge (i) departed from the accepted principles of sentencing; and (ii) imposed a sentence outside of the range of sentences which the court is empowered to give, or the usual range of sentences imposed in like cases."

[19] It remains, therefore, to be determined whether the learned judge in the instant case failed to apply one or more of these principles and further whether such failure resulted in the sentence that was passed being manifestly excessive. It is important to note that even if it is found that the learned judge fell into error in the application of one or more of these principles, such finding will not automatically result in a finding that the sentence was manifestly excessive. Instead, it would be necessary for this court to examine the particular circumstances of this case afresh and, in so doing, determine whether the appeal should be allowed.

Did the learned judge err?

[20] It appears to this court, having regard to the sentencing remarks mentioned at paragraph [12] above, that there is merit in Miss Lewis' submissions that the learned

judge failed to apply the relevant principles of sentencing. The learned judge did not refer to any starting point. Further, although she indicated that she took the appellant's age into consideration, she did not demonstrate the effect that the appellant's age had on her sentence. Neither did she have regard to the fact that the appellant was a first time offender, which would have been a mitigating factor.

[21] With respect to the four classical principles of sentencing, the learned judge seemed to have emphasised the retribution element to the exclusion of rehabilitation. Since the appellant was only 24-years-old at the date of sentencing, rehabilitation would have been an important goal. Therefore, in failing to give adequate regard to the possibility of rehabilitation, the learned judge would have erred.

[22] Having noted the above, we also acknowledge, as pointed out by Miss Hickson, that this case pre-dates **Meisha Clement v R** and the Sentencing Guidelines. Notwithstanding this, it cannot be said that the learned judge was bereft of ample guidance from other cases that would have enabled her to apply fully, the correct principles of sentencing. Such cases included **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002. In that case, Harrison JA (as he then was) stated, at pages 3 and 4, as follows:

> "The principles which govern the method by which that ultimate goal [of sentencing] is achieved, have been well formulated and generally accepted. The aim of the sentence is to satisfy the goals of:
>
> (a) Retribution;

(b) Deterrence;

(c) Reformation; and

(d) Protection of the society

or any one or a combination of such goals, depending on the circumstances of the particular case." (Page 3)

"If … the sentencer considers that the 'best possible sentence' is a term of imprisonment, he should again make a determination, as an initial step, of the length of the sentence, **as a starting point**, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise. …" (Emphasis supplied) (Page 4)

[23] Also, in the case of **R v Saw and others** [2009] EWCA Crim 1, to which Miss Lewis referred, at paragraph 4 the court explained 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".

[24] As it relates to the time spent by the appellant on remand, it is not disputed that the law now mandates that a convicted person should receive full credit for the time spent in custody prior to sentence. In this regard, Miss Lewis referred us to the decision of the Privy Council in **Callachand and anor v The State** [2008] UKPC 49, in which Sir Paul Kennedy stated at paragraph 9 that:

"…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."

There is no indication that this principle was employed in the instant case.

[25] In all the circumstances, it appears that the learned judge erred when she failed to demonstrate how she arrived at her sentence and failed to deduct the time spent by the appellant on remand.

Was the sentence imposed manifestly excessive?

[26] Miss Lewis referred to the cases of **Trevor Whyte et al v R** [2017] JMCA Crim 13 and **Anthony Russell v R** [2018] JMCA Crim 9, as being useful guides in arriving at a fair sentence. These were cases involving double murders in which the offenders were sentenced to life imprisonment with the stipulation that they should serve at least 25 years, before becoming eligible for parole. In the **Trevor Whyte** case the appeal against sentence was allowed by this court, with the result that the period to be served before parole was reduced to 20 years. This was not because the court considered that the sentence imposed was manifestly excessive, but rather, because the court found that there was an inordinate and inexcusable delay of 12 years between the time the appellants were convicted and the hearing of the appeal. The court found that the State was responsible for this delay. In the **Anthony Russell** case, there was also a reduction in sentence by three years, to account for the time that **Russell** had spent on remand, prior to being sentenced. It is important to note that in both these cases P Williams JA stated that the stipulations that the appellants serve at least 25 years before becoming eligible for parole, could be viewed as "more than reasonable". We have taken both these cases into consideration in determining whether the sentence imposed in the instant case, was manifestly excessive.

[27] In the case of **Paul Brown v R** [2019] JMCA Crim 3, F Williams JA, after examining several cases involving persons convicted of murder, concluded at paragraph [8] that, "[t]hese cases show a range of sentencing of between 45 years' and 25 years' imprisonment before eligibility for parole, with the higher figures in the range being stipulated in cases involving multiple counts of murder".

[28] In the case of **Julian Brown v R** [2020] JMCA Crim 42, Brown was convicted for the murder of Howard Thompson. This murder was committed in the daytime and it appears the murder was premeditated. The evidence was that Brown shot the deceased as he was walking toward him and further that, after the deceased had fallen, Brown stood over the deceased and fired more shots at him as he lay on the ground. Brown was sentenced to life imprisonment without the possibility of parole before 28 years. Brown was at that time 28-years-old. On an application for leave to appeal against sentence on the basis that the sentence was manifestly excessive, this court refused leave on the basis that such an appeal could not succeed.

[29] In the case of **Jermaine McIntosh v R**, the evidence was that McIntosh accosted the deceased at night and shot him in the head and back. McIntosh was convicted of murder and sentenced to imprisonment for life without eligibility for parole before 30 years. He was 22-years-old at the time he was sentenced. McIntosh's application for leave to appeal against sentence was similarly refused as it could not be said that the sentence imposed was manifestly excessive.

[30] Taking account of all these cases, it is our view that the learned judge in the instant case cannot be faulted for imposing a sentence of life imprisonment, as this is not only well within the range of sentences for the offence of murder, but is in fact the norm, especially in the case of a gun murder.

[31] On the other hand, it seems that the stipulation that the appellant should serve 40 years before becoming eligible for parole, is outside of the norm that is usually stipulated in similar cases involving the murder of one person. For that reason, it is our view that the sentence imposed in this case was manifestly excessive.

An appropriate sentence

[32] This was on all accounts a serious offence and one committed with the use of a dangerous and illegal weapon, a firearm. The attack on the young man was brazen and senseless. We agree with the learned judge that the fact of the appellant's education would only have served to increase his culpability. As such, this court would adopt a starting point of life imprisonment without eligibility for parole before 26 years, as being appropriate.

[33] We agree with Miss Hickson that relevant aggravating features include the fact that the murder was obviously premeditated and was committed in the daytime, at the home of three of the witnesses. This court also takes note of the fact that the appellant fled, and could not be found for a year, thereby delaying justice for the loved ones of the deceased. The appellant clearly had no intention to surrender or to accept responsibility

for his actions. These aggravating factors would increase the time to be served by the appellant before parole, to 30 years.

[34] With respect to mitigating features, the court accepts that the appellant had no previous convictions, was a young adult at the time he committed the offence and was gainfully employed. Hence, it is fair to say that he could be rehabilitated and reintegrated into society. When these considerations are weighed in the balance, they give rise to a reduction of four years.

[35] Further, given the absence of any exceptional circumstances, the court is duty bound to deduct the time that the appellant spent in custody prior to being sentenced. The information at hand suggests that the appellant was remanded for approximately 27 months prior to being sentenced. In the circumstances, we conclude that the time stipulated to be served by the appellant before becoming eligible for parole, should be reduced to 23 years and 9 months.

[36] The appellant, having not pursued a renewed application for leave to appeal conviction, the conviction stands. Accordingly, we make the following orders:

(1) The application for leave to appeal against conviction is refused and the conviction is affirmed.

(2) The appeal against sentence is allowed.

(3) The sentence of imprisonment for life at hard labour is affirmed. The stipulation that the appellant should serve 40

years without eligibility for parole is set aside and substituted therefor is a period of 23 years and 9 months.

(4) The sentence is to be reckoned as having commenced on 4 May 2012, being the date on which it was imposed.