[2022] JMCA Crim 12

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 91/2017

KELVIN DOWNER v R

Keith Bishop and Andrew Graham instructed by Bishop and Partners for the appellant

Miss Maxine Jackson, Miss Tamara Merchant and Miss Cindy-Kay Graham for the Crown

31 January and 18 February 2022

STRAW JA

[1] On 29 September 2017, the appellant and his co-accused were found guilty of the murder of Dr Peter Vogel ('Dr Vogel'), a lecturer at the University of the West Indies, Mona. The murder was committed on the night of 18 July 2007 at the home of the victim.

[2] On the same day of the conviction, the learned judge sentenced the appellant and his co-accused to serve 25 years' imprisonment with the condition that neither was eligible for parole until they had each served 15 years.

[3] On 11 October 2017, the appellant sought leave to appeal both his conviction and sentence and, on 4 June 2021, a single judge of this court granted the application.

[4] On 26 January 2022, the appellant instructed his attorney to abandon his appeal against conviction, but confirmed his decision to proceed with submissions on sentence.

We granted permission for the appellant to proceed in this regard. Therefore, we are only considering the appeal against sentence.

[5] Although the appellant is no longer challenging his conviction, the facts of the case bear relevance to any consideration of sentence.

The Crown's case

[6] The deceased, Dr Vogel was a senior lecturer at the University of the West Indies and lived in College Common with his three children. His wife, Parlan Vogel ('Mrs Vogel') worked in the Cayman Islands.

[7] In March of 2007, the appellant, Mrs Vogel's son's barber, overheard her talking about the need to get a helper and he recommended his girlfriend and co-accused Yanika Scott ('Miss Scott'). She commenced working the following day and was given permission to have her young child stay with her at the Vogel's home, but no permission was given for the appellant to stay there.

[8] Mrs Vogel returned to the Cayman Islands and maintained supervisory relations with Miss Scott. By June 2007, the relationship between the family and Miss Scott was deteriorating and by mid July 2007, Mrs Vogel told Miss Scott that it would be best for them to part ways and that she would be returning from the Cayman Islands the following week. She also told Miss Scott that her employment was being terminated but she could remain at the house until she, Mrs Vogel, arrived home. Miss Scott hung up the phone on Mrs Vogel.

[9] On 18 July 2007, between the hours of 9:00 pm and 9:30 pm, Mr Vogel tucked his three children ages six, eight and 10 years old, into bed. Miss Scott was present at that point. About 1:00 am the next day, he was found by the children, face down on the floor with his hands and feet bound with a gold string (used to tie back the curtain) and a piece of pillowcase on his face. Miss Scott and her baby were nowhere to be found and clothes for herself and items for the baby were missing. Her bed appeared as

though it was not slept in. The children reached out to, and were assisted by, other adults and the police were contacted.

[10] Dr Vogel's body was pronounced dead on 19 July 2007 by Dr K Prasad. The cause of death was asphyxia secondary to smothering and strangulation.

[11] Neither the appellant nor Miss Scott contacted the Vogel family or the police after 18 July 2007. They moved from their usual place of abode and Miss Scott stole the identity of another person which she utilized up to the time of her arrest.

[12] On 13 November 2008, the appellant was apprehended, and Miss Scott was arrested on 12 May 2012. They were tried jointly for the murder of Dr Vogel and on 29 June 2017 were both found guilty by a jury.

[13] By the time the appellant and his co-defendant were tried and convicted, their periods of pre-trial detention were approximately nine years and five years respectively.

[14] During the sentencing hearing, the learned judge said he bore in mind the social enquiry report, the content of the antecedent report, the psychiatric report, the many factors urged on him during the plea in mitigation, the fact that the appellant had no previous conviction, comments made by the community and the fact that the appellant "spent…. approaching nine years in custody."

The appellant's submissions

[15] The appellant's sole ground of appeal was that the learned judge failed to demonstrate, at the sentencing hearing, how he arrived at the sentence imposed on the appellant.

[16] Mr Keith Bishop, on behalf of the appellant, referred the court to the following cases and materials: **R v Alpha Green** (1969) 11 JLR 283; **Romeo Da Costa Hall v Queen** [2011] CCJ 6 (AJ); **Meisha Clement v R** [2016] JMCA Crim 26; the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts,

December 2017 ('the Sentencing Guidelines'); **Daniel Roulston v R** [2018] JMCA Crim 20; **Lincoln Hall v R** [2018] JMCA Crim 17; **Paul Brown v R** [2019] JMCA Crim 3; **Sylvan Green and others v R** [2021] JMCA Crim 23; the Offences against the Person Act ('OAPD'); and **Linford McIntosh v R** [2015] JMCA Crim 26.

[17] He submitted that at the time of sentencing in September 2017, the learned judge had the benefit of several authorities that could have guided him in determining the starting point. He pointed to the fact that the judgment in **Meisha Clement v R** was delivered by this court well over a year before the appellant was sentenced.

[18] He added that, although the Sentencing Guidelines came into effect in December 2017 (a few months after the sentence hearing in the matter before the court), the principles were in use by our courts for several years before, as shown in **Meisha Clement** and the judgment of McDonald-Bishop JA in **Daniel Roulston v R**, where the learned judge of appeal outlined the correct approach to sentencing which included consideration of the appropriate starting point, mitigating factors, aggravating factors among other things.

[19] Mr Bishop noted however, that the words: "starting point, mitigating factors, aggravating factors" were never mentioned during the sentencing hearing by the learned judge. He advanced that the issue for determination is whether the learned judge demonstrated how he arrived at the starting point and ultimately at a sentence of 25 years with a stipulation of 15 years before eligibility for parole. In other words, whether the learned judge erred in principle based on the dictum of Hilbery J in **R v Ball** (1951) 35 Cr App 164 where it was outlined how the Court of Appeal should approach reviewing a sentence of imprisonment.

[20] He submitted that the learned judge failed to demonstrate the method used to arrive at the sentence imposed and as such, this court can now take corrective action, but with full recognition of the limitations.

[21] Counsel contended that an issue to be resolved is whether or not the learned judge accounted for and credited the appellant with the nine years that he spent in custody awaiting trial. He noted that it was clear that the learned judge intended to give credit for the nine years spent by the appellant in custody; however, he did not say whether his starting point was 34 years, and that he credited the appellant with nine years and then gave him a determinate sentence of 25 years maximum. This, he said, cannot be assumed by the court.

[22] Counsel pointed the court to the case of **Lincoln Hall v R**, where Morrison P also had to contend with the issue of the delay in bringing the matter to trial and how he resolved that issue. With that in mind, therefore, he said the only other issue remaining is what would be an appropriate sentence for the appellant, given all the circumstances.

[23] In that regard, he pointed the court to section 3(1C) of the OAPD, which sets out a number of possible options. He cautioned, however, that in light of cases such as **Williams (Earl) v The State** [2005] UKPC 11 and **Linford McIntosh v R**, notice from the Court of Appeal would need to be given before this court would be able to increase the sentence. Any attempt to account for the nine years, by adding it to the 25 years, would be an increase in the sentence.

[24] He concluded by submitting that the best approach that would do justice to the appellant is for this court to reduce the period before parole to 10 years. He indicated that the effect of this is that the appellant, having served nine years before trial and four years and three months from the date of trial to present, would now be required to serve another five years and nine months before parole. This would result in the appellant serving a grand total of 19 years before parole. This proposal to resolve the matter, he pointed out, does not offend section 3(1C) of the OAPD, which provides for a minimum parole period of 10 years.

[25] Counsel also asked that the court determine whether it could further adjust the sentence of the appellant based on the COVID–19 pandemic and its impact on individuals who are imprisoned. In that regard, he referred the court to a decision of the Court of Appeal of England for consideration – **Attorney General's Reference: R v Manning** [2020] All ER (D) 44 (May).

The respondent's submissions

[26] On behalf of the Crown, counsel Miss Tamara Merchant conceded that there was value in the argument that the learned judge did not make it clear how he arrived at the final sentence.

[27] Crown Counsel also agreed with the appellant that while the Sentencing Guidelines were not available to the learned judge at the sentencing hearing, the decision of **Meisha Clement v R**, which was delivered by this court, before the sentencing exercise of this matter provided useful guidance concerning how a judge should approach this difficult task.

[28] Also, it was conceded that an issue existed as to whether the learned judge was sufficiently explicit that he gave full credit to the appellant for the nine years spent in custody before his conviction. She submitted that such demonstration must be an arithmetical deduction and not just words.

[29] Crown Counsel cited the following cases: **Mohamed Iqbal Anwar**, **Callachand v The State** [2008] UKPC 49; **Romeo DaCosta Hall v The Queen**; **Christopher Thomas v R** [2018] JMCA Crim 31; and **Sylvan Green**.

[30] It was stated that this appeal had an unusual set of circumstances, most notably, the long period of pre–trial detention of nine years, one of the longest to date in Jamaica, based on a review of the available authorities.

[31] Initially, Crown Counsel submitted that in order to meet the justice of the case, as well as to credit the appellant with some of his time spent on remand, the appellant's recommendation that the period of parole be reduced to the minimum of 10 years would be the best approach to be adopted by this court.

[32] On being asked by the bench whether, in light of **Sylvan Green**, such an approach would be prudent, Crown Counsel conceded that there might be a number of challenges with that approach. However, Senior Deputy Director of Public Prosecutions, Miss Maxine Jackson, in subsequent submissions, stated that the circumstances in **Sylvan Green** could be distinguished, as the court, in that case, found that the sentencing judge had sufficiently demonstrated that he had intended to impose the determinate sentence in light of several factors, including the time that had been spent in pretrial custody by the several appellants. This was not done by the learned judge in the case at bar.

[33] Ultimately, it was submitted that the sentence be adjusted in accordance with the powers of the court in the manner best suited to address the circumstances of the case.

Discussion and analysis

The statutory framework

[34] The learned judge would have determined the sentence of the appellant for murder based on sections 3(1)(b) and 3(1C)(b) of the OAPA. In that regard, the learned judge could have imposed a sentence of life imprisonment with no less than 15 years before eligibility for parole or alternatively, any other determinate term with no less than 10 years' imprisonment before the appellant would be eligible for parole.

[35] The appellant is not contending that the sentence actually imposed was manifestly excessive. Indeed he could not, as the normal range, based on the Sentencing Guidelines, is 15 years to life. The circumstances of the murder were also

quite egregious, including breach of trust, the manner of Dr Vogel's death, the trauma visited upon the children (who were left alone to discover his body) and the psychological and emotional strain upon the family with the disappearance of the appellant for a year before he was apprehended by the police.

[36] We are of the opinion, however, that the learned judge did err in failing to apply the sentencing principles as set out in several authorities, including **Regina v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered 5 July 2002 and **Meisha Clement**. These authorities would have been available to the learned judge at the time of sentencing. There was no indication that he identified a starting point from which he then went on to consider factors that influenced the sentence, either upwards or downwards, which is the correct approach to be adopted by sentencing judges, as outlined by McDonald-Bishop JA in **Daniel Roulston**.

[37] The learned judge also erred in failing to properly demonstrate that he credited the appellant with the nine years that he had spent in pre-trial custody. The authorities are clear that it is after the determinate term is decided, that the sentencing judge ought to mathematically fully subtract the pre-trial remand period from the determinate term to arrive at the sentence to be imposed (see **Mohamed Iqbal Anwar, Callachand v The State**; **Romeo DaCosta Hall v The Queen** and **Daniel Roulston**).

[38] At page 1030, lines 1-7 of the transcript, the learned judge expressed that he bore in mind that the appellant spent nine years in pre-trial custody. At page 1031, lines 13 to 15, he stated, in relation to the appellant's co-accused, that her lawyer asked him to consider that she had spent five years in pre-trial custody. However, at page 1033, he indicated that he could not say that one or the other played a greater part in the killing of Dr Vogel, so in his judgment, they were both deserving of the same sentence. The learned judge then went on to impose the sentence of 25 years' imprisonment with eligibility for parole after 15 years for both the appellant and his co-

accused. It cannot be said, therefore, with any certainty, that he had applied any separate mathematical consideration of nine years and five years respectively before imposing the determinate sentences of 25 years. These circumstances can be distinguished from **Sylvan Green**.

[39] McDonald-Bishop JA, at paragraphs [60] and [61] of **Sylvan Green**, stated that the sentencing judge would have taken into account the time spent on pre-sentence remand, based on the words he used, although he had failed to demonstrate by an arithmetical formula that he had accorded full credit to all the appellants. For example, in respect of the appellant Ricardo Taylor, the sentencing judge stated, "all things taken into account, including the time he has spent in custody…The sentence of the court is a finite term of imprisonment…"

[40] We were unable to arrive at the same conclusion in respect of the learned judge's utterances in the case at bar, in particularly, since a similar treatment was meted out to both the appellant and his co-accused in spite of the differences in their pre-trial detention.

[41] Therefore, it was necessary to review the sentence imposed, in order to rectify the deprivation of the appellant's liberty based on his pre-trial detention. This court is empowered to do so, if we find that the learned judge has erred in principle in determining sentence (see paragraph [25] of **Lincoln Hall**, where Morrison P referred to and quoted **Alpha Green**).

[42] The finite term of 25 years was imposed by the learned judge. If we were to attempt to credit the appellant with his pre-trial period of nine years (to be subtracted from 25 years), it would result in the imposition of 16 years' imprisonment. While such an approach could possibly shock the public conscience based on the circumstances of the offence, it must be appreciated that the appellant has actually spent nine out of the 25 years imposed prior to the date of sentence; for this he must be credited (see **Meisha Clement**; **Ajay Dookee v State of Mauritius** [2012] UKPC 21).

[43] However, following that approach the appellant would not benefit from the term of 15 years that had been set before parole could be considered, because he would, effectively, be serving 24 years on a 16-year sentence. How would this be so? He had to his credit nine years' pre-trial custody at the time the sentence was imposed. If we were to impose a sentence of 16 years, to run as of 29 September 2017 (the date the sentence was imposed), without adjusting the minimum period stipulated by the learned judge, which he must serve before becoming eligible for parole, this would result in him spending nine years (pre-trial custody) plus 15 years (pre-parole eligibility) effectively resulting in 24 years' imprisonment. This would not accord with the principles of justice as he would have been deprived of his right to his liberty for nine years awaiting trial without receiving any credit for that period of time.

[44] The court has the statutory jurisdiction to increase a sentence imposed on an appellant, if the court is of the view that a different sentence ought to have been passed than the sentence imposed. The authority is conferred by section 14(3) of the Judicature (Appellate Jurisdiction) Act ('JAJA') which is set out below:

> "On 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."

[45] However, while we are of the opinion that the determinate period of 25 years appears to be somewhat lenient, the exercise of the court's discretion given under the above section cannot be arbitrarily exercised. Furthermore, an increase in sentence could only be effected, if notice had been given by the court to the appellant that such action was contemplated and he be permitted to make submissions on the point or given the opportunity to withdraw his appeal (see **Williams (Earl) v The State** and **Linford McIntosh v R**).

[46] In the round therefore, we thought it prudent to only consider the application of the credit for the appellant's pre-trial custody. Also, that in the circumstances of the case, this application should be effected on the recommended period that should be served before eligibility for parole. This would mean reducing the period before eligibility from 15 years to 10 years. While this would only result in the credit of only five out of nine years (pre-trial custody) to the appellant, we were unable to do any further downward adjustment, as the OAPA restricts the minimum period that must be served before eligibility for parole to 10 years (see section 3(1C)(b)). As Mr Bishop has submitted, this will result in the appellant serving a period of 19 years' imprisonment before parole may be considered.

[47] As far as any further reductions are concerned in light of the present COVID–19 pandemic, we did not think that this was appropriate in all the circumstances. The appellant is not subject to a short period of imprisonment such as was the case in **R v Manning**. Further, as previously indicated, the circumstances of the murder of Dr Vogel are quite egregious and require an appropriate sentence that does not shock the public conscience.

Conclusion

[48] The appellant not having pursued his appeal against conviction, that aspect of his appeal should be refused. In terms of the appeal against sentence, the court concluded that that aspect of the appeal should be allowed in part in that, the fixed term of 25 years should stand but the period of eligibility for parole should be reduced from 15 years to 10 years, having credited the appellant with five out of the nine years he spent in pre-trial custody.

Order

1. The appeal against conviction is refused.
2. The appeal against sentence is allowed in part.
3. The sentence of 25 years' imprisonment is affirmed.

4. The stipulation that the appellant serve 15 years before becoming eligible for parole is set aside and substituted therefor is the stipulation that the appellant serve 10 years before becoming eligible for parole, having credited the appellant five out of the nine years he spent in pre-trial custody.
5. The sentence is reckoned as having commenced on 29 September 2017.