[2017] JMCA Crim 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 121, 122, 126 & 127/2009

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA (AG)

ROWE GENTLES
JASON MILLS
MICHAEL PATTERSON
PAUL GAYLE v R

Linden Wellesley for the applicant Gentles

Glenroy Mellish for the applicant Mills

William Hines for the applicant Patterson

Delano Harrison QC for the applicant Gayle

Miss Kathy-Ann Pyke for the Crown

12 December 2016 and 20 January 2017

MORRISON P

[1] The applicants were charged with murdering Mr Gilbert Davis (the deceased) on 2 June 2008, during the course or furtherance of a robbery, contrary to section

2(1)(d)(i) of the Offences Against the Person Act (the OAPA). On 18 November 2009, after a trial before Hibbert J (the judge) and a jury in the Circuit Court for the parish of Saint Ann, the applicants were convicted of manslaughter. On that same day, the applicants Gentles, Mills, and Gayle were each sentenced to 20 years' imprisonment, while the applicant Patterson was sentenced to 25 years' imprisonment.

[2] All four applicants applied for leave to appeal against their convictions and sentences and their applications were duly considered by a single judge of this court on 22 October 2010. The single judge refused the applications, observing as follows:

> "The learned trial judge dealt adequately with the issues which arose in this matter and gave the jury clear and proper directions to assist them in arriving at their verdicts for which there was ample evidence."

[3] This is therefore the applicants' renewed application for leave to appeal against conviction and sentence. The brief background to the matter is as follows. The deceased was employed to a security company as a driver. Among other things, the company provided courier services for businesses and financial institutions which found it necessary to move quantities of cash from one location to the other from time to time. The applicant Mills was also an employee of the company. On 2 June 2008, while so engaged in the Ocho Rios area of Saint Ann, the deceased was killed when the motor car which he was driving, containing a substantial amount of cash, was set upon by robbers and stolen. Police investigations led to the arrest of the applicants, all of whom implicated themselves in some way by way of statements made and answers

given to questions posed by the police. The case for the prosecution was that the applicants had acted pursuant to a joint enterprise to commit the offence of robbery, during which the deceased was shot and killed.

[4] In relation to the applicant Patterson, the principal evidence against him came from the response attributed to him by the police upon his being arrested and cautioned some three weeks after the deceased was killed. Among other things, he was alleged to have said, "Mi alone naw go a prison. Is a man give mi a job". There was also some evidence that the applicant Patterson had (i) approached at least one other person about a week before the robbery with a view to getting him to participate in it; and (ii) rented the motor car used in the robbery on 1 June 2008, the day before the robbery, and returned it to the owner early in the morning of 3 June 2008.

[5] In preparation for the sentencing exercise, social enquiry reports were ordered and obtained in respect of all of the applicants. In his prefatory remarks at the sentencing hearing, the judge said this:

> "Let me start by saying that you are most fortunate that you were not found guilty of the offence of murder. Based on evidence which came out, it must have been known that any attack upon this armed courier of money must have involved the use of weapons and that it must have been foreseen that if there was any resistance, any weapon brought would have been used. However, the jury has said that they were not satisfied to the extent that they feel sure that you were aware that weapons were to be used; perhaps, they thought that you would go with your bare hands, demand that these persons who were armed hand over the money that they had and they would just gladly hand it over to you. I don't know what they think it was but they have returned a verdict of guilty of manslaughter on each of you and,

> therefore, any sentence that I pass would be in keeping with the jury's verdict that is manslaughter and not murder, as I think it properly ought to have been. The sentence that I would pass would reflect the jury's decision that you are each guilty of manslaughter."

[6] Immediately prior to sentencing the applicants, the judge said that he had looked at their antecedent reports, their social enquiry reports, the comments by members of their community (which were in most instances favourable) and "all the circumstances".

[7] When the applications for leave to appeal against conviction and sentence came on for hearing on 12 December 2016, counsel for the applicants all indicated that, upon a perusal of the transcript of the evidence taken at the trial of this matter, they could find no ground that could properly be advanced in the applicants' favour. Accordingly, counsel for each applicant sought and was granted leave to argue, in substitution for the grounds of appeal originally filed in respect of conviction, the single ground that the sentence imposed by the judge was manifestly excessive having regard to all the circumstances.

[8] Taking the lead with the consent of counsel for the other applicants, Mr Harrison QC for the applicant Gayle, submitted that the judge had erred in principle in his approach to the sentencing exercise. In particular, Mr Harrison complained that the judge's pre-sentencing remarks plainly demonstrated that none of the established sentencing guidelines was present to his mind at the material time. Accordingly, it was submitted, the sentence of 20 years' imprisonment imposed on the applicant Gayle was

manifestly excessive, in that it failed to take into account matters particularly relevant to his situation. In support of these submissions, Mr Harrison directed us to the applicant Gayle's social enquiry report, which revealed that, at age 35, he had no previous conviction and that he was previously of good character. In this regard, we were referred to the views attributed by the author of the report to citizens, who "expressed their disbelief of his involvement in such a heinous crime"; and considered that, based on his previously displayed attitude and character, "his deviation from the accepted norms of the society can be corrected with the assistance of professional guidance". In the circumstances, it was submitted, the judge had erred, either by failing to take these matters into account, or, if he did, to give sufficient weight to them.

[9] Mr Harrison referred us finally to two well-known decisions of this court. The first is **R v Cecil Gibson** (1975) 13 JLR 207, 211-212, in which Graham-Perkins JA observed that:

> "... it should never at any time be thought that a convicted person standing in a dock is no more than an abstraction. He is what he is because of his antecedents and justice can only be done to him if proper and due regard is had to him as an individual, and a real attempt is made to deal with him with reference to the particular circumstances of his case. To ignore these is to ignore an essential consideration in the purpose of punishment, namely, the rehabilitation of the offender."

[10] And the second is **R v Sydney Beckford and David Lewis** (1980) 17 JLR 202, 204, in which Rowe JA (as he then was) cited with approval the following oft-quoted observation by Lawton LJ in **R v Sergeant** (1975) 60 Cr App R 74, 77:

> "We take the view that for men of good character the very fact that prison gates are closed is the main punishment. It does not necessarily follow that they should remain closed for a long time."

[11] Counsel for the other three applicants were content to adopt Mr Harrison's submissions on the general principles of sentencing, but each made brief submissions based on the personal circumstances of the other applicants.

[12] For the applicant Gentles, Mr Linden Wellesley pointed out that this applicant also had an "impeccable" record, submitting that this ought to have been taken into account by the judge. For the applicant Mills, Mr Glenroy Mellish directed our attention to the fact that this applicant had co-operated with the police during the investigation, submitting that the court should "find a point below 20 years' imprisonment that gives some value to his co-operation". And lastly, for the applicant Patterson, Mr William Hines submitted that, despite the judge's recognition of the fact that the jury had returned a verdict of guilty of manslaughter, he seemed to have sentenced this applicant on the basis of a verdict of guilty of murder.

[13] In this regard, Mr Hines pointed out that, under section 3(1)(b) of the OAPA, a person who is convicted of murder is liable to imprisonment for life or a term of not less than 15 years. Accordingly, it was submitted, a sentence for manslaughter, being a lesser offence to murder, ought to be closer to the 15 year minimum sentence prescribed for the latter offence. Mr Hines also referred us to the decision of this court in **Whitfield Williams v R** SCCA No 174/2005, judgment delivered 31 October 2008,

in which the applicant's sentence of 14 years' imprisonment for the offence of manslaughter, committed while acting as an accomplice in a joint enterprise, was not disturbed on appeal. Mr Hines realistically acknowledged that the applicant Patterson "may have played a pivotal role" in the commission of the offence. However, he submitted that the sentence of 25 years' imprisonment imposed by the judge was manifestly excessive, bearing in mind that, although this applicant had been deported from the United States of America as a result of criminal conduct there, he had no record of criminality in this jurisdiction.

[14] Miss Kathy-Ann Pyke for the Crown elected to make no submissions on the issue of sentencing.

[15] For present purposes, there is no need to rehearse in any detail the principles of sentencing which this court has consistently endorsed and applied. In **R v Beckford and Lewis**, the four "classical principles" were identified as retribution, deterrence, prevention and rehabilitation (per Rowe JA at pages 203-204). More recently, in **Delroy Barron v R** [2016] JMCA Crim 32, the court emphasised the need for the sentencing judge to keep in mind the objectives of sentencing, "against the background of the nature and seriousness of the offence, the circumstances surrounding its commission and the personal circumstances of the offender" (per McDonald-Bishop JA, at para. [43]). There can therefore be no doubt that Graham-Perkins JA's memorable caution in **R v Cecil Gibson** against treating the offender as an abstraction remains as important an aspect of the sentencing exercise as it ever was.

[16] Therefore, in arriving at the appropriate sentence to be imposed on the applicant in this case, it was necessary for the judge to consider, firstly the individual circumstances of each of them. While the judge did say that he had "looked at" the social enquiry reports, and that he had "also noted that the comments by members of their community [are] in most instances favourable", it is an unfortunate feature of the case that there is no indication from his sentencing remarks what weight he gave to this material in relation to each applicant. But, that having been said, it is clear that the judge did attempt to differentiate between the applicant Patterson, and the other applicants, on the basis which Mr Hines quite properly acknowledged (see para. [13] above).

[17] Secondly, the judge was obliged to take into account the nature of the offence for which the applicants had been found guilty by the jury. It is clear from the judge's sentencing remarks (see paragraph [5] above) that, in the light of the evidence, he considered the verdict of guilty of manslaughter to be something of an aberration. Notwithstanding this, as the judge quite properly reminded himself, his obligation was to impose sentences which reflected the jury's decision. In our respectful view, there is much force in Mr Hines' submission that, despite the judge's caution to himself to avoid this result, the sentences which he did impose appear more apt to a case of murder, the minimum sentence for which in comparable circumstances would have been 15 years' imprisonment (OAPA, section 3(1)(b)). For although, like murder, the maximum sentence for manslaughter is life imprisonment, the range of sentences established by

the authorities for manslaughter is in fact considerably less than the 20-25 year range that the judge apparently considered to be appropriate.

[18] But it appears to us that the sentence of 14 years' imprisonment imposed in **Whitfield Williams v R**, the case cited by Mr Hines, may be at the lower end of the range of sentences for manslaughter, particularly bearing in mind that the applicant in that case was convicted after trial. In both **Oniel Hudson v R** [2011] JMCA Crim 9 and **Bertell Myers v R** [2013] JMCA Crim 58, for instance, the appellants pleaded guilty to the offence of manslaughter and were sentenced to 18 years and 15 years' imprisonment respectively: this court reduced the sentences to 12 years' imprisonment, in part on the basis of the pleas of guilty. And, in **Dennis Beagle v R** [2013] JMCA Crim 50, a sentence of 18 years' imprisonment for manslaughter imposed after a plea of guilty was reduced by this court to 15 years' imprisonment, again to reflect in part the fact of the guilty plea.

[19] More to the point, in our view, is the perhaps insufficiently noticed decision of the court in **Emilio Beckford & Kadett Brown v R** [2010] JMCA Crim 26. That was a case in which, at 2 o'clock one morning, a domino-playing group of men at a bar at Cornwall District in the parish of Saint Elizabeth was set upon by two masked men, one armed with a gun and the other with a knife. The gunman fired several shots, resulting in injuries to some of the men and the death of one of them. Both intruders were convicted of murder after a trial and sentenced to imprisonment for life, with the court stipulating that they should serve a period of 23 years in prison before being eligible for

parole. On appeal, the conviction of one of them (Mr Beckford) was quashed on a verdict of acquittal entered. However, in relation to the other intruder (Mr Brown), the court quashed the conviction for murder and substituted therefor a conviction for manslaughter, on the basis that the trial judge ought to have left that possibility to the jury in the event of their finding that he lacked the requisite intention for murder.

[20] As regards the appropriate sentence to be imposed on Mr Brown for manslaughter, the court took into account the fact that he was 21 years old at the time of the commission of the offence and that there was no indication that he had any previous conviction. Brooks JA (Ag) (as he then was), who delivered the judgment of the court, said this (at para. [37]:

> "The appropriate sentence in this case must be considered against the background of the maximum penalty for manslaughter, being imprisonment for life (See section 9 of the Offences Against the Person Act). There is no gainsaying that the circumstances of this killing, in the context of a robbery and accompanied by a degree of arrogance, were particularly heinous. A sentence for the lesser offence of manslaughter should, however, be less onerous than that imposed for murder. Bearing all those issues in mind, but especially the manner in which this offence was committed, it is our view that a fairly long sentence of imprisonment must be imposed. Eighteen years imprisonment at hard labour would be appropriate in the circumstances."

[21] **Emilio Beckford & Kadett Brown v R** is therefore clear authority for the propositions that (i) sentences for manslaughter should generally reflect the difference in intrinsic seriousness between that offence and the offence of murder; and (ii) a

sentence of 18 years' imprisonment after trial will generally be appropriate in a case of manslaughter at or close to the top of the range in terms of seriousness.

[22] In the instant case, we take into account the status of the applicants Gentles, Mills and Gayle as first offenders and the nature and circumstances of the offence for which they were found guilty by the jury. In the light of these factors, we have come to the view that these applicants have made good their contention that the sentences of 20 years' imprisonment imposed on them by the judge were manifestly excessive. We consider that in all the circumstances, sentences of 17 years' imprisonment would have been more appropriate.

[23] In the case of the applicant Patterson, in the absence of any detailed evidence of the circumstances which led to his deportation from the United States of America and any record of previous convictions in this jurisdiction, we also consider that it would be right to treat him as a first offender for the purposes of sentencing. However, in his case, the additional factor which comes into play, which Mr Hines concedes that the judge would have been entitled to take into account, is that there is some indication from the record that he played a greater role than the others in the chain of events which led to the deceased's killing. In these circumstances, we consider that a sentence of 20 years' imprisonment would be appropriate.

[24] In the result, the applications for leave to appeal against conviction are refused. However, the applications for leave to appeal against sentence are granted and the hearing of the applications is treated as the hearing of the appeals, which are allowed.

The sentences imposed by the judge are set aside and, in their stead, we substitute sentences of 17 years' imprisonment on the appellants Gentles, Mills and Gayle; and 20 years' imprisonment on the appellant Patterson. These sentences are to be reckoned as having commenced from 18 November 2009.