[2019] JMCA Crim 42

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA IN THE PARISH OF HANOVER

SUPREME COURT CRIMINAL APPEAL NO 14/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

TYRONE GILLARD v R

Chumu Paris for the appellant

Ms Cadeen Barnett and Ms Kelly-Ann Francis for the Crown

19 and 22 November 2019

F WILLIAMS JA

[1] In this appeal, the appellant, Tyrone Gillard, sought to set aside his sentence for the offence of murder. His sentence was one of life imprisonment at hard labour with a stipulation that he would not become eligible for parole until he had served 22 years. He pleaded guilty to the said offence in the Circuit Court for the parish of Saint Catherine on 20 October 2017. The main thrust of his complaint against his sentence was that, when one has regard to sentences imposed for murder after a trial, the sentence that had been imposed on him was manifestly excessive.

Background facts

[2] In the background facts of the case against the appellant, it was alleged that he shared a relationship with Miss Shaniecia Martin ("Miss Martin"), who was also supposed to have been a committed relationship with Mr Isaac Campbell ("Mr Campbell"). Miss Martin decided to remove to a location unknown to Mr Campbell, but Mr Campbell would "continually call" and "harass her". Mr Campbell somehow managed to locate the area to which Miss Martin had relocated, and chased her with a machete. She made a telephone call to the appellant seeking his protection.

[3] Sometime between 25 and 27 January 2015, Mr Campbell found out where Miss Martin lived and trailed her to a community standpipe where she had gone to bathe. On being telephoned for help by Miss Martin, the appellant summoned other men and they together confronted Mr Campbell. The appellant gave a statement on caution in which he outlined the details of the incident that transpired thereafter. The appellant indicated that he gathered some of his friends who had armed themselves with machetes. However, he had decided against "going to do any chopping" and so he armed himself with a guava stick. The appellant and his friends confronted Mr Campbell. The upshot of this was that Mr Campbell was beaten and chopped to death. The body of Mr Campbell was discovered on 27 January 2015 at 7:30 am with chop wounds to the head, neck, hand and feet.

Sentencing of the appellant

[4] In endeavouring to fix a starting point, the learned judge took note of the fact Mr Campbell was "chopped up in such a manner" because of a relationship that both he

and the appellant shared with one woman. She also mentioned that Mr Campbell was killed in a particularly-gruesome manner. She stated that the sentence that would normally be imposed for murder in these circumstances was 35 years, but noted that the appellant would receive a discount as a result of his guilty plea. The learned judge eventually fixed the starting point at 40 years.

[5] She noted that, although the appellant could benefit from a discount of up to 50%, she would only give him a 40% discount, which would reduce his pre-parole period to 25 years' imprisonment at hard labour. From that figure, she deducted one year for the time spent in custody, and a further two years for the appellant's lack of previous convictions. She thereafter imposed a sentence of life imprisonment with eligibility for parole after 22 years.

Summary of submissions

For the appellant

[6] Both counsel for the appellant and the Crown agreed that the learned judge erred in her sentencing of the appellant. They agreed that she had failed to adequately consider and apply the sentencing principles as stipulated in the Criminal Justice (Administration) (Amendment) Act, 2015 ("the CJAAA") and **Meisha Clement v R** [2016] JMCA Crim 26. However, both counsel diverged with regard to whether the sentence could fairly be said to be manifestly excessive.

[7] Counsel for the appellant submitted that the learned judge paid no regard to section 42F of the CJAAA, which stipulates that, where an accused pleads guilty, and a

sentence of life imprisonment is being contemplated, that sentence of life imprisonment shall be deemed to be a term of 30 years. Counsel further argued that, pursuant to section 3(1C)(b) of the Offences Against the Person Act, the learned judge could have considered sentencing the appellant to imprisonment for a fixed term, which would have had the impact of reducing by five years the mandatory minimum period required to be served in order to become eligible for parole. Counsel's next complaint about the sentence that had been imposed was that it approximated too closely to sentences that were imposed for murder after a trial and conviction, rather than those imposed on a guilty plea, and, in that sense, the sentence imposed was far outside the range of sentences that would normally have been imposed after a guilty plea, and so was manifestly excessive.

[8] Counsel had also at first sought to argue that the learned judge's attempt to adjust an aspect of the sentence that she had originally passed by changing how the figure of 22 years was arrived at, was not permitted. The basis for this, it was said, was that, once she passed the sentence, she was *functus officio*. However, this line was not pursued with any vigour; and, we think, rightly so, as, *inter alia*, the ultimate sentence of 22 years itself remained unchanged.

For the Crown

[9] Crown Counsel conceded that section 42F of the CJAAA was apparently not considered by the learned judge, but she submitted that, pursuant to section 42E(2)(a) of the CJAAA, the appellant would only have been entitled to a discount of 33.3%, while the learned judge gave him a higher discount of 40%. She posited, therefore, that, had

the learned judge given the appellant a discount of 33.3% and had given consideration to the aggravating factors contained in his Social Enquiry Report (which the judge expressly stated that she would not), the sentence imposed would have been higher. She submitted that, given the circumstances of the case, and the gruesome nature of the killing, it could not be said that a sentence of life imprisonment with a stipulation of 22 years before parole was manifestly excessive.

Discussion and analysis

[10] The question arises as to whether, in all the circumstances, the sentence imposed on the appellant was manifestly excessive.

[11] Since the appellant pleaded guilty on 20 October 2017, which, it was agreed, was a "sentence-reduction day", and so to be treated as a plea made on the "first relevant date", his sentencing would have been governed by the provisions of, in particular, section 42E of the CJAAA. Our learned Morrison P, in **Lincoln Hall v R** [2018] JMCA Crim 17, outlined a two-step process when sentencing pursuant to the CJAAA is being carried out. In that case, Morrison P referred to section 42F of the CJAA which states that:

> "Where the offence to which the defendant pleads guilty is one for which the Court may impose a sentence of life imprisonment, and the Court would have imposed that sentence had the defendant been tried and convicted for the offence, then, for the purpose of calculating a reduction of sentence in accordance with the provisions of this Part**, a term of life imprisonment shall be deemed to be a term of thirty years**." (Emphasis supplied)

[12] He commented at paragraph [20] that:

> "... the required approach to the calculation of the reduction in the appellant's sentence on account of his guilty plea would have been to treat the term of life imprisonment which the sentencing judge had in mind as though it were a sentence of 30 years' imprisonment".

[13] The second step was then "to determine the actual percentage by which the sentence should be reduced within the range indicated" in the CJAAA depending on the offence, having regard to the factors outlined in section 42H.

[14] Undoubtedly, had the appellant not pleaded guilty and so necessitated going through the full rigours of a trial, then, having regard to the trivial circumstances that gave rise to Mr Campbell's killing, the particularly gruesome nature of his murder, and the fact that it was the appellant who had summoned and gathered persons to assist in its commission, the imposition of a sentence of life imprisonment on the appellant would have been appropriate and reasonable. Conversely, and for the same reasons, a fixed term sentence would likely not have been appropriate in those circumstances.

[15] In cases such as: **Maurice Lawrence v R** [2014] JMCA Crim 16; **Troy Jarrett and Jermaine Mitchell v R** [2017] JMCA Crim 38; **Lincoln Hall v R**; and **Demar Shortridge v R** [2018] JMCA Crim 30, having regard to the particularly egregious nature of the murders involved in those case, the court found that, despite the appellant's guilty plea in each case, a sentence of life imprisonment was appropriate. We make this observation whilst recognizing that, with the exception of **Lincoln Hall v**

R, this set of cases deals with sentencing that occurred before the CJAAA came into effect on 30 November 2015. However, having regard to: (i) the circumstances of this case as outlined in the allegations; (ii) the sentences imposed in the cases stated; and (iii) Morrison P's dicta in **Lincoln Hall v R**, we could not say that the imposition of a sentence of life imprisonment at hard labour as opposed to a fixed term was manifestly excessive or done in error. The issue in this case has arisen in respect of the stipulated pre-parole period. In seeking to arrive at the appropriate pre-parole period, our starting point in those circumstances would therefore be 30 years in accordance with section 42F of the CJAAA.

[16] In determining the actual percentage by which the sentence should be reduced within the range indicated in section 42E(2)(b) (and so, in this case, the period after which the appellant would become eligible for parole), a judge should have regard to the factors outlined in section 42H, 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."

[17] The learned judge recognized that the appellant would have been entitled to a discount. However, Crown Counsel was correct to concede that the learned judge, in giving the appellant a discount of 40%, would have given the appellant a greater discount than that to which he was entitled. By virtue of section 42E(2)(a), the appellant would only have been entitled to a discount of "up to" 33.3%. However, based on the gruesome nature of the killing and the petty circumstances which caused it, we believe that a full 33.3% reduction could be regarded as "disproportionate to the seriousness of the offence", and so, in our view, a 30% reduction would be more appropriate. The learned judge gave the appellant a two-year reduction for not having any previous convictions, and a further one year for the time he had spent in custody. However, the consideration of no previous convictions is already a factor that would have been considered (pursuant to section 42H(f)) in arriving at the appropriate percentage discount. The only further discount given by the learned judge that we could apply is the one-year reduction for time spent in custody. The sentence to be imposed would therefore be 20 years.

[18] In **Lincoln McKoy v R** [2019] JMCA Crim 35, this court (per McDonald-Bishop JA) found that, although the learned trial judge "did not demonstrably conduct the requisite analysis of the relevant principles of law and apply the accepted mathematical formula", it could not be said that the minimum period that would be served before

parole was outside the range of sentences for murder committed in those circumstances. The appeal in that case was dismissed.

[19] However, in our view, the learned judge in the instant case failed to pay sufficiently close regard to the principles applicable to sentencing on a guilty plea, resulting in the stipulation of a period to be served before parole that might be said to be manifestly excessive, and thus entitling or requiring this court to intervene. In taking this approach, we are guided by the dictum of Hilbery J in the case of **R v Kenneth John Ball** (1951) 35 Cr App Rep 164, at page 165, where it was observed that:

> "In the first place, 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 to character he may have chosen to call. It is only when a sentence appears to err in principle that this 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 the Court will intervene."

[20] The appeal against sentence is therefore allowed in part in that, although the sentence of life imprisonment is affirmed, that part of the sentence stipulating a pre-parole period of 22 years is set aside and substituted therefor is a stipulation that the appellant serve a period of 20 years before becoming eligible for parole. The sentence imposed is to be reckoned as having commenced on 2 February 2018, the date on which it was originally imposed.