[2022] JMCA Crim 70

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00073

QUACIE HART v R

Patrick Peterkin for the applicant

Mrs Kimberley Dell-Williams and Andre Wedderburn for the Crown

19 and 20 December 2022

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] On 26 October 2016, 14-year-old Jamaica College student, Mr Nicholas Francis ('the deceased'), was stabbed to death by Mr Quacie Hart ('the applicant') aboard a coaster bus travelling from Papine towards Liguanea in the parish of Saint Andrew. The applicant was 21 years old.

[2] The case brought by the prosecution was that the deceased and the applicant boarded the bus in Papine. The applicant sat beside the deceased as the bus made its way towards Liguanea. On reaching the junction of Old Hope Road and Hope Boulevard, the applicant attempted to steal the deceased's watch. The deceased resisted, and a fist fight ensued between them. Someone parted them and put the deceased to sit at the back of the bus.

[3] The bus continued towards Liguanea and later made a stop along Old Hope Road. At this point, the applicant threw the deceased's bag outside the bus. The deceased

attempted to retrieve the bag, but the applicant intercepted him. The two began to fight again, and the applicant used a ratchet knife to stab the deceased on the hand. One of the conductors on the bus attempted to part them, but the applicant reached past the conductor and stabbed the deceased in the chest. The applicant exited the bus and made his escape. The deceased was taken to the University Hospital of the West Indies, where he succumbed to his injuries less than an hour later.

[4] On 29 October 2016, the applicant was taken to the police station by his attorney-at-law after a warrant was prepared for his arrest. The applicant was subsequently charged with the offence of murder. When cautioned, he responded, "[m]i a bad bwoy, mi nah tell you nothing".

[5] On 8 May 2019, the first day of trial, the applicant pleaded guilty to the charge of murder at the Home Circuit Court in Kingston. He was sentenced on 26 July 2019 to life imprisonment with the stipulation that he serves 31 years before becoming eligible for parole.

[6] The applicant applied for leave to appeal against the sentence on two grounds: "(i) [t]hat based on the facts as presented, the sentence is harsh and excessive and cannot be justified"; and "(ii) [t]hat the learned [sentencing] judge did not temper justice with mercy as [his] guilty plea was not taken into consideration". The application for leave to appeal was refused by a single judge of this court, who opined that the learned sentencing judge's approach, "although a bit unusual, largely followed the procedure" outlined in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), and so the sentence cannot properly be challenged.

[7] The applicant has renewed his application for leave to appeal before this court, as he is entitled to do. With the leave of the court, the original grounds of appeal were abandoned, and counsel on his behalf, Mr Peterkin, was permitted to argue the single

ground of appeal, which essentially, is that the sentence imposed by the learned sentencing judge was manifestly excessive. Mr Peterkin framed the ground this way:

> "The learned [sentencing] judge did not address her mind to the classical principles of sentencing and further did not seek to balance the mitigating factors with the aggravating factors of the offender, and as such the sentence handed down was manifestly excessive in light of his circumstances in relation to the case."

[8] In support of this ground, Mr Peterkin argued that although the learned sentencing judge took into consideration the applicant's good community and antecedent reports, the fact that he had surrendered himself to the police, and pleaded guilty, she "failed to take into account several other factors which would have provided sufficient mitigating and particularized information in relation to the [applicant] in order for her to deal with the issue of sentencing in an appropriate and fair manner". Two such factors, counsel contended, were the applicant's age and expression of remorse.

[9] Regarding the applicant's age, counsel heavily relied on **Gavin Clarke v R** [2020] JMCA Crim 52 and argued that the learned sentencing judge failed to give sufficient consideration to the fact that the applicant, who had just turned 21 years old at the time of the commission of the offence and 23 years old at the time of sentencing should be treated as a young offender. This, he said, "is a fundamental error as it also rids the [applicant] of his potential for rehabilitation and reform", bearing in mind the four classical principles of sentencing (retribution, deterrence, prevention, and rehabilitation).

[10] Counsel also contended that the learned sentencing judge did not give sufficient weight to the applicant's expression of remorse, which he demonstrated prior to being sentenced when he said, "I am very sorry. I am very sorry" (see page 33, lines 7 – 8 of the transcript).

[11] Mr Peterkin further argued that the learned sentencing judge disregarded the applicant's background and particular circumstances, which were expressed in the plea in mitigation. Counsel noted that there is no indication that the learned sentencing judge

addressed her mind to, what we would term, the 'special socio-economic circumstances' of the applicant and failed to give sufficient weight to the views expressed by the community as recorded in the social enquiry report.

[12] Counsel also took issue with the learned sentencing judge's starting point of 40 years before eligibility for parole and the 10% discount she applied in consideration of the applicant's guilty plea. Counsel argued that a starting point of 40 years did not accord with the usual starting point for cases of a similar nature. He relied on several cases in support of this argument, including **Kevin Young v R** [2015] JMCA Crim 12 and **Maurice Lawrence v R** [2014] JMCA Crim 16.

[13] Concerning the 10% discount given for the guilty plea, counsel submitted that this discount is not reflective of the full benefits that are available under section 42E(2)(b) of the Criminal Justice (Administration) Act ('the CJAA'), which allows for a reduction of up to 25% where the offender indicates to the court, after the first relevant date but before trial commences, that he wishes to plead guilty. Counsel also relied on section 42F of the CJAA in submitting that given the applicant's guilty plea, the learned sentencing judge, in determining the period to be specified before the applicant should be eligible for parole (conveniently referred to as the 'minimum pre-parole period' for our purposes) ought to have treated the term of life imprisonment as though it was one of 30 years. According to Mr Peterkin, a more appropriate minimum pre-parole period would have been within the range of 19 to 20 years, which would be within the normal range of sentences for this type of offence.

[14] In response, counsel for the Crown took the position that the learned sentencing judge did not depart from the accepted principles of sentencing, nor did she impose a sentence which was outside the normal range of sentences.

[15] With respect to the applicant's age, the Crown conceded that the learned sentencing judge did not expressly mention the applicant's age. Counsel for the Crown pointed out, however, that the learned sentencing judge had calculated a discount,

reflecting the applicant's good social enquiry report, which captured "a host of information", including his age. Therefore, the learned sentencing judge, according to counsel, must have had the applicant's age in her contemplation. Counsel further argued that notwithstanding that the learned sentencing judge did not specifically highlight the age of the applicant, this omission could not lead the court to conclude that the sentence was manifestly excessive.

[16] Regarding the applicant's expression of remorse, counsel submitted that a guilty plea is usually treated as an indication of remorse and, therefore, the learned sentencing judge, by granting a 10% reduction of the sentence, had also accounted for the applicant's expression of remorse.

[17] As it relates to the starting point of 40 years utilized by the learned sentencing judge, counsel for the Crown submitted that this starting point was appropriate in the circumstances. They contended that the starting point of 40 years was premised on all the circumstances of the case and is reflective of the intrinsic seriousness of the offence, which, according to them, was murder in furtherance of a robbery. Counsel submitted that although section 42F of the CJAA provides that a term of life imprisonment shall be deemed to be a term of 30 years for the purpose of calculating a reduction of sentence on a guilty plea, the facts of the instant case do not allow for the adoption of a starting point reflective of this statutory fiction. Counsel maintained that "the circumstances of this case, not least of which is the age of the deceased as well as the deliberateness of the applicant's actions and heinous nature of the offence, would warrant a higher starting point". Therefore, "the suitable starting point would be that chosen by the learned [sentencing] judge". Counsel sought to distinguish the case of **Kevin Young v R**, relied on by the applicant.

[18] With respect to the 10% discount applied by the learned sentencing judge for the guilty plea, counsel for the Crown argued that the learned sentencing judge clearly demonstrated that she was cognizant of the relevant statutory provisions and the factors that are to be considered, pursuant to section 42H of the CJAA. Counsel maintained that

based on the circumstances of the case, the discount of 10% was appropriate, and a discount of 25%, contended for by the applicant, would shock the public conscience.

[19] Accordingly, counsel for the Crown argued that the sentence cannot be regarded as manifestly excessive to warrant an alteration, and so, the application should be refused and the sentence affirmed.

[20] We have duly considered the helpful submissions of counsel on both sides. In doing so, we also bore in mind the principles emanating from the case of **R v Ball** (1951) 35 Cr App Rep 164, which have established the standard of review in appeals against sentence that has been followed by this court. The accepted principle is that this court ought not to interfere with the sentence imposed on the applicant unless "the 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".

[21] In **Wayne Lewis v R** [2021] JMCA Crim 3 at para. [13], Brooks P succinctly expressed a similar principle in this way:

> "…this court will not overturn the sentence unless it finds that it is one that no reasonable judge could have arrived at in the circumstances."

[22] In **Meisha Clement v R** [2016] JMCA Crim 26, at para. [43], Morrison P helpfully directed:

> "On an appeal against sentence…this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[23] We have noted that the applicant did not seek to challenge the life sentence imposed on him. The court will, therefore, not focus on whether the imposition of life

imprisonment, rather than a fixed term sentence, was appropriate. The solitary question for the consideration of the court is whether the learned sentencing judge erred when she stipulated that the applicant should serve a minimum pre-parole period of 31 years, having, purportedly, given credit for time spent in pre-sentence custody.

[24] The starting point in assessing the appropriateness of the minimum pre-parole period is to consider the indictment on which the applicant was charged. The applicant was charged with a murder falling within section 2(2) of the Offences Against the Person Act ('OAPA'). It was not alleged in the particulars of the indictment that the applicant killed the deceased "in furtherance of a robbery". Therefore, the circumstances of the charge did not fall within section 2(1)(a) of the OAPA.

[25] Given the facts of the case, the position taken by the Crown not to indict the applicant for murder falling under section 2(1)(a) of the OAPA is understandable. The transcript reveals that there were two separate fights between the applicant and the deceased. The first fight was a fist fight which ensued after the applicant reportedly attempted to steal the deceased's watch. The applicant did not brandish a knife at the time he attempted to take the deceased's watch or during the first fight. The second fight occurred later on after the applicant threw the deceased's bag outside the bus. It was during this second fight that the applicant used the ratchet knife to fatally stab the deceased. Therefore, the highest it could be said was that the murder arose following the applicant's foiled attempt at larceny from the person, which resulted in two fights, the last of which led to the death of the deceased. There was, therefore, strictly speaking, no robbery to invoke the provisions of section 2(1)(a) of the OAPA. This observation is significant as the relevant sentencing considerations depend on the category in which the murder falls.

[26] In keeping with the law, the applicant must be sentenced on the facts most favourable to him in the absence of a Newton hearing. The applicant stood to be sentenced on the basis of the indictment preferred by the Crown, which was for murder falling under section 2(2) of the OAPA. Accordingly, the learned sentencing judge's

reasoning, which was based on the premise that the stabbing was in furtherance of a robbery, is inaccurate and, therefore, cannot be accepted.

[27] Section 3(1)(b) of the OAPA provides that a person convicted of murder falling within section 2(2) shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than 15 years. As it relates to the minimum pre-parole period, the OAPA provides that for a murder falling within section 2(2), where the court imposes a life sentence, the court shall specify a pre-parole period, being not less than 15 years, but where a fixed term sentence is given, the court shall specify a pre-parole period of not less than 10 years (section 3(1C)(b).

[28] It is usually accepted that the statutory minimum pre-parole period could be used as a guide for selecting a range for the minimum pre-parole period to be specified as well as a starting point. Given that the learned sentencing judge had given life imprisonment, there would have been no scope for the operation of the Sentencing Guidelines. However, in murder cases, where life imprisonment is imposed, the court has used the Sentencing Guidelines and the arithmetical methodology introduced by case law to assist it in arriving at an appropriate minimum pre-parole period as it would in determining a fixed term sentence. This ensures adherence to the proportionality and parity principles and aims at preventing arbitrariness.

[29] This court, in **Daniel Roulston v R** [2018] JMCA Crim 20 at para. [17], had set out the methodology that should be followed in determining an appropriate sentence as established in **Meisha Clement** and other authorities. In keeping with the prescribed methodology, the learned sentencing judge referred to a starting point, aggravating and mitigating factors, the discount for the guilty plea, and the applicant's entitlement to time spent on pre-sentence remand.

[30] However, the first valid challenge to the learned sentencing judge's approach is that she failed to indicate the range of minimum pre-parole periods in relation to which

she had chosen a starting point of 40 years. The second justifiable challenge is that she did not state her reasons for choosing a starting point of 40 years.

[31] There are numerous authorities from this court treating with the range of minimum pre-parole periods in murder cases. In this regard, Mr Peterkin had furnished the court with a table showing a summary of cases and minimum pre-parole periods from this court for the period 2016 to 2020, involving one count of murder (in other words, one victim as in this case). Most of these murders were committed with the use of firearms, which normally attract a higher starting point. The minimum pre-parole periods extracted from those cases range from 15 to 25 years' imprisonment.

[32] The table provided by Mr Peterkin is considered against the backdrop of the summary of pre-parole periods considered by this court in **Paul Brown v R** [2019] JMCA Crim 3 (delivered 8 February 2019). Those cases relate to multiple murders or murders falling within section 2(1) of the OAPA. This table of cases would have been available to the learned sentencing judge in July 2019. The review undertaken by the court in **Paul Brown** shows a range of minimum parole periods of 30 to 45 years for multiple counts of murder. The highest in the range, being 45 years, was given in the case of **Jeffrey Perry v R** [2012] JMCA Crim 17 for the murder of three children with the use of a machete. Therefore, up to the date the applicant was being sentenced in 2019, the highest pre-parole period in a multiple murder case, involving children, was 45 years.

[33] Having borne in mind all the circumstances of this case, particularly as it involved one victim, and a defendant who had no previous conviction, we believe the appropriate range for a minimum pre-parole period should be anywhere between 15 years (the statutory minimum) and 25 years.

[34] The learned sentencing judge clearly treated the circumstances of this case as a murder committed in furtherance of a robbery, for which the applicant was not indicted, and which was not supported by the facts outlined by the prosecution. Guideline 5.6 of the Sentencing Guidelines has cautioned, that in dealing with sentences in cases falling

under section 2(1)(a) to (f), which, for convenience, we would refer to as "capital murder" cases), "sentencing judges should consider carefully the actual terms of the indictment under which the offender has been brought before the court in order to satisfy themselves of the applicability of the section". The same may be said of the indictment that does not charge murder under that section. In this case, the terms of the indictment would have indisputably shown that the prosecution did not allege that the murder was committed in furtherance of or ancillary to a robbery. This was an important consideration in determining the appropriate minimum pre-parole period.

[35] In any event, even if the applicant had committed the murder in furtherance of a robbery, a starting point of 40 years would have been too high having regard to the statutory minimum pre-parole period of 20 years for a murder of that nature (see section 3(1C)(a) of the OAPA). Indeed, given that the statutory minimum pre-parole period for a "capital murder" case is 20 years, the learned sentencing judge's choice of a starting point of 40 years would have doubled the statutory minimum for those types of murder. Based on the learned sentencing judge's reasoning and what she identified as aggravating factors, the Crown would be hard-pressed to defend a starting point that is 20 years above the statutory minimum.

[36] There is no justification, in law, for a starting point of over 40 years for a murder falling within section 2(2) of the OAPA, which involved a knife and one fatal stab wound inflicted during a fight. The starting point of 40 years is demonstrably disproportionate and so cannot stand. Consequently, the learned sentencing judge would have erred by selecting a starting point of 40 years, as contended by the applicant. In this case, the starting point for a minimum pre-parole period should not have exceeded 25 years.

[37] The next step was for the learned sentencing judge to have balanced the aggravating and mitigating factors in arriving at the provisional sentence. This would have been the sentence she would have imposed had the applicant not pleaded guilty. Regrettably, the learned sentencing judge did not clearly conduct this balancing exercise

to demonstrate the provisional minimum pre-parole period she had arrived at before taking account of the guilty plea. Again, in this regard, she would have erred.

[38] It is important to note, too, that the consideration of the guilty plea would have warranted a separate and distinct consideration from a balancing of aggravating and mitigating factors. The learned sentencing judge, having decided that she would have imposed a sentence of life imprisonment, did not see it fit to discount that sentence by virtue of the applicant's guilty plea, albeit that the law makes it possible for such discount to be given through the application of section 42F of the CJAA. This subsection reads:

> "42F. Where the offence to which a 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 added)

[39] Parliament has, therefore, created a statutory fiction by treating a term of 30 years as life imprisonment for the purpose of calculating a reduction of a sentence when life imprisonment is imposed.

[40] The implication and application of this deeming provision have been explained in several cases from this court, starting most notably with **Lincoln Hall v R** [2018] JMCA Crim 17. In that case, Morrison P, in commenting on section 42F of the CJAA, stated:

> "[18] In the case of a sentence of life imprisonment, this naturally begs the question of how to approach the calculation of the actual level of discount for the guilty plea. This is the very question which section 42F seeks to address…
>
> [19] So the problem of calculation of a percentage of a sentence of indeterminate duration is resolved by resort to a deeming provision, essentially a statutory fiction by which something is decreed to be other than it is for some particular purpose (see **R v Verrette** [1978] 2 SCR 838, per Beetz J at page 845)...

> [20] In this case, there can in our view be no doubt that, had the appellant been tried and convicted for the murder for which he was charged, the court would have imposed a sentence of life imprisonment... Accordingly, as it seems to us, 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.
>
> [21] That having been done, the next step is to determine the actual percentage by which the sentence should be reduced within the range indicated in section 42E(2)(b)…"

[41] The learned sentencing judge chose to retain life imprisonment as the sentence to be imposed but decided to take the applicant's guilty plea into account in setting the minimum pre-parole period. Nothing is wrong with this exercise of the learned sentencing judge's discretion, as this court has historically embraced this approach in the interests of justice, so that persons who have pleaded guilty and are still sentenced to life imprisonment may, nevertheless, derive some tangible benefit from the guilty plea. In this way, offenders can be treated differently depending on their personal circumstances, the circumstances of the commission of the offence and the stage at which they pleaded guilty.

[42] Once a discount is given on the sentence of life imprisonment, the sentence cannot still remain life but must be a term lower than the statutory fiction of 30 years. The specification of a minimum pre-parole period is a mandatory part of the sentence for murder falling within section 2(2) of the OAPA. Therefore, whilst sections 42E and 42F of the CJAA do not expressly state that the provisions are directly applicable to the calculation of the minimum pre-parole period, it seems rational and just for the court to apply these provisions in circumstances where it decides not to grant a reduction of the life imprisonment but to apply the discount to the pre-parole stipulation.

[43] Therefore, the wording of section 42F that "for the purpose of calculating a reduction in sentence", on account of a guilty plea, life imprisonment must be deemed to

be 30 years should extend to the determination of the pre-parole period when life imprisonment is imposed and the discount for a guilty plea is contemplated.

[44] It follows then that in this case, the deeming provision of section 42F should have been used as a guide in treating with the discount to be applied in considering the minimum pre-parole period. This means that the life imprisonment imposed by the learned judge should have been deemed to be 30 years for the purpose of determining the minimum pre-parole period to which her consideration of a discount would have applied in light of the guilty plea.

[45] Therefore, where an offender pleads guilty and is sentenced to life imprisonment, and the court does not see it fit to convert the life sentence to a fixed term of imprisonment for the purposes of calculating a discount but chooses to grant the reduction on the pre-parole period, then the starting point for the minimum pre-parole cannot be 30 years or more. This is simply because consideration for parole must arise before the term of imprisonment ends. On the basis of this analysis, the learned sentencing judge's choice of 40 years as a starting point and 34 years as a minimum pre-parole period (which it would be before credit is given for time served in pre-sentence custody) has become even more indefensible.

[46] Accordingly, we find merit in the applicant's contention that the starting point of 40 years, utilized by the learned sentencing judge in determining the minimum pre-parole, is erroneous in principle and, therefore, manifestly excessive.

[47] This court must, therefore, embark on its own consideration of the appropriate sentence by reference to the applicable law, bearing in mind the circumstances of the commission of the offence, the personal circumstances of the applicant and his guilty plea.

[48] As already established, the appropriate range of the minimum pre-parole period in the circumstances would be anywhere between 15 and 25 years, as reflected in the various cases cited by counsel and others reviewed by the court.

[49] We accept that a starting point of 19 years would be reasonable, having regard to the circumstances in which the incident arose, emanating as it did not from what would have been, at the highest, an attempted larceny from the person. The nature of the offending is akin to a murder committed in furtherance of or ancillary to a robbery. This justifies a starting point slightly below the statutory minimum pre-parole period of 20 years, which would have applied had the murder been committed in furtherance of or ancillary to a robbery.

[50] We note the following as aggravating features having had regard to the Sentencing Guidelines and case law:

(a) the age of the deceased being 14 years old;

(b) the peculiar vulnerability of the deceased, who was an unarmed and defenceless student on his way from school;

(c) the location and timing of the offence, which was on public transport with other persons aboard in broad daylight. This points to a brazenness on the part of the applicant and scant regard for law and order;

(d) the applicant's persistence in interfering with the deceased, clearly with the intention to do him harm, as even after they were parted and the deceased removed from within close proximity of the applicant, the applicant continued his attack; and

(e) an appreciable degree of pre-meditation in brandishing the knife and waiting for an opportune time to pounce upon the deceased after the first fight, which cannot be dismissed as inconsequential.

[51] When all these factors are considered and appropriately weighed, with the more significant weight accorded to the age and vulnerability of the deceased and the applicant's obvious persistence in hurting him, there is an upward shift in the starting point to a pre-parole period of 28 years.

[52] We must consider mitigating factors and balance them against the aggravating factors. Mr Peterkin is correct that the age and immaturity of the applicant were features of this case that should have been considered as mitigating factors. The applicant had just turned 21 at the time of the incident. The Sentencing Guidelines have clearly established that the youth of the offender is a mitigating factor, as it is critical in considering the issue of capacity for reform. This is especially so when viewed against the backdrop that he had no previous conviction, and had obtained, what can be described as, a relatively favourable community report. These were correctly taken into account by the learned sentencing judge as mitigating factors.

[53] The court notes that the learned sentencing judge did not identify any feature in the case which would have shown that the applicant was beyond reform. His capacity for reform should have been balanced in the equation, as nothing negative was highlighted as part of any criminal history.

[54] However, while the applicant's age may be a mitigating consideration, the weight of it is almost obliterated by the countervailing consideration of the age of the deceased, who was significantly younger than the applicant. This was compounded by the status of the deceased as a student on way from school and from whom the applicant was trying to steal.

[55] Mr Peterkin as well as the learned sentencing judge also considered, as a mitigating factor, that the applicant had surrendered to the police relatively soon after the incident. However, the potency of this as a mitigating factor is diluted by the applicant's response upon caution that he was a "bad bwoy" and would not be telling the police anything. This was not an offender who genuinely wanted to cooperate with the police investigation from the outset, a factor that would have weighed heavily in his favour. Anyway, some allowance is made for the fact that he did not engage the police in a long search for him before he surrendered to custody.

[56] The applicant also made verbal expressions of remorse to the probation officer and in court, at the time he was sentenced. However, it is noted that these expressions would have come after he had already pleaded guilty and not at the point he was arrested or during the three years he was awaiting trial. So, even though the expression of remorse may be viewed as a mitigating factor, its effect is not as significant as it would have been had it been given earlier.

[57] When the mitigating factors are balanced against the aggravating factors, it is found that the aggravating factors clearly outweigh the mitigating factors. Furthermore, when all the circumstances of the case and the applicant are considered against the background of the objects of sentencing, we find that had the applicant gone to trial, a period of 26 years before eligibility for parole would have been commensurate with the seriousness of the offence. This would have taken his sentence slightly outside the normal range at the upper end.

[58] However, consideration must be given to the applicant's guilty plea. Using, as a reference point, section 42E(2)(b) of the CJAA and the factors listed in section 42H, it cannot be said that the learned sentencing judge's election of a reduction of 10% for the guilty plea is unreasonable. The applicant did not plead early in the proceedings, and the evidence against him was overwhelming, leaving little or no prospect of an acquittal. This discount of 10% would result in a reduction of approximately two years and six months.

[59] Even after applying the relevant guidelines and the guilty plea discount, the court is, nevertheless, obliged to step back and consider all the circumstances of the case and the offender and ensure that, in the end, the punishment fits the crime. Having taken all the relevant sentencing principles into account, we find that a sentence of life imprisonment with the stipulation of a pre-parole period of 23 years is proportionate and would fall within the range of sentences for murder of this nature, having regard to the personal circumstances of the applicant and the objectives of sentencing.

[60] The court notes, however, that the applicant had spent three years in pre-sentence custody, for which he must be credited in keeping with the authorities. This would result in the stipulation of a minimum term of 20 years' imprisonment before his eligibility for parole.

[61] Having examined all the relevant principles of law and the circumstances of the case and the applicant, the court finds that there is merit in the ground of appeal that the stipulation that the applicant should serve a sentence of 31 years before eligibility for parole is disproportionate and, accordingly, manifestly excessive. This would justify the intervention of this court with the sentence imposed by the trial judge.

[62] Therefore, while the sentence of life imprisonment shall remain undisturbed, the stipulated minimum pre-parole period should be set aside. Substituted therefor should be a stipulation that the applicant serves 20 years before being eligible for parole, three years having been credited for the time he spent in pre-sentence custody.

[63] Consequently, we would grant the application for leave to appeal sentence and treat the hearing of the application as the hearing of the appeal.

Disposition

[64] Accordingly, the orders of the court are as follows:

1. The application for leave to appeal sentence is granted and the hearing of the application is treated as the hearing of the appeal.

2. The appeal against sentence is allowed.

3. The sentence of life imprisonment imposed by the learned sentencing judge is affirmed.

4. The stipulation that the applicant serves a period of 31 years before being eligible for parole is set aside and substituted, therefor, is the stipulation that he should serve 20 years before becoming eligible for

parole, having been credited for three years spent in pre-sentence custody.

5. The sentence is to be reckoned as having commenced on 26 July 2019, the date on which it was imposed.