

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 39/2018

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE FRASER JA
THE HON MRS JUSTICE V HARRIS JA**

WAYNE LEWIS v R

Ms Melrose Reid for the applicant

Mrs Andrea Martin-Swaby and Miss Shanique Farquharson for the Crown

11 January 2021

BROOKS P

[1] A firearm in the hands of a drunk person is a catastrophe in waiting. That situation materialised on the evening of 22 April 2014, when Mr Wayne Lewis, who had already been drinking, entered the bar run by his friend Ms Ann-Marie Campbell. After a few minutes of friendly exchange, he pulled out his licensed firearm and shot her in the chest. She was rushed to the hospital but succumbed to her injuries four days later. Mr Lewis says that when he came to his senses, he was in the same hospital, having been beaten by other persons in the bar. He says that he had no recollection of what he had done. The incident took place in Black River in the parish of Saint Elizabeth.

[2] Mr Lewis was charged with murder. Fortunately, for him, his case came before the Circuit Court for the parish of Saint Elizabeth on a day declared by the Chief Justice to be a Sentence Reduction Day. He pleaded guilty to manslaughter and the prosecution accepted the plea. The antecedents and a social enquiry report were later prepared, and Mr Lewis was sentenced on 23 March 2018. The learned sentencing judge (the judge) sentenced him to 10 years' imprisonment at hard labour.

[3] Mr Lewis applied for leave to appeal his sentence. A single judge of this court granted his application on the basis that the judge seemed to have used an inappropriate starting point for the sentencing exercise. The appeal has been advanced before this court by Ms Melrose Reid, of counsel.

[4] Learned counsel argued that the judge erred in the sentencing exercise in that he failed to:

- a. take into consideration the law of involuntary manslaughter in relation to the manner of the killing;
- b. apply the principles of sentencing;
- c. conscientiously take into account the contents of the social enquiry report; and
- d. hand down a sentence in accordance with the purpose of Sentence Reduction Day.

The appeal will be considered in respect of those issues. Item b. will be discussed last.

Involuntary Manslaughter

[5] Although the prosecution did not state the reason for accepting the guilty plea, it was apparent that the judge considered that the killing was not deliberate but was based on Mr Lewis' intoxication. At page 17, lines 16-17, the judge stated that "it is diminished responsibility that causes the manslaughter thing". More than once, the judge referred to Mr Lewis' inability to "hold [his] liquor". Ms Reid's reference to several cases, which indicate:

- a. that intoxication is a basis for accepting the absence of a specific intent to kill; and
- b. the distinction between manslaughter and murder on the basis of absence of intent,

although informative, is unhelpful in this case.

The Social Enquiry Report

[6] Ms Reid is also not correct in saying that the learned judge did not pay sufficient attention to the social enquiry report. He referred to it several times. The judge noted that it spoke:

- a. generally, very well of Mr Lewis;
- b. of his being gainfully employed;
- b. of his becoming unruly when he drinks;
- c. of his having a good relationship with Ms Campbell;
- d. of some of Ms Campbell's family members begging for Mr Lewis not to be sent to prison; and

- e. of Mr Lewis drinking very heavily on the night of the shooting.

It would not be accurate to say that the judge treated the report in a platitudinous way.

The principles of Sentence Reduction Day

[7] Ms Reid's point in respect of the Sentence Reduction Day also fails. There is nothing in the declaration of a Sentence Reduction Day which requires anything other than the application of the provisions of section 42D of the Criminal Justice Administration Act, as it was amended in 2015. That section allows for discounts on sentences for early guilty pleas. Sentence Reduction Day is an initiative of the Criminal Case Management Steering Committee, whereby the provisions of section 42D were promoted and advertised for implementation on a specific day. The aim was to sensitise the profession and the public on the existence of the provisions of section 42D, and to popularise their use. The relevant part of the section states:

"(1) Subject to the provisions of this Part, where a defendant pleads guilty to an offence with which he has been charged, the Court may, in accordance with subsection (2), reduce the sentence that it would otherwise have imposed on the defendant, had the defendant been tried and convicted of the offence.

(2) Pursuant to subsection (1), the Court may reduce the sentence that it would otherwise have imposed on the defendant in the following manner—

- (a) where the defendant indicates to the Court, on the first relevant date, that he wishes to plead guilty to the offence, the sentence may be reduced by up to fifty *per cent*;

...

(4) In determining the percentage by which the sentence for an offence is to be reduced pursuant to subsection (2), the Court shall have regard to the factors outlined under section 42H, as may be relevant.”

The term “first relevant date” is defined in the Criminal Justice Administration Act to mean, essentially, the first date on which the defendant is equipped to make an informed decision in respect of his plea. Section 42H, which is cited in section 42D, will be mentioned more specifically below.

[8] The first notice that spoke to a Sentence Reduction Day was issued on 3 May 2017. It stipulated that the court would, on the advertised Sentence Reduction Day, consider that the plea was given on the first relevant date. The first paragraph of the document states as follows:

“This Notice is issued by the Registrar of the Supreme Court under the direction of the Honourable Chief Justice, in consultation with Judges of the Supreme Court and the Criminal Case Management Steering Committee in relation to special days where accused persons upon entering a guilty plea will be treated as if that accused person had pleaded guilty on the First Relevant Date.”

[9] The judge took into account that Mr Lewis deserved a discounted sentence based on the guilty plea. At page 15, lines 24 and 25, of the transcript, he is recorded as saying:

“You deserve the 50% because you pleaded guilty on the first opportunity.”

[10] Accordingly, Ms Reid's submissions that the judge should have made specific reference to "Sentence Reduction Day", is an unfair criticism. The judge spoke to the essence of the purpose and the effect of Mr Lewis' plea of guilt, and, ostensibly, gave him the full benefit of it.

The principles of sentencing

[11] Ms Reid is more on point in her submission that the judge failed to identify, or use the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts ('the Sentencing Guidelines'), which includes, among those guidelines, an appropriate starting point in analysing the sentence that he imposed.

[12] The judge said that he took into account that Mr Lewis deserved a discounted sentence. He, however, did not, specifically state the sentencing range that he considered appropriate, nor did he specifically state a starting point. Those are only two of the steps in sentencing that the Sentencing Guidelines recommend.

[13] On those bases, Ms Reid is correct that the learned judge erred in carrying out the sentencing exercise. It, therefore, must be redone, but with the understanding that 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 (see **R v Ball** (1951) 35 Cr App Rep 164).

Applying the principles of the Sentencing Guidelines

[14] The correct approach and methodology that the judge ought to have followed are set out at paragraph 6.3 of the Sentencing Guidelines:

- “(i) identify the appropriate starting point within the range for the particular offender;
- (ii) consider the impact of any relevant aggravating features;
- (iii) consider the impact of any relevant mitigating features (including personal mitigation);
- (iv) consider, where appropriate, whether to reduce the sentence on account of a guilty plea;
- (v) decide on the appropriate sentence;
- (vi) make, where applicable, an appropriate deduction for time spent on remand pending trial; and
- (vii) give reasons for the sentencing decision.”

[15] The Sentencing Guidelines stipulate that the sentence range for manslaughter based on diminished responsibility is three – 10 years (see Appendix A of the Sentencing Guidelines). That range does not, however, contemplate the use of a firearm, which is considered to be an aggravating factor (see paragraph 8.2 of the Sentencing Guidelines).

[16] **Emilio Beckford and Kadett Brown v R** [2010] JMCA Crim 26 is a case in which a firearm in the hands of a would-be robber, was said to have gone off accidentally in the course of the robbery. In that case, this court set aside a conviction

for murder for Mr Brown and substituted a conviction for the offence of manslaughter. It imposed a sentence of 18 years at hard labour for the offence.

[17] In this case, considering the use of a firearm, but bearing in mind that this was not an unlicensed firearm, a figure less than 18 years should be used. A starting point of 10 years would be appropriate.

[18] Miss Farquharson, for the Crown, identified the appropriate aggravating factors:

- a. The Appellant was a licensed firearm holder, having been entrusted with the responsibility of handling a lethal barrelled weapon [and breached that trust];
- b. He is known to have [drunk] excessively based on the community [report] which was alluded to during the sentencing. On the night in question, he was intoxicated;
- c. There was a loss of life of a citizen who was operating her establishment at the material time."

Those factors would add a further five years to the sentence.

[19] The mitigating factors are based on the very good social enquiry report that Mr Lewis received. The report revealed that:

- a. he had no previous convictions;
- b. the community spoke well of him;
- c. he was hard-working and gainfully employed; and

- d. the deceased's family did not wish to see him incarcerated.

Those factors would reduce the sentence by three years.

[20] The resultant figure of 12 years would be subject to the appropriate discount. A maximum of 50% is allowable, and when applied, amounts to a sentence of six years.

[21] The next question is whether that sentence would "shock the public conscience". That is a term used in section 42H of the Criminal Justice Administration Act, which states, in part:

"Pursuant to the provisions of this Part, in determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made by a defendant within a particular period referred to in 42D(2) and 42E(2), the Court shall have regard to the following factors namely—

- (a) whether the reduction of the sentence of the defendant would be disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;

..."

[22] Given the circumstances of the killing, and taking into account the relationship between Ms Campbell and Mr Lewis, and the fact that her family was asking that he not be incarcerated, the sentence of six years' imprisonment is not one that would "shock the public conscience". A non-custodial sentence or a period of three years incarceration, as suggested by Ms Reid, would, however, "shock the public conscience".

[23] From the figure of six years, must be deducted the period of eight months that Mr Lewis spent on remand before being released on bail. The sentence that should be imposed is five years and four months' imprisonment at hard labour.

Summary and conclusion

[24] Although the judge had the Sentencing Guidelines and the guidance from the well known judgment of **Meisha Clement** [2016] JMCA Crim 16, to assist him, he did not follow them. Accordingly, although he did take into account Mr Lewis' plea of guilt and his favourable social enquiry report, the judge erred in failing to identify:

- a. the appropriate range of sentence for the type of case; and
- b. an appropriate starting point.

As a result, he arrived at a sentence that, based on an application of the Sentencing Guidelines, is manifestly excessive.

[25] Accordingly, the orders are:

1. The appeal against sentence is allowed and the sentence imposed by the learned sentencing judge is set aside.
2. A sentence of five years and four months' imprisonment at hard labour is substituted therefor.
3. The sentence is to be reckoned as having commenced on 23 March 2018.