[2019] JMCA Crim 35

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 44/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA

LINCOLN MCKOY v R

Miss Gillian Burgess for the applicant

Orrett Brown and Mrs Nickesha Young Shand for the Crown

15 and 16 October 2019

MCDONALD-BISHOP JA

[1] This is a renewed application for leave to appeal conviction and sentence, brought by Mr Lincoln McKoy ("the applicant").

[2] On divers days between 4 and 13 April 2016, the applicant was tried before Hibbert J, sitting with a jury, in the Home Circuit Court, for the offence of murder. The particulars of offence on the single-count indictment, on which the applicant was charged, were that on 14 August 2013, in the parish of Portland, he murdered Jessica King (“the deceased”).

[3] The jury returned a unanimous verdict of guilty and, on 6 May 2016, the applicant was sentenced to life imprisonment with the stipulation that he is to serve a minimum period of imprisonment of 25 years before being eligible for parole.

[4] The applicant filed an application for leave to appeal his conviction and sentence. He sought to rely on two grounds of appeal. They are:

> "(a) The Learned Trial Judge erred in that he allowed the statement of Alecia Brown to be tendered into evidence unfairly.
>
> (b) The learned Trial Judge erred in that he unreasonable [sic] left out the weaknesses of the prosecution case and strength of the defence case in his summing up to the jury."

[5] The application for leave to appeal was considered and refused by a single judge of this court. In the opinion of the single judge, the learned trial judge did a proper assessment of the relevant conditions that had to be satisfied in relation to the admissibility of the statement of Alecia Brown and he properly dealt with the weaknesses in the evidence of the prosecution and put the applicant's defence fairly to the jury. She opined that there was strong and cogent evidence against the applicant to support the conviction, and so, there was no proper basis for granting leave to appeal against conviction.

[6] In relation to sentence, the applicant had filed no ground of appeal although he sought leave to appeal sentence. The single judge, however, considered the learned trial judge's reasoning in arriving at the sentence imposed and found no basis on which this court could properly disturb the sentence.

[7] The applicant sought to renew his application for leave to appeal before this court as he is entitled to do.

The hearing of the application for leave to appeal

[8] At the hearing of the application before this court, counsel for the applicant, Miss Gillian Burgess, candidly conceded, and rightly so, that there is nothing that she could urge on this court to advance the grounds of appeal filed by the applicant challenging his conviction. She, however, sought and obtained the leave of the court to argue a supplemental ground of appeal in relation to sentence, which was omitted from the original application for leave to appeal that was considered by the single judge.

[9] The supplemental ground as formulated by the court, based on counsel's submissions, is that the failure of the learned trial judge to take into account as a mitigating factor, the applicant's mental state at the time of the commission of the offence, has rendered the sentence manifestly excessive.

The background

[10] The case mounted by the prosecution against the applicant, which was accepted by the jury, was as follows.

[11] On or around 14 August 2013, the applicant was a serving member of the Jamaica Constabulary Force ("the JCF"). He was stationed at the Buff Bay Police Station in the parish of Portland.

[12] Between the years 2011 and 2013, the applicant was involved in a common law relationship with the deceased. They shared residence at various addresses in the parish of Portland. Sometime in or around August 2013, the deceased moved out of the house she shared with the applicant and returned to reside at her mother's house in Milibank in the parish of Portland. On one occasion, shortly after the deceased moved out, the applicant visited her at her mother's house and tried to speak to her. The deceased's mother recounted that the deceased refused to speak to the applicant and locked herself away from him.

[13] On 14 August 2013, at sometime before 2:00 pm, the applicant spoke to the mother of the deceased by telephone and told her that he was at work and "could not function". The applicant wanted her to talk to the deceased for him. She promised him that she would.

[14] A witness for the Crown, Mr Carlton Thyme, stated that shortly at about 6:00 pm on that same day, he was at the Errol Flynn Marina in Port Antonio seated under a gazebo. He was a soldier on duty at the marina. Whilst there, he observed a man and a woman enter the marina. They sat on some rocks talking for about 10 minutes. They then started to argue, during the course of which, they both stood up from where they were seated. He then heard two gunshot explosions coming from the direction in which the man and the woman were standing. He saw them remain standing after those explosions. He then heard a second set of two explosions and he observed the woman fall. He then heard another explosion and he saw the man fall in the same direction that the woman had fallen. The man got up and took what appeared to be a handgun and put it to his head.

Mr Thyme said that he then heard another explosion and he noticed the man fall on top of the woman. He said that apart from this man, he saw no one else with a firearm in the marina at the time. He did not know the man or the woman before that day.

[15] The Crown relied on the evidence of a second civilian witness, Miss Alecia Brown, whose statement was tendered and admitted into evidence under section 31D(c) of the Evidence Act, and which is the subject matter of the complaint in ground one. Her evidence was to this effect, in summary. She saw a man and a woman, whom she did not know before, sitting on stones at the marina. She was walking slowly towards her car and when she was about three feet away from them, she saw the man holding a black handgun, resembling those that police take around in their waistband. The gun was in his right hand and it was pointed in the woman's face. The woman was begging for her life saying, "no Lincoln, no Lincoln, nuh do it. You ago kill mi? si the woman a pass deh suh*". The woman was making gestures and was pleading to the man not to kill her. At the time, the woman was almost on bended knees (crouching and going up and down) trying to touch the man with the gun and pleading for her life. The woman seemed to be fearful and terrified.

[16] The witness said she felt very scared because this was the first person she was seeing with a gun in those circumstances and because the woman was begging for her life. It was at that point that she decided to run. She then heard an explosion and saw the man standing and holding a gun in his outstretched hand. She said she was traumatized and she started running fast. Afterwards, she went back to the scene where she observed the man who had the gun lying on top of the woman with whom he was

talking. She saw police personnel come on the scene, take up the man and put him in a car. She also observed that the police took up a gun, where the applicant and the woman were lying.

[17] Police personnel attached to the Marine Police Station in Port Antonio, which was in close proximity to the marina, also gave evidence. They testified that upon their arrival on the scene, the man, who was subsequently identified by one of their members to be the applicant, was found suffering from gunshot wounds to his head and was lying down on a woman, who was later identified to be the deceased. The service firearm assigned to the applicant was found underneath his body. The applicant and the deceased were removed from the scene by the police and taken to the Port Antonio Hospital.

Defence

[18] The applicant gave sworn evidence at the trial, denying involvement in the killing of the deceased. He stated, in summary, that he was at the Errol Flynn Marina with the deceased. While they were there sitting and talking, the deceased was facing the main gate and his back was turned to it. He heard the deceased call out his name loudly saying, "Lincoln" and immediately he felt someone shove him in the back of his head. It was a hard shove, the force of which caused him to fall forward. While he was falling, he felt someone disarm him of his firearm and he heard two explosions. He tried to scramble to his feet and look around. The next thing he knew was that he woke up at the hospital suffering from gunshot injuries with bandages on his face and forehead.

[19] The applicant stated that he had “a very good relationship” with the deceased from 22 September 2008 until 14 August 2013, the date of the incident.

Ground one

[20] The contention of the applicant in challenging his conviction in ground of appeal one is that the learned trial judge erred in unfairly allowing the statement of Alecia Brown to be tendered into evidence.

[21] The admissibility of the witness statement of Alecia Brown was a question of law, which would have turned on some questions of fact to satisfy the learned trial judge that the conditions for admissibility of the statement were satisfied in accordance with the Evidence Act.

[22] The prosecution’s application for the witness statement to be tendered was made pursuant to section 31D(c) of the Evidence Act. That is to say, that the witness was outside of Jamaica and it was not reasonably practicable to secure her attendance.

[23] The learned trial judge, having heard the evidence concerning the witness' unavailability to attend court to testify, correctly applied the relevant law and found that the conditions were satisfied.

[24] His ruling on the admissibility of the statement is unimpeachable and the statement was rightly admitted into evidence.

[25] Having admitted the statement into evidence, the learned trial judge, repeatedly, explained to the jury that they had not had the opportunity to see the witness and to

hear her give evidence on oath. He advised them that the evidence had not been tested by cross-examination and that they were deprived of the opportunity to assess the witness. He also highlighted discrepancies between her statement and that of the other civilian witness, Mr Thyme. The learned trial judge instructed the jury to carefully examine the evidence in order to determine her credibility, which was, as he told them, a matter for them.

[26] We find that the learned trial judge gave the jury accurate and adequate directions in law as to how to treat with the evidence of the absent witness. His directions cannot be faulted. Ground one is completely without merit.

Ground two

[27] In relation to ground two, the applicant contends that the learned trial judge erred in that he unreasonably left out the "weaknesses of the prosecution's case and the strengths of the defence['s] case" in his directions to the jury.

[28] We find that the learned trial judge gave the jury all the necessary directions in law pertaining to the reliability and credibility of the evidence presented by the prosecution. He directed the jury's attention to discrepancies and inconsistencies and how they are to be treated, giving them not only the correct directions in law but the necessary assistance in identifying, what he viewed, as the significant contradictions in the evidence. It is not fair to say that the learned trial judge left out the weaknesses in the prosecution's case in directing the jury.

[29] In relation to the applicant’s evidence, the learned trial judge made it clear to the jury, repeatedly, that the applicant had no burden cast on him by law to prove his innocence but that the burden to prove the case against him rested on the prosecution. The learned trial judge noted to the jury, to the applicant's credit, that:

> "...Bearing in mind [the applicant] does not have to prove anything. He could stay where he was and say nothing at all. And he could remain where he was without taking an oath and tell the court his version of the events, in which case he could not be asked any questions, he could not be cross-examined. Or the other option, which is the one he exercised that he went into the witness box, took the oath, gave his evidence on oath and subjected himself to cross-examination.
>
> Now, please bear in mind what I told you earlier yesterday that even when he does that he is not undertaking any duty to prove his innocence, the duty for proof of his guilt still remains with the prosecution. And even if you don't believe him, you can not [sic] because you don't believe him, by that alone say he is guilty of the offence. You would have to look at all the evidence, in particular, that which is put forward by the prosecution and to see whether or not on the basis of the evidence put forward by the prosecution you say that you feel sure that he committed the offence and only then, you can return a verdict adverse against him."

[30] The learned trial judge instructed the jury, as he was obliged to do, that even if they did not believe the applicant, that did not mean that he was guilty. They would have had to look at all the evidence, in particular, that put forward by the prosecution, in determining whether they were satisfied to the extent that they felt sure, of the applicant's guilt. The applicant was also the beneficiary of a full good character direction, which would have enured to his benefit.

[31] The applicant's case was put squarely and fairly to the jury by the learned trial judge with proper guidance in law on how to treat with it. The learned trial judge cannot, therefore, be faulted in his treatment of the case for the applicant.

[32] Ground two also fails.

Conclusion on leave to appeal conviction

[33] The learned trial judge's directions to the jury are unassailable. We accept the submissions made on behalf of the prosecution by Mr Orrett Brown, and endorse the ruling of the single judge, that there is no proper basis on which the conviction can be disturbed.

[34] The application for leave to appeal conviction must, inevitably, be refused.

Supplemental ground of appeal

[35] In his supplemental ground in relation to sentence, the complaint of the applicant is that the learned trial judge failed to take into account, as a mitigating factor, his mental state at the time of the commission of the offence.

[36] The transcript reveals that the learned trial judge, in sentencing the applicant, took into account the circumstances of the commission of the offence, including the fact that he shot the deceased twice, at close range, to the throat and in the forehead. He noted that the applicant did it in the view of a passerby, while the deceased was pleading for her life. He took into account the applicant's background and that he had spent three

years in custody prior to trial. He gave a discount for the period the applicant was in custody, albeit that he did not indicate the exact time which he took into account.

[37] Miss Burgess, while accepting that the sentence imposed on the applicant is within the usual range of sentences for an offence of this nature, noted, however, that the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ("the Sentencing Guidelines") contain a specific requirement for a sentencing judge to consider the mental state of an offender as a mitigating factor. She accepts that in this case, there is no diagnosis on record of any mental state of the applicant. Nevertheless, she argued that his mental state is a relevant consideration in sentencing, which was not taken into account as a mitigating factor by the learned trial judge.

[38] In seeking to establish the relevance of what she described as the mental impairment of the applicant, counsel referred to the evidence of the prosecution of the behaviour of the applicant when he visited the deceased a few days before the incident at her mother's house and his refusal to leave, when the deceased locked herself away and refused to see him. She also relied on the evidence of the deceased's mother that the applicant had asked her to speak to the deceased for him because he could not eat, sleep or concentrate without her.

[39] This contention of counsel that the applicant's mental state must be taken into account as a mitigating factor is not accepted. While there may be cases where the mental condition of an offender may properly be treated as a mitigating feature, this is, certainly,

not such a case. There was no evidence led at the trial by the prosecution or, more importantly, by the defence, pointing to mental impairment on the part of the applicant that would serve to justify his clear evil intent to harm the deceased at the material time, which was on 14 August 2013, the time of the fatal shooting.

[40] Interestingly, the applicant himself did not accept at the trial that he did the acts alleged by the prosecution and on which he now seeks to rely to ground mental impairment. For instance, upon cross-examination, he denied going to the deceased mother's house and demanding to see the deceased who refused to see him. Above all, he denied that the deceased had left him. He gave evidence that while they were at the marina, sitting and talking, the deceased agreed that he would move in to live with her at her mother's house. It was after that agreement was arrived at, he said, that he was attacked from behind by the person who proceeded to disarm him. He maintained that he had a "very good relationship" with the deceased up to the time of her death.

[41] There was absolutely no evidential basis for this issue of mental impairment, raised by counsel, to have been considered by the learned trial judge in sentencing the applicant. Mental impairment in mitigation of sentence simply did not (and still does not) arise as a relevant consideration in the circumstances of this case. As will be demonstrated shortly, in treating with the issue of whether the sentence is manifestly excessive, this court has had regard to the fact that the commission of the offence arose from domestic circumstances. Therefore, no further allowance can be made for any emotional state of the applicant, which counsel alleges had given rise to mental impairment, in the absence of medical evidence establishing that fact.

[42] The supplemental ground challenging the sentence as being manifestly excessive because of the alleged mental impairment of the applicant also fails.

Determining the sentence

[43] We note that the learned trial judge did not expressly set out the methodology in sentencing that the court now routinely employs by choosing a range of sentences, a starting point and by making the necessary adjustments for aggravating and mitigating factors through the application of an acceptable mathematical formula. There is, therefore, no demonstration of how he had arrived at the sentence imposed. For this reason, the court cannot hold, without more, that the learned trial judge did not err in principle in sentencing the applicant. It, therefore, falls on this court to determine the appropriate sentence that ought to have been imposed after an application of the relevant principles.

[44] Having taken into account several relevant authorities from this court, relative to sentencing for the offence of murder after a trial in a case of this nature, the broad range of the minimum period of imprisonment to be served before parole, following a sentence of life imprisonment, is accepted to fall from anywhere between 20 and 40 years' imprisonment.

[45] The statutory minimum period to be stipulated for parole for the offence of murder, when life imprisonment is imposed, is 15 years. This is often times used as a helpful point of reference in determining an appropriate starting point for this offence and so 15 years is treated as the minimum that a starting point should be in this case.

[46] In setting the appropriate starting point, bearing in mind the range of sentences for murder in circumstances such as these and the minimum of 15 years fixed by statute, when life imprisonment is imposed, the following features have been taken into account:

a) the circumstances of the commission of this offence, to include the fact that it had its genesis in domestic circumstances with an apparent motive for the killing;

b) the use of a firearm;

c) the action resulting in death was committed on a defenceless victim who was pleading for her life; and

d) the nature and extent of the injuries inflicted.

[47] These matters would justify a starting point of no less than 23 years.

[48] In terms of aggravating features, the following are relevant considerations, which would lead to an upward adjustment of the sentence from the starting point of 23 years:

a) the applicant was a police officer sworn to serve and protect, which rendered the commission of the offence a betrayal of trust;

b) he used the firearm assigned to him for the execution of his duties as a policeman to commit the offence;

c) the time and place of the commission of the offence, which includes the fact that it was in a public space, in the view of members of the

public and security personnel on duty in the marina and within close proximity to the police station; and

d) premeditation.

[49] In terms of mitigating features, the court will have regard to his previous good character and positive antecedent, which would result in a downward adjustment of the sentence.

[50] The aggravating features, however, are such as to substantially outweigh the mitigating effect of his previous good character (which he was expected to have, in any event, by virtue of his position as a serving member of the JCF). The force of his previous good character is substantially reduced, if not completely wiped out, by the egregious nature of the killing and the pressing weight of the aggravating factors.

[51] Taking into account and balancing the aggravating and mitigating factors, a minimum period for parole in the circumstances of this case and of the offender could justifiably have been, anywhere, between 28 to 30 years.

[52] He would have had to be credited time for pre-trial remand, which would lead to a deduction of three years from the sentence that ought properly to be imposed.

[53] It means, therefore, that a minimum period of parole in the region of 25 to 27 years' imprisonment would be proportionate and commensurate with the crime, taking into account credit to be given for the time spent on pre-trial remand.

[54] The learned trial judge stipulated a minimum of 25 years' imprisonment before parole, even though he did not demonstrably conduct the requisite analysis of the relevant principles of law and apply the accepted mathematical formula. He had taken into account, as a matter, which would have resulted in a reduction in the sentence, the time spent in custody before trial. He did not, however, indicate the extent of the credit given for pre-trial remand. Despite this, it cannot reasonably be said that the sentence he imposed is manifestly excessive to warrant the intervention of this court. It is well within the established range of sentences for murder committed in these circumstances.

[55] Accordingly, the application for leave to appeal sentence must also be refused.

[56] The court orders that:

i) The application for leave to appeal conviction and sentence is refused.

ii) The sentence is to be reckoned as having commenced on 6 May 2016.