[2016] JMCA Crim 27

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA IN THE PARISH OF HANOVER

SUPREME COURT CRIMINAL APPEAL NO 3/2011

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA

GLENROY MITCHELL v R

Ronald Paris for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions for the Crown

9, 10 December 2015 and 22 July 2016

PHILLIPS JA

[1] On 18 November 2010, the applicant pleaded guilty in the Circuit Court for the parish of Clarendon before Pusey J, on an indictment containing one count of murder, the particulars of which were that on 27 March 2008 he had murdered Indira Coleman in that parish. He was 25 years of age (at the time of sentencing) and was represented by counsel, Mr George Clue. In answer to a query from the court, the applicant stated that he was taking responsibility for "wrongly killing" Miss Coleman. The matter was adjourned to 3 December 2010, for the production of the Social Enquiry Report (SER), the antecedent report and for sentencing.

[2] On 15 December 2010, the applicant was present with his counsel, Mr Clue in court. The transcript of the proceedings in respect of that day's hearing disclosed that the above reports had been submitted to the court, and the learned judge had also in the interim, been provided with two reports from consultant psychiatrists relating to the applicant. One of the reports dated, 25 October 2010, had indicated that the applicant was not fit to plead, and the judge stated that as a result the plea of guilt had been withdrawn. However, the later report dated 15 November 2010, stated that the applicant was fit to plead and consequently the plea had been accepted.

[3] At the hearing Crown Counsel presented the facts on behalf of the prosecution. The antecedent report was tendered through the evidence of Dale Julius, Detective Corporal of Police, stationed at the May Pen Police Station in the parish of Clarendon. The SER was taken as being part of the record. Counsel for the applicant made a plea in mitigation on his behalf, and the learned judge at the conclusion of the hearing sentenced the applicant to 25 years imprisonment at hard labour. In his application for leave to appeal dated 30 December 2010 (Criminal Form B1), the applicant gave notice of his desire to appeal against both his conviction and sentence on the following grounds:

> "1. **Unfair Trial:-** That although the facts were presented to the Learned Trial judge about me been [sic] forced to plea Guilty to the Murder, the Judge did not tamper [sic] justice with mercy as reflected by the excessive nature of the sentence.
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> B. That the Sentence is harsh and excessice [sic] and cannot be justified when all the circumstances are taken into consideration.

C. **Miscarriage of Justice:-** That I was wrongly convicted for a crime I did not commit, but was force [sic] by an Area Leader to own such act."

[4] On 31 May 2015, a single judge of this court refused leave to appeal conviction and sentence.

[5] On 9 and 10 December 2015, this matter was heard in the Court of Appeal on circuit, in Lucea, in the parish of Hanover. The court made the following order:

> "Application to appeal against conviction and sentence refused. The sentence is to be reckoned as having commenced on 15 December 2010."

We promised then to put our reasons in writing in due course. These are the promised reasons and we apologise for the delay in providing the same.

[6] Based on the manner in which this matter unfolded, it may be useful to set out the details of what transpired when the matter came before the court on 18 November 2010, before Pusey J. Crown Counsel stated the allegations as follows:

> "... on Thursday, the 27th day of March, 2008, at about 2:30 in the morning, the police received information that gunshots were being fired in the Savannah Cross District, in Clarendon. Constable Dave Lindsay went to the scene, where he discovered the body of a man lying in the yard with blood all over his body, with gunshot wound to his head. The body appeared to be that of a dead man.
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> He entered the dwelling house--- the same officer-- m 'Lord, which he noticed was ransacked. He noticed another body, that of a female, slumped over a bed. She was moving slightly. The officer then saw a little boy, about eight or nine years old, who told him that they had killed his mother and stepfather. Constable Lindsay rolled over the female and found a two year-old girl under the female's body. She, too,

> was covered in blood. The officer took both children to the service vehicle parked outside and the boy told him that, 'A four boy do it and me know the four of them. One name Flicker, one name Kid, one name King and the other name Ricky.'... 'The whole a dem and me mother used to be friends. Me all know weh dem live down a Hunts Bay and New Bowens.'"

[7] Crown Counsel also informed the court that the scene had been later processed by the Scenes of Crime Unit and on 2 April 2008, at the post mortem examination the body of the female taken from the scene, Ms Indira Coleman (otherwise called Serena), had been identified by her sister Suzette Blair. The cause of death was stated to be laceration to the brain due to gunshot wounds. On 30 March 2008, gun samples had been collected and handed over to the police.

[8] Crown Counsel informed the court that the applicant had given a cautioned statement in which it was stated that:

> "...he was approached by Kid and Flicker to go and collect money in Savannah. Kid told another man that they were going to rob somewhere. They went to the house of the deceased, kicked off the door and he, Mr. Mitchell, asked Coleman, the deceased, for money and she told him she had none. He was ordered by Kid to kill her and he went and shot her in her head. It was when he was leaving the scene, m'Lord, that he saw the body of the other deceased mentioned earlier. He was arrested and charged for the offence of murder. There is no indication, m'Lord, that he made any further statement when he was cautioned."

[9] The transcript revealed that after the statement of facts for the prosecution had been read out by Crown Counsel, the following exchange took place between the learned judge and counsel for the applicant:

> "HIS LORDSHIP: You are satisfied with that Mr. Clue, there is nothing else to add?
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> MR CLUE: I want her to add that there was a Question and Answer in which a number of questions were posed to him and he gave certain responses, M'Lord, in relation to Question 42.
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> HIS LORDSHIP: Maybe you can deal with them in the Plea in Mitigation
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> HIS LORDSHIP: Very well. Go ahead. Go ahead and swear."

The reports

[10] The antecedent report was tendered as indicated previously through Detective Corporal Julius. In summary, he stated that the applicant was born in the Leicesterfield District in the parish of Clarendon on 28 November 1985. He grew up with his parents in John's Hall District in Clarendon and had attended John's Hall Basic and All-Age Schools. However, due to financial difficulties, he had dropped out of school at 16 years of age. He was illiterate. After leaving school, he commenced farming, earning $3,000.00 and $7,000.00 weekly, while simultaneously learning the mason trade with one Mr Frank on construction sites where he earned $5,000.00 per fortnight. He was thus engaged at the time of his arrest. The applicant was single, had no dependents, and there were no previous convictions recorded against him.

[11] In the SER dated 29 November 2010, details of the applicant's siblings were stated. His educational and work background were also set out. The report revealed that he had resided in an unfinished three bedroom concrete structure with detached sanitary and kitchen facilities. Additionally, he had developed a mental condition since being incarcerated, but there was no mental health history in his family ancestry. He

appeared to have a cordial relationship with his siblings and family members generally. Unfortunately, his mother died in 2000 due to asthma, and his father was reportedly in prison.

[12] In the applicant's community, several members spoke well of him and stated that he was a hardworking individual who tried to do various jobs occasionally, such as gardening and helping persons to "cut their yards and any other odd jobs". However, he was described as an ardent ganja smoker which made some persons question his mental capacity, as he had been seen talking and laughing to himself, and even lying along the roadside. He was not seen as a troublemaker, although his behavioural patterns had seemed to change as he grew older, developing certain anti-social tendencies, and he had begun to associate with persons who had a negative influence on him.

[13] In making their assessment and recommendation, the probation officers were concerned about the premature end to his educational pursuits leaving him illiterate; the impact of the death of his mother and his father's incarceration on him; and the negative influences in his life. They concluded, having examined all of the foregoing, as follows:

> "...[the applicant] is the product of an environment characterised by financial hardship which has seemingly caused instability in the different aspects of his life. Furthermore, it appears that his childhood was aborted due to those different obstacles and now as an adult he still struggles and the presence of negative influences further compounds his current situation."

[14] Of greater significance to the application before the court, was the further "partial" SER, of the same date, which recounted the interview with the applicant at the Horizon Adult Remand and Correctional Centre. He was described as being polite, respectful and timid in his behaviour. His answers to questions posed to him produced the following account of the incident which had taken place on 27 March 2008, and in respect of which he had pleaded guilty on 18 November 2010. It was noted that the applicant had said that:

> "...on the night of the incident, he was at his home when a man by the name of 'Markel' came to him and asked him if he could accompany him to a 'dance'. He explained that he knew Markel from the community and noted that same had bought him a drink at a shop in the community about a month before that night. Mr. Mitchell asserted that he agreed to accompany Markel and they left shortly after his invitation in a car driven by Markel. He disclosed that Markel did not indicate the destination of the dance, but stated his intention of making a stop in Savannah, Clarendon to visit his girlfriend.
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> Mr Mitchell explained that Markel stopped in front of a gate before a house, and as he alighted from the vehicle, he remarked that his girlfriend (Ms. Coleman) appeared to be taking him for a fool and drew a gun from his waistband. He stated that after Markel entered the house, he heard several gun shots. He shared that at that point he wanted to run from the vehicle but he was afraid that he would have been killed too. Additionally, he noted that Savannah was long [sic] way from his home, and he feared that he would have a difficulty reaching home. According to him, as Markel approached the vehicle he (Markel) asserted that if he (Mr. Mitchell) told anyone about what had happened, he would kill him as well.
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> Mr. Mitchell informed that they did not continue to the dance as scheduled, but went back home. During the drive home, [the applicant] stated that Markel related to him that he and Ms. Coleman were intimately involved, but since her

> boyfriend returned from a foreign country she had been reacting differently towards him; this is the reason for him killing both Ms. Coleman and her boyfriend. Mr. Mitchell said that it was at that point that he ascertained that the deceased's boyfriend was also murdered. He noted that Markel dropped him back home, and warned him not to say anything about the incident.
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> Mr. Mitchell indicated, whilst crying, that he had no idea that Markel was a gunman and stated that he did not know that it was Markel's intention to kill anyone that night. He also divulged that he knew Ms. Coleman prior to the incident, as she too resided in Hunts Pen, Clarendon and often bought calaloo from him. He noted also that he is worried about his future as he not only pleaded guilty to the offence, but told the police that he had committed same after his arrest. He informed that after learning what his fate might be and that Markel is now deceased, he decided to speak freely about the incident."

The plea in mitigation

[15] Counsel for the applicant, Mr Clue, made his plea in mitigation. He firstly recognised that the offence in respect of which the applicant had been charged was a very serious one, but pointed out to the court that to his credit, the applicant had very soon after having been taken into custody informed the police of his involvement in what had transpired. He had not wasted precious judicial time by going to trial. Counsel submitted that having had the opportunity of reviewing the answers given by the applicant in the 'Question and Answers' (Q & A) interview, he had formed the view that something was wrong with the applicant's mind. He had, he said, as a consequence spoken with a member of his family who indicated that they were unaware of him having any medical problems, but, they were of the view that he was easily led. Counsel confirmed that in the first psychiatric report, dated 25 October 2010, the

applicant was said to have mild mental retardation, which would, he submitted, underpin his family's assessment of him as being capable of being easily led.

[16] Counsel submitted further that the applicant was petrified, as he did not want others to know, that he had acknowledged that he had taken part with others, who had been named in this criminal activity. Counsel also noted that the applicant was wary of giving any information to the State as he was afraid. Counsel remarked that he hoped that the applicant would endeavour "to speak out" and assist in the ends of justice. Although, counsel recognised, it was unfortunate that one was forced to acknowledge that the State was not always able to protect persons in custody, counsel stated that the applicant had recognised that he would receive a sentence of incarceration.

[17] Interestingly though, counsel commented that "...I don't see any remorse in the Social Enquiry Report on his part, what I saw he is trying to find another way to explain how the incident unfolded". Counsel described the applicant as a coward, being unable, he said, to say to persons "I am not going to participate". He condemned those who are stronger than others, and do not hesitate to take advantage of those who are weak, and can be easily led astray.

[18] Finally, counsel pleaded for mercy for the applicant, in that, he was still a young man and not beyond redemption. He asked that wherever the applicant was placed to serve his period of imprisonment, that he be afforded psychiatric assistance.

The sentence

[19] The learned judge indicated that he had read and listened with interest to the SER and the antecedent report, and had taken particular note of the fact that the applicant had no previous convictions, and that he had pleaded guilty in what was a very serious case. He indicated that that must be weighed in the balance with the fact that a life had been lost by the use of the gun, and Ms Coleman had lost her life with her children nearby, which was a rather gruesome situation. Having considered all things relating to the applicant and the circumstances of the offence, the learned judge decided not to sentence the applicant to life imprisonment, but to give him a reduced sentence based on the fact, particularly, that he had pleaded guilty. He therefore sentenced him to 25 years imprisonment at hard labour.

The appeal

[20] Counsel for the applicant on appeal, Mr Ronald Paris, drew the court's attention to the fact that in the first psychiatric report, the consultant had opined that the applicant suffered from mild mental retardation and that had informed the withdrawal of the applicant's original guilty plea. It was the second report, counsel urged, which had allowed the judge to accept the second plea of guilty by the applicant. Counsel then submitted that the facts outlined by the prosecution "failed to meet the standard required to establish a case for the acceptance of the [applicant's] guilty plea by the judge".

[21] Counsel argued that there were no facts disclosed with regard to the applicant's identification, other than the alias given by the deceased's eight year old son. There

was also no indication whether a statement had been taken from him, and if he had named four men as the attackers, whether he had at any point, identified the applicant as being one of them.

[22] With regard to the admissibility of the cautioned statement, there was no evidence, counsel argued, as to whether the applicant had mental challenges, at the time the statement was given, or, for instance, that he may have suffered from the said mild mental retardation as the consultant psychiatrist's report had indicated and how that could have affected the admissibility of the statement. Additionally, in any event, there was no information with regard to the provenance of the cautioned statement and how it came to be made.

[23] Mr Paris pointed out that Mr Clue, counsel for the applicant before Pusey J, had referred to the applicant's answers to the questions posed by the police in the Q & A interview as they had not been disclosed by counsel for the prosecution, and queried what was the effect, if any, of those answers by the applicant on the facts presented by the prosecution. As, he said, it was those facts which were the basis of the prosecution's case against the applicant, and for the learned judge's acceptance of the guilty plea.

[24] Unfortunately, Mr Paris complained, defence counsel in the court below had not taken advantage of the judge's suggestion to deal with the answers in the Q & A interview, in the plea in mitigation. Additionally, the judge, he said, had not reminded counsel of his duty to do so, and so the learned judge had deprived himself of the

opportunity to hear whether the applicant had a version of the facts which was at variance with the Crown's case, so as to render it necessary for the court to hear evidence in keeping with the principle set out in **R v Newton** (1982) 77 Cr App Rep. Counsel submitted that the applicant's version of the facts was different from that of the prosecution, and the court should have recognised it as such, and a hearing taken place to ascertain the basis on which the guilty plea was being accepted, which ought to have been his version of events.

[25] The learned Director of Public Prosecutions submitted in response that, once the prosecutor had outlined the facts, and the material referred to had been disclosed to the defence, it was the duty of defence counsel, who is the custodian of the instructions from the client, to indicate to the court that the facts of the case in respect of the defence are different from those being presented by the prosecution, and to place the defendant's version before the court at that time.

[26] It was clear from the transcript, she submitted, that Mr Clue had the SER in his possession. His conduct in the court below would have led to the assumption that he had accepted the version of facts stated by the Crown. One also has to assume, the learned Director submitted, that defence counsel was familiar with the ingredients of the offence of murder. Defence counsel was also the best person to be able to inform the court concerning the applicant's mental state with regard to his ability to plead to the offence, and the impact that condition could have had on his giving a cautioned statement to the police, which said that it was he who had shot Ms Coleman in the head, as instructed.

Discussion and analysis

[27] There is no question that it is of crucial importance for there to be sufficient and accurate facts before the court in order for it to pass sentence. Sometimes, even at the end of a carefully controlled trial, certain matters relative to the sentencing have not been fully dealt with. In circumstances where the defendant pleads guilty, more difficulties may arise, particularly where the prosecution may rely on certain facts and the defendant may advance a completely different version. And if that occurs, the sentencer must resolve the issue before passing sentence.

[28] The procedure which must be followed where conflicting versions of the facts of the offence have been put forward by the prosecution and the defence was considered by Lord Lane CJ in **R v Newton**. In Archbold: Pleading, Evidence and Practice in Criminal Cases, 1992, volume 1, the ruling of the Learned Chief Justice is set out at paragraph 5-41 as follows:

> "Lord Lane C.J. said that there were three ways in which a judge in these circumstances can approach his difficult task of sentencing. In some cases it was possible to obtain an answer from a jury, where the different versions could be reflected in different charges in the indictment. The second method is for the judge 'himself to hear the evidence on one side and another, and come to his own conclusion, acting so to speak as his own jury on the issue which is the root of the problem.' The third possibility is for the judge to hear no evidence, but to listen to the submissions of counsel; but if this course is adopted, 'if there is a substantial conflict between the two sides, he must come down on the side of the defendant... the version of the defendant must so far as possible be accepted."

[29] It is always a matter for the court to decide whether the issue is one to be tried and on which the court should hear evidence (**R v Smith** (1986) 8 Cr App R (S) 169), and if a "Newton hearing" takes place the evidence must be called in the normal way by counsel, and of course the judge should direct himself according to the normal criminal burden of proof. If the defendant's account is disbelieved, the sentencing judge can withhold the discount which the defendant would normally receive in recognition of his plea of guilt.

[30] In Archbold, the author mentions that although there are cases where there are disputes as to the facts, the "Newton hearing" is not necessary, for instance where:

> (i) the difference in the two versions is immaterial to the sentence, and the same sentence would have been passed regardless of how the issue was determined;
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> (ii) the version put forward by the defendant can be described as "manifestly false"; and
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> (iii) matters put forward by the defence did not amount to contradiction of the prosecution's case, but rather to extraneous mitigation explaining the background of the offence or other circumstances which may lessen the sentence.

[31] However, with the greatest of respect to counsel for the defence, Mr Paris, who attempted to rely on a "Newton hearing" being relevant to the determination of this

appeal, in our view, **R v Newton** is inapplicable to the case at bar. We will set out below our reasons for saying this.

[32] The prosecution opened to the facts of the case on 18 November 2010. The applicant was present and represented by counsel who was also present. There was no objection to the facts as stated. There was no indication that anything that had been said was inaccurate, or that the applicant had a different version of facts to place before the court. In fact, to the contrary, as indicated in paragraph [10] herein, the learned judge asked counsel for the defence if he was satisfied with the facts as presented, and whether he had anything that he wished to add. In response, counsel vaguely referred to an answer to question 42 of the Q & A interview, which had been participated in by the applicant. Having been encouraged by the learned judge to refer to and rely on that answer, if thought necessary, in the submissions relating to mitigation in respect of the sentence to be imposed, no more was said about it. So, the answer remains a mystery, and one can only assume that counsel thought better about mentioning it, or simply forgot about it. But, in either case, it was not before the court and so could not be dealt with in any way by the learned judge. We agree with the learned Director that it is counsel for the defence who is presumed to know his client's case, and who must object to the facts presented by the prosecution or state his version of the facts. It is only then, in our view, once the different versions are disclosed, that the issue of a "Newton hearing" could arise, and counsel could then have requested the learned judge to adopt the approach, as set out by Lord Lane in that case.

[33] Contrary to that approach however, counsel for the defence in the court below, Mr Clue, from a perusal of the transcript of the proceedings, as set out herein, demonstrated that he was aware of the facts outlined by the prosecution, and it appeared that those were the facts with which he was also familiar. In fact, he made the comment that the applicant had not shown any remorse, based on the information provided in the SER, but appeared to be endeavouring to find another way to explain how the incident had unfolded.

[34] Mr Clue also addressed the issue of the unwillingness of the applicant to "speak up", which he said may be due to the applicant being fearful, even though incarcerated in prison. He called him a coward for failing to refuse to participate in the heinous activities of the group of men on that fateful day. Bearing in mind this approach, in the court below, as against the attempt by Mr Paris on appeal to refer to other facts, including those in the SER, this court was impelled to point out to Mr Paris that the facts in the SER did not appear to accord with a guilty plea, and that is what the applicant had done, he had pleaded guilty and his counsel at the sentencing hearing clearly appeared to support the position taken by him. He had not at any time suggested that Pusey J consider a different version of the facts. Although the SER was in the possession of all the parties, including defence counsel, those facts stated therein were never presented to the court as the facts on which the applicant wished the court to pass sentence on a guilty plea. There were therefore no different facts before the judge on which he could say that a "Newton hearing" was applicable and advise himself accordingly as to how to proceed.

[35] With regard to the questions posed by counsel in respect of the identification of the applicant by the deceased's son, by an alias, or statement or otherwise, and/or in relation to the provenance of the cautioned statement, or the applicant's ability to give one, and in the light of the comments made by this court in respect of the "Newton hearing", this court felt impelled to ask Mr Paris whether he was attempting to withdraw or change the guilty plea entered in the court below, and his answer was in the negative. Based on that approach, this court was compelled to point out that it was based on the facts as set out in paragraph [7] herein that the applicant had pleaded guilty, in the presence of his counsel. It was noted also with some significance, that Mr Paris had not challenged the sentence imposed. It appears that the only challenge before Pusey J, and ultimately before us, was the fact that potentially there may have been some information which could have resulted in a different version of the facts, which did not come to light. The learned judge, as a consequence was therefore bereft of that assistance in the exercise of his discretion to impose an appropriate sentence in the circumstances of this case.

[36] But that information, such as it was, was in the bosom of the applicant/defence counsel and, as indicted, was not eventually referred to. It is of much significance that Mr Clue had never attempted at any time, to utilize the entirely new story set out by the applicant in the SER, which facts had not been mentioned at all when the applicant pleaded guilty before the court on the indictment for the murder of Ms Coleman.

[37] In the light of the above, the application for leave to appeal was refused by a single judge of this court and also by the full court when his application was renewed before us in the Circuit Court in Hanover.