[2022] JMCA Crim 19

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 19/2017

OP v R

Linton Gordon for the applicant

Orrett Brown and Miss Renelle Morgan for the Crown

16 December 2021 and 8 April 2022

BROOKS P

[1] On 6 December 2009, the applicant OP, who was then 13 years old, and another young person, OM, were engaged in an altercation over a bicycle. Because of the age of the parties involved, their names will not be used in this judgment. The applicant will be referred to as "OP". During the altercation, OP stabbed OM, who later died. OP alleges that he acted in self-defence, or alternatively, that he was provoked to act as he did.

[2] OP was convicted for the offence of murder on 18 January 2017 in the Home Circuit Court in the parish of Kingston before a judge sitting with a jury. On 23 February 2017, the learned judge sentenced him to life imprisonment at hard labour, with the stipulation that he should serve 15 years' imprisonment before becoming eligible for parole.

[3] OP applied for leave to appeal against his conviction and sentence, but a single judge of this court refused his application. As is his right, OP has renewed his application before the court.

The prosecution's case

[4] The prosecution called numerous witnesses, but its case largely rested on the evidence of one eyewitness. The prosecution's case is that on 6 December 2009, OP, without permission, rode away on a bicycle that OM was using to make deliveries, but had left for a short while near 31 Rushworth Avenue, in the parish of Saint Andrew. When OP later returned with the bicycle a quarrel ensued between them. OM told OP to get off the bicycle, but OP refused. OM then pushed OP and he eventually dismounted. OM took the bicycle then rode off to make another delivery.

[5] Shortly after, OM returned to 31 Rushworth Avenue. There, OP confronted OM, and they started arguing. The argument then spiralled into a physical altercation. OP then pulled a knife from his waist. OM managed to escape from OP and armed himself with an ice pick. The eyewitness intervened and implored them to stop and took the ice pick from OM and threw it away. OM then took up a knife and the eyewitness told him to stop. OM dropped the knife and walked off with the eyewitness. As they walked away, OP followed behind them, reached around OM, stabbed him in the chest, and fled the scene. A man in the community later caught OP and held him until the police arrived.

The applicant's case

[6] OP gave an unsworn statement. In his unsworn statement, OP admitted that he was present at 31 Rushworth Avenue, but stated that he was there playing dominoes. While there, OM approached and hit him on the head and pointed at his, OP's, face. OP moved OM's hand from his face and walked away. OM followed him and kicked his feet, causing him to fall to the ground. OP got up, took up a stone and used it to hit OM on his side. OM then ran into a nearby yard for an ice pick and a knife. At that moment, someone approached and spoke with OP. That person gave OP tissue and hand towels

to sell and gave him the bicycle, which he rode to sell the items. Upon OP's return, OM pushed him off the bicycle. He got up and pushed OM, who hit him on his mouth and "draped" him. OP walked away from OM but OM followed him, took a knife from his waist and "draped him up". OM dropped the knife, took out an ice pick, threatened to use it, and then tried to stab OP, who ran away. OP, however, stopped in his tracks, deciding not to run away, after all. He took his own knife from his waist and stabbed OM but did not intend to kill him. OM ran off and then fell to the ground. OP was afraid and ran off, with the knife in his hand. OP's case is that the sole eyewitness for the prosecution lied to the court. OP asserts that the eyewitness was not present at the time of the incident.

Grounds of appeal

[7] OP abandoned his original grounds of appeal and argued the following supplemental grounds of appeal:

> "**GROUND OF APPEAL 1**
>
> The Learned Trial Judge failed to address the Jury on the principle that the Prosecution has a duty to prove the case against [OP] beyond a reasonable doubt and indeed at no time during her summation to the jury did the Learned Trial Judge explain to the jurors what is meant by 'proof beyond a reasonable doubt'. This failure resulted in the Trial being conducted in an unfair way to [OP].
>
> **GROUND OF APPEAL 2**
>
> The Learned Trial Judge in sentencing [OP] did not take into consideration and did not credit [him] with the time spent in custody prior to his conviction thereby imposing an excessive sentence on [OP]." (Bold as in original)

[8] OP also filed the following further supplemental grounds of appeal:

> "i. The Learned Trial failed to appreciate that given the circumstances of the case, [OP] should have benefitted from the issuance of a Judge's Certificate pursuant to section 42K of the Criminal Justice Administration (Amendment) Act of 2015.

ii. That in the circumstances of the case the imposition of the minimum mandatory sentence of 15 years is manifestly excessive."

[9] The issues arising from the grounds are:

a. Whether the learned judge failed to properly direct the jury on the standard of proof (supplemental ground 1);

b. Whether the learned judge should have given the applicant credit for time spent in pre-trial custody (supplemental ground 2);

c. Should the learned judge have issued a certificate pursuant to section 42K of the Criminal Justice Administration (Amendment) Act (further supplemental ground 1);

d. Whether the sentence is manifestly excessive (further supplemental ground 2).

Whether the learned judge failed to properly direct the jury on the standard of proof (supplemental ground 1)

Standard of proof

[10] Mr Linton Gordon, on behalf of OP, submitted that the learned judge did not give the jury adequate directions on the appropriate standard of proof. Learned counsel argued that the learned judge should have directed the jury that the evidence that the prosecution adduced must satisfy them beyond a reasonable doubt and that duty continues throughout the trial. Learned counsel advanced that the learned judge should have explained to the jury what "reasonable doubt" means. Counsel contended that the learned judge, instead, directed the jury that they should be "sure". Learned counsel reasoned that the learned judge's failure to direct the jury that they could only find OP guilty of murder if they believed the prosecution's case, beyond a reasonable doubt, rendered OP's trial unfair. He relied on **Woolmington v Director of Public Prosecutions** [1935] AC 462 ('**Woolmington v DPP'**) and **Everton Clarke v R** [2017]

JMCA Crim 31. Counsel invited this court to consider that the absence of the proper directions was more egregious since there was only one eyewitness, who, OP always asserted, was not present at the material time and lied about what transpired. Counsel argued that the jury must have been sure beyond a reasonable doubt of the eyewitness' credibility before finding OP guilty.

[11] Mr Brown, on behalf of the Crown, submitted that the learned judge used the modern approach in directing the jury on the standard of proof, that is, that they must be sure of OP's guilt. That direction, he submitted, was appropriate.

[12] There is no merit to the complaint about the direction on the standard of proof. Trial judges have, for decades, been using the formulation that the learned judge used in this case.

[13] It is settled that the prosecution has a duty to prove its case against an accused, beyond a reasonable doubt. The House of Lords distilled this principle in **Woolmington v DPP**. Viscount Sankey LC, who wrote the judgment, with which the other Law Lords agreed, stated on page 481 that:

> "Juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt."

[14] It is also settled, that the law is not static. A trial judge is not bound by a particular formula or set of words to direct the jury on the standard of proof. The authorities demonstrate that it is satisfactory for trial judges to use the term "sure" when describing the standard of proof. What is important is that trial judges must convey to the jury that the prosecution must prove its case against the accused and that they can only find the accused guilty if satisfied beyond a reasonable doubt or if they are sure of the accused's guilt (see paragraphs [16] and [17] of **Everton Clarke v R**, which cites **Regina v Hepworth and Fearnley** [1955] 2 QB 600). In **Regina v Hepworth and Fearnley**, the appellants were charged with unlawfully receiving stolen property. The judge told the jury they must be "satisfied". The appellants complained that the judge's summation did

not adequately give the jury direction in relation to the burden of proof, their regard for the evidence and the level of certainty they were to feel. Lord Goddard CJ, on page 603 relied on his dictum from **Rex v Kritz** [1950] 1 KB 82 that:

> "But I desire to repeat what I said in *Rex v Kritz*: 'It is not the particular formula that matters: it is the effect of the summing-up. If the jury are made to understand that they have to be satisfied and must not return a verdict against a defendant **unless they feel sure**, and that the onus is all the time on the prosecution and not on the defence…'" (Italics as in original; emphasis supplied)

[15] Lord Goddard CJ stated, in **Regina v Hepworth and Fearnley**, that "that is enough". He stated, on page 604 that:

> "I should be very sorry if it were thought that these cases should depend on the use of a particular formula or particular word or words. The point is that the jury should be directed first, that the onus is always on the prosecution; secondly, that before they convict they must feel **sure** of the accused's guilt. If that is done, that will be enough." (Emphasis supplied)

[16] The Court of Appeal of England has pronounced that the directions "proof beyond reasonable doubt" and proof that they are "sure" are "two different ways of saying what is really the same thing" (see **R v Yap Chuan Ching** (1976) 63 Cr App Rep 7 and page 47, paragraph 3 of the Supreme Court of Jamaica Criminal Bench Book). Trial judges, however, must refrain from elaborating on the standard of proof (see **R v Yap Chuan Ching**).

[17] Their Lordships, in **Henry Walters v The Queen** [1969] 2 AC 26 ('**Walters v The Queen**') have also agreed that there is no set formula as to the words a trial judge ought to use to direct the jury on the standard of proof. The Board emphasised that it is the effect of the entire summing up that is important. The Board made these comments, at pages 30-31:

> "In their Lordships' view it is best left to [the trial judge's] discretion to choose the most appropriate set of words in

> which to make *that* jury understand that they must not return a verdict against a defendant **unless they are sure of his guilt**; and if the judge feels that any of them, through unfamiliarity with court procedure, are in danger of thinking that they are engaged in some task more esoteric than applying to the evidence adduced at the trial the common sense with which they approach matters of importance to them in their ordinary lives, then the use of such analogies as that used by [the trial judge in this case] in the present case, whether in the words in which he expressed it or in those used in any of the other cases to which reference has been made, may be helpful and is in their Lordships' view unexceptionable. **Their Lordships would deprecate any attempt to lay down some precise formula or to draw fine distinctions between one set of words and another. It is the effect of the summing-up as a whole that matters**." (Italic as in original; emphasis supplied)

[18] The editors of the Supreme Court of Judicature of Jamaica Criminal Bench Book have also shed light on this issue. On page 48, paragraph 9, the learned editors state:

> "When (as is usual) the burden of proof is on the prosecution, the jury should be directed as follows:
>
> (1) It is for the prosecution to prove that the defendant is guilty.
>
> (2) To do this, **the prosecution must make the jury sure that the defendant is guilty**. Nothing less will do.
>
> (3) It follows that the defendant does not have to prove that he is not guilty. If appropriate: this is so even though the defendant has given/ called evidence." (Emphasis supplied)

[19] In the instant case, the learned judge gave the jury directions on the prosecution's duty and the standard of proof, several times throughout the summation. It is necessary to highlight a few of those directions to determine if the learned judge adequately instructed the jury on the standard of proof. The learned judge, on page 399, line 25 to page 400 line 11, stated that:

> " Now in this case, the Prosecution must prove to you that [OP] is guilty, he does not have to prove that he is innocent. It does not work that way. The Prosecution must prove to you that he is guilty.
>
> So how does the Prosecution do that? The answer is: By making you **sure of his guilt**; nothing less than that will do. If after you consider all the evidence you are sure that he is guilty, then your verdict must be guilty. If you are not sure, then your verdict must be not guilty." (Emphasis supplied)

[20] The learned judge, once more, emphasised, the prosecution's duty and the standard of proof, on page 493, line 25 to page 494, line 11:

> "…But even if you do not believe the case for [OP], that is not the end of the matter. You still have to turn around and consider all the evidence and **decide if the Prosecution has satisfied you so that you are sure of the guilt of [OP]** for [the] offence of murder. So even if you don't believe his case you still turn around and determine if you are satisfied so that you are sure that he is guilty of murder before you can say he is guilty of murder." (Emphasis supplied)

[21] On page 500, lines 11-18, the learned judge again said:

> "…**So if you are satisfied so that you are sure that the ingredients of murder have been proved**, your verdict must be guilty of murder. If you are not satisfied so that you are sure that this man, [OP], is guilty of murder, then you consider if you are satisfied so that you are sure that he is guilty of the lesser offence of manslaughter." (Emphasis supplied)

[22] The learned judge adequately directed the jury as to the prosecution's duty to prove its case against OP, so that they are sure of OP's guilt. The use of the word "sure" is the equivalent of "beyond reasonable doubt". The direction that the jury must be sure of the accused's guilt is in keeping with the authorities and is sufficient. This aspect of the ground therefore fails.

Provocation

[23] Mr Gordon also included in this ground, the learned judge's directions on provocation. Learned counsel submitted that the learned judge did not properly address the jury on how they were to deal with provocation. This amounted to a misdirection, he submitted, which confused the jury. Learned counsel argued that the learned judge should have explained to the jury that based on the sequence of events, there was a real possibility that OP acted under provocation since there was no cooling down period and he was still heightened in temper.

[24] Mr Brown submitted that the learned judge's directions on provocation and manslaughter were clear and concise. Additionally, counsel contended that the jurors were not confused by the learned judge's directions on provocation as she accurately informed them that they must be sure that OP was not provoked.

[25] This aspect of the ground must also fail. Provocation is addressed in section 6 of the Offences against the Person Act ('OAPA'). It reads:

> "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

[26] Brown JA (Ag), writing on behalf of the court in **Raymond Bailey v R** [2021] JMCA Crim 34, underscored the importance of section 6 of the OAPA, that it abolished the rule at common law that words alone were not enough to find provocation. He also noted that it clearly demonstrates that, if there is evidence of provocation, it was the jury's duty to determine whether a reasonable man would have reacted as the accused did when provoked. This the learned judge said at paragraphs [68] to [70]:

> "[68] The mischief which the legislature sought to cure by the passage of section 6 was two-fold. First, the abolition of the rule at common law that words alone were insufficient to ground provocation. Second, to place within the jury's sole domain the question of whether a reasonable man would have reacted to the provocation in the way the defendant did (see **Phillips v R** [1969] 2 AC 130, at page 134). The judge can, therefore, no longer determine whether the reaction of the defendant meets the reasonable man test, and words alone, conduct alone, or both may constitute provocative conduct (see **R v Peter Davies** [1975] QB 691, at page 700).
>
> [69] The section, therefore, speaks to three things: the provocative conduct, the causative link between the provocation and the loss of self-control and the objective assessment of the defendant's response to the provocation (see **R v Acott** [1997] 1 WLR 306, (HL(E)) at page 310). The second and third encapsulate the two-stage test of provocation laid down by the Privy Council in **Phillips v R**, and applied consistently by this court (see for example **Bernard Ballentyne v R** [2017] JMCA Crim 23, which followed **Dwight Wright v R** [2010] JMCA Crim 17).
>
> [70] There is, therefore, an evidential bar that has to be met before the issue of provocation can be left to the jury for their consideration…" (Bold type as in original)

[27] It is the prosecution's duty to disprove, to the criminal standard, that an accused was provoked (see page 296 in paragraph 4 and page 300 in paragraph 24 of the Supreme Court of Jamaica Criminal Bench Book).

[28] The trial judge must direct the jury that if they believe that the accused was provoked or if they are not sure that he/she was provoked or doubt whether he/she was provoked, they must find that the accused was provoked and return a verdict of not guilty of murder, but guilty of manslaughter. Harrison JA, who wrote on behalf of the court in **Damion Thomas v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 192/2000, judgment delivered 21 May 2003, distilled the trial judge's duty in respect of provocation, at pages 6-7, that:

> "…

> The duty of a trial judge, therefore, in such circumstances is to direct the jury that:
>
> (1) If they find that the accused was acting under legal provocation, or
>
> (2) If they are not sure that he was so acting, that is, they are in doubt, they should find that he was in fact so acting,
>
> and, in either case their verdict would be one of not guilty of murder but guilty of manslaughter."

[29] In that case, the trial judge failed to direct the jury that if they were not sure whether the accused was acting under legal provocation, they should find that he was provoked and so find him guilty of manslaughter, not murder. Harrison JA, pronounced, at pages 8-9, that that failure amounted to a non-direction:

> " ...
>
> At no time did the learned trial judge tell the jury, in respect of the issue of provocation, that if they were not sure or if they were in doubt whether or not the accused was acting under legal provocation, they should find that he was so acting and accordingly find him not guilty of murder but guilty of manslaughter.
>
> The omission of the learned trial judge to so direct the jury, is a failure to [recognise] that if a doubt exists in the jury's mind it means that the prosecution has not discharged its burden to prove to the satisfaction of the jury that the accused was not acting under legal provocation. If the probability exists that the accused may have been acting under legal provocation, the defence of provocation is proved, and the appellant would have been entitled to be acquitted of the offence of murder but convicted of the offence of manslaughter. The failure to so direct the jury is a non-direction which deprived the appellant of the chance to be acquitted of the charge of murder on the ground of provocation."

Brown JA (Ag) expressed similar sentiments in paragraph [80] of **Raymond Bailey v R**.

[30] The editors of the Supreme Court of Jamaica Criminal Bench Book, recommend the following directions on provocation, on page 300, paragraphs 24 to 27:

> "23. …
> 24. The jury should be told that the burden of disproving provocation lies upon the prosecution to the criminal standard.
> 25. The direction will require an explanation of the two-stage test using the words of the section but, essentially placing it within the context of the evidence in the case.
> 26. The provocative words or conduct should be identified, as should the development of cumulative or 'slow-burn' provocation.
>
> 27. Any relevant characteristics of the defendant should be identified and their relevance to the stage 2 objective test explained[.]"

[31] The learned judge comprehensively directed the jury on the issue of provocation. She started by explaining that the prosecution must make them feel sure that OP was not legally provoked before they convict him of murder. She noted that if they believe he was provoked then they must find that he is guilty of manslaughter, not murder. She gave these directions on page 494, lines 12 to page 495, line 5:

> " Now, in the circumstances of this case, I am going to leave another instance in which you can say that [OP] is not guilty of murder, but is guilty of the lesser offence of manslaughter, and that is, if you find that he was provoked in the legal sense.
>
> **Before you can convict this man of murder, the Prosecution must make you sure that he was not provoked in the legal sense to do as he did**. **In law, the word provocation has a special meaning, if the Prosecution does make you sure that he was not provoked to do as he did, then he is guilty of murder. If he is not provoked, guilty of murder. If, on the other hand, you conclude either that he was provoked or he may have been provoked, then the accused would not be guilty of murder, but will be guilty of the lesser offence of manslaughter, that's if he is provoked in the legal sense**." (Emphasis supplied)

[32] The learned judge then went on, from page 495, line 6 to page 496, line 20, to direct the jury on the two-stage test of provocation then linked it to the evidence and identified the provocative words and conduct:

> " So how then do you determine whether [OP] was provoked or may have been provoked to do as he did? There are two questions which you will have to consider before you are entitled to conclude that [OP] was provoked or may have been provoked on this occasion. The first one is this: May [OM's] conduct have provoked [OP] to suddenly and temporarily lose his self-control? By conduct we mean the things that [OM] did, the things that [OM] said, that's what we talk about, his conduct. So the first question you will be asking yourself is: May [OM's] conduct, things he did or said have provoked [OP] suddenly and temporarily to lose his self-control?"
>
> There is evidence on the prosecution's case of some words passed in between the two men just immediately prior to when the wound was inflicted; there is evidence as to some movement, chucking, immediately before; there is the statement from the accused man, as to [OM] hitting him on the back of his head, cursing him, running him down.
>
> **Mr. Foreman and your members, you consider all of that as you try to determine if those actions may have caused this man to suddenly and temporarily lose his self-control to do what he did. If you are sure that the answer to that question is no that didn't happen, then the Prosecution will have disproved provocation. That is, there would be no provocation. And providing the Prosecution has made you sure of the ingredients of murder, then your verdict would be guilty of murder.** No provocation, no provoking.
>
> **But, if your answer to the question is yes, the actions of [OM] may have provoked him, caused this man to suddenly and temporarily lose his self-control...**" (Emphasis supplied)

[33] The learned judge then went further to explain that the jury should assess whether a reasonable man, of the same age and sex of OP, would have acted as OP did, in those circumstances. This the learned judge did on page 496, line 20 to page 498, line 8:

> "…**if the answer to [the question whether the actions of OM may cause OP to suddenly and temporarily lose his self-control] is yes, then you ask yourself the next question, may that conduct have been such as to cause a reasonable and sober person of this man's age and sex to do as he did?** So you consider the actions, words, of [OM] and you determine if they were of such a nature as to cause a reasonable and sober person of this man's age and sex to do as he did.
>
> A reasonable person is simply a person who has the degree of self-control which is to be expected of the ordinary citizen who is sober and who is of [OP's] age and sex. Remember at the time [OP], the accused man was about 15 years old. So you consider if a 15- year- old person, a reasonable and sober 15 year old person would respond as he did.
>
> When considering this question, Mr Foreman and your members, you have to take into account everything which was done and said according to the effect which, in your opinion, it would have on such an ordinary person.
>
> So if you are sure that what was done or what was said or both what was done and what was said would not have caused an ordinary, sober person, 15 years old, male, to do as this man did, it means the Prosecution will have disproved provocation. Then providing the Prosecution has made you sure of the ingredients of murder, your verdict would be, must be, guilty of murder.
>
> **If, on the other hand, your answer is that what was done or what was said or both what was done and said, would or might have caused an ordinary, sober 15 year old boy to do as this man did, then provocation is very much alive and your verdict would be not guilty of murder, but guilty of the lesser charge of manslaughter**." (Emphasis supplied)

[34] The learned judge's directions were therefore clear and would not have confused the jury. She adequately indicated that, before they could convict OP of murder, the prosecution had the burden of disproving provocation, to the extent that they were sure that OP was not provoked. She went further to assess the two sides of the pendulum: if the prosecution made them sure he was not provoked, he would be guilty of murder, provided the prosecution made them sure of the elements of murder, but if he was or may have been provoked then he was guilty of manslaughter, not murder. It is true that the learned judge did not say, if they are in doubt as to whether OP was provoked then they should find him not guilty of murder, but the jury would have appreciated that logical conclusion from the context of the direction that the prosecution had the burden to make them feel sure on that point.

[35] The learned judge outlined the two-stage test of provocation, relative to the evidence, which is first, whether OM said or did anything to provoke OP and highlighted that OM and OP said things before the stabbing as well as certain actions. She asked them to consider whether the things said and/or done caused OP to stab OM. The learned judge thereafter directed the jury that if they accepted that OM engaged in provoking conduct, they were to assess whether a reasonable man, with similar characteristics as OP, would have reacted as OP did. The learned judge's directions were therefore appropriate. This aspect of the ground also fails.

Whether the learned judge should have given the applicant credit for time spent in pre-trial custody (supplemental ground 2)

Submissions

[36] Mr Gordon submitted that the learned judge erred, in that, she did not credit OP for the time (approximately five years) he spent in custody on remand. Learned counsel relied on **Meisha Clement v R** [2016] JMCA Crim 26, **Paul Brown v R** [2019] JMCA Crim 3 and **Reid and others v R** [2020] JMCA Crim 35. Learned counsel acknowledged that the learned judge's sentence was the statutory minimum but queried whether this court was bound by the statutory minimum.

Mr Brown contended that the learned judge imposed the statutory minimum sentence and this court cannot reduce the sentence to account for the time spent in custody. Learned counsel stridently submitted that the OAPA empowered the judge to impose the sentence she did as it was within the learned judge's discretion to determine the appropriate sentence.

Discussion and analysis

[37] It is a well-established principle that, generally, an accused must be credited for the time spent in pre-trial custody. Morrison P, in **Meisha Clement v R**, made this statement, in paragraph [34]:

> "… However, in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial. As the Privy Council stated in **Callachand & Anor v The State** [[2008] UKPC 49], an appeal from the Court of Appeal of Mauritius-
>
> > '... any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing.'"

[38] When viewed in the context of a statutory minimum sentence, however, this court is unable to interfere with the sentence, as it cannot contravene the intentions of Parliament. Pursuant to section 3(1)(b) of the OAPA, the statutory minimum for a determinate sentence for the offence of murder is 15 years' imprisonment. The provision states in part, that a person convicted for murder in circumstances such as in this case:

> "…shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years."

Section 3(1C)(b) also provides a minimum pre-parole period. It states, in part:

> "(b) where, pursuant to subsection (1)(b), a court imposes-

(i) a sentence of imprisonment for life, the court shall specify a period, being not less than fifteen years;

(ii) any other sentence of imprisonment, the court shall specify a period, being not less than ten years,

which that person should serve before becoming eligible for parole."

[39] This court, in **Ewin Harriott v R** [2018] JMCA Crim 22 had to consider whether Mr Harriott should be credited with time spent on remand despite the mandatory minimum sentence. The court determined that a mandatory minimum sentence removes the court's discretion to give credit for time spent in custody. This court, in paragraph [15] said:

> "The difficulty in the case of this appellant is that he has been sentenced as a result of a mandatory minimum sentence. It is our view that the terms of section (6)(1)(b)(ii) of the Sexual Offences Act removes the discretion to give credit. **The judge's sentencing discretion is curtailed by the statutory imposition of a mandatory minimum sentence**." (Emphasis supplied)

[40] The court further noted that the mandatory minimum sentence creates an unsatisfactory situation where the offender will spend more time than the mandatory minimum sentence but this correction would require legislative intervention. In the absence of such intervention, this court does not ordinarily have the discretion to impose a sentence that is less than the statutory minimum. However, if the learned judge had issued a certificate, pursuant to section 42K(1) of the Criminal Justice Administration (Amendment) Act (2015) ('CJAAA'), this court would have been empowered to reduce the sentence. Morrison P in **Paul Haughton v R** [2019] JMCA Crim 29 said the following in paragraph [50] of his judgment:

> "But the issues of the period spent on remand by the appellant before sentence and the appellant's eligibility for parole remain outstanding. On the first issue, it is clear from the authorities that, however short the period spent on remand may be, the appellant is entitled to have it reflected in the sentence. Happily, once a certificate has been granted by the

> sentencing judge pursuant to section 42K(1) of the CJAA, it is open to this court to reduce the sentence below the prescribed minimum sentence. This factor serves to distinguish this case from **Ewin Harriott v R**, in which the appeal did not come before this court through the section 42K gateway and the court was therefore powerless to dis-apply the prescribed minimum sentence in order to reflect the time spent on remand…"

[41] Since there is no record of a certificate having been issued in this case, this court has no authority to reduce the sentence below the statutory minimum. This ground, therefore, has no merit.

Should the learned judge have issued a certificate pursuant to section 42K of the Criminal Justice Administration (Amendment) Act and whether the sentence is manifestly excessive (further supplemental grounds 1 and 2)

Submissions

[42] Mr Gordon argued that the learned judge erred in not issuing the certificate, pursuant to section 42K of the CJAAA. He contended that there were several reasons why the learned judge should have issued the certificate. Learned counsel submitted that these reasons were:

i. OP's youth at the time of the offence;
ii. OP did not have any prior convictions;
iii. The killing was not premeditated;
iv. The appellant was in pre-trial custody for five years, which resulted in a sentence of 20 years; and
v. The learned judge's comments raised an inference that she would have imposed a lower sentence, in the absence of a statutory minimum.

[43] Counsel insisted that the learned judge's imposition of the minimum sentence resulted in a sentence that is manifestly excessive. He cited **Kerone Morris v R** [2021] JMCA Crim 10 in support of his submissions.

[44] Mr Brown noted that the learned judge did not identify a starting point and did not demonstrate how the mitigating factors reduced the sentence. Nonetheless, counsel argued, the sentence is not manifestly excessive and the errors did not merit this court's intervention.

Discussion and analysis

[45] Section 42K of the CJAAA gives sentencing judges the discretion, where they believe the circumstances of the particular case merit a sentence below the statutory minimum sentence to, sentence the offender to the statutory minimum. When doing so, however, the sentencing judge should issue a certificate so that the offender may appeal the sentence at the Court of Appeal, in hopes to receive a sentence below the statutory minimum. It states:

> "42K.—(1) Where a defendant has been tried and convicted of an offence that is punishable by a prescribed minimum penalty and the court determines that, having regard to the circumstances of the particular case, it would be manifestly excessive and unjust to sentence the defendant to the prescribes minimum penalty for which the offence is punishable, the court shall—
>
> (a) sentence the defendant to the prescribed minimum penalty; and
>
> (b) issue to the defendant a certificate so as to allow the defendant to seek leave to appeal to a Judge of the Court of Appeal against his sentence...."

[46] In **Kerone Morris v R**, the trial judge stated emphatically that if she had not been bound by the statutory minimum, she would have imposed a lesser sentence by giving Mr Morris credit for the time he spent on remand (see paragraph [14] of **Kerone Morris v R**). She, however, omitted to issue a certificate to that effect. In those circumstances, although the trial judge erred in not issuing the certificate, her intention was clear and certified that she would have imposed a sentence below the statutory minimum. Accordingly, this court exercised its discretion, pursuant to sections 13(1A) and 14(3) of

the Judicature (Appellate Jurisdiction) Act, and the justice of the case, to cure the trial judge's error.

[47] In the present case, the learned judge did not issue a certificate, nor did she indicate that she would have imposed a lesser sentence. There is no obvious gateway for the use of the provisions of section 42K of the CJAAA.

[48] There is no other basis for interfering with the sentence imposed. This court can only intervene to disturb a trial judge's sentence where the sentence is excessive or the sentence suggests that the judge applied the wrong principles (see **R v Alpha Green** (1969) 11 JLR 283). There is a set formula for sentencing, which is outlined in the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Court, December 2017, which had not been promulgated at the time the learned judge sentenced OP. The learned judge, however, would have had the benefit of the guidance, that Morrison P outlined in **Meisha Clement v R**, which highlighted the sentencing practice outlined in earlier authorities. In paragraph [26], he said:

> "Having decided that a sentence of imprisonment is appropriate in a particular case, the sentencing judge's first task is, as Harrison JA explained in **R v Everald Dunkley** [(unreported), Court of Appeal, Jamaica, Resident Magistrate Criminal Appeal No 55/2001, judgment delivered 5 July 2002], to 'make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any other factors that will serve to influence the sentence, whether in mitigation or otherwise'. More recently, making the same point in **R v Saw and others** [[2009] EWCA Crim 1], Lord Judge CJ observed that 'the expression 'starting point' ... is nowadays used to identify a notional point within a broad range, from which the sentence should be increased or decreased to allow for aggravating or mitigating features'."

[49] The learned judge did not strictly follow the guidelines set out by these authorities. She did not outline a starting point. She did, however, consider the mitigating and aggravating features in arriving at the sentence. This court also notes that the learned judge did not state, arithmetically, the amount added or subtracted for her consideration

of the features. The learned judge asserted that she listened to the plea in mitigation, the social enquiry report and OP's antecedents. The learned judge made these observations on page 538, lines 4-8:

> " HER LADYSHIP: [OP], I have listened to every word that has been spoken on your behalf. I have contemplated the Social Enquiry Report, the antecedents and I have paid special attention to your lawyer's plea in mitigation…"

[50] The learned judge, on page 538, line 15 to page 539, line 1, specifically highlighted the fact that OP had no previous convictions, his youth, the good report from his school and that he is industrious:

> "HER LADYSHIP: So I consider as I sentence you, that you have no previous convictions.
>
> I consider that you were a young boy at the time, 14 years, and [OM] was your best friend. I hear you to say that at the time you were young, immature and acting foolishly, two youngsters together, so I consider all of that.
>
> And I consider that the report from your school is good, no behavioural problems, respectful, and you had the potential to graduate at the top of your class. I think about that, you are industrious…."

[51] The learned judge also considered that OM's father lost his son, for no reason. She also recognised that she should be lenient because OP was young. Those factors, no doubt, informed the learned judge's decision to impose a sentence of imprisonment for life but to impose the minimum pre-parole period. She made this comment on page 540, lines 9-14:

> "…I have to give you a lesser sentence that [sic] I would give a person who had committed murder when they were a big man, you were a young person, and I reduce the sentence because of that, because that is what the law says I have to do…"

[52] The closest that the learned judge came to addressing the mandatory minimum sentence is where she said, in part, on page 539, in lines 16-19:

> "So the law limits me as to how [low] I can go in the sentencing and something else that limits me, my own mind, is a consideration of [OM], he too was young…"

[53] There was, however, no indication that she would have imposed a lesser sentence than the statutory minimum. Instead, she indicated that the law said she had to reduce the sentence because of OP's youth. The learned judge concluded her sentencing exercise by stating what she believed was an appropriate sentence. She did this on page 540, line 24 to page 541, lines 1-2:

> "And the sentence I regard as being appropriate is a sentence of imprisonment for life, not eligible for parole for 15 years, one-five…."

[54] Given the nature of this case, it cannot be said that the mandatory sentence is excessive or it demonstrated that the learned judge applied the wrong principles. Nor is the sentence so aberrant to merit this court's intervention (see paragraph [34] of **Nario Allen v R** [2018] JMCA Crim 37). This ground fails.

Whether the applicant's age at the time of committing the offence should have affected the sentence imposed

[55] During the hearing of the application, this court asked counsel to make submissions on the court's jurisdiction in light of OP's age and whether the learned judge, in sentencing OP to life imprisonment and to serve 15 years' imprisonment before becoming eligible for parole, ought to have selected a determinative sentence.

Submissions

[56] Mr Gordon made no submissions on this issue.

[57] Mr Brown argued that, although the Child Care and Protection Act ('CCPA') provides that a child is any person under the age of 18, the age of criminal responsibility is 12 years old. Accordingly, learned counsel submitted that this court has jurisdiction to

adjudicate the matter. Additionally, counsel averred that although OP was 13 years old at the time of the commission of the offence, he was 20 years old at the time of sentencing and so was not a child when he was tried, convicted and sentenced. He asserted that the sentence was appropriate. Learned counsel submitted that it is of no moment that OP was not tried in a Children's Court because the Circuit Court has the powers of a Children's Court.

[58] Learned counsel submitted that the learned judge had the jurisdiction to sentence OP to life imprisonment, pursuant to section 78(1) of the CCPA. He further submitted that the learned judge properly exercised her discretion, since the sentence, coupled with the period OP had spent on pre-trial remand (amounting to 20 years) is below the maximum fixed term of 25 years' imprisonment set by the CCPA.

Discussion and analysis

[59] Section 2 of the CCPA defines a child as follows:

> "'child' means a person under the age of eighteen years"

[60] Notwithstanding that provision, the CCPA goes further, in section 63, to outline that the age of criminal liability is 12 years old. It states:

> "It shall be conclusively presumed that no child under the age of twelve years can be guilty of an offence."

This, therefore, means that OP, who was 13 years old at the time of the commission of the offence, was a child, but still capable of being held criminally responsible.

[61] The CCPA provides that a Children's Court is to be established to try children. Where a child is charged with the offence of murder, the trial cannot take place in a Children's Court, as the procedure in a Children's Court "shall be the same as in the [Parish Court]" (see section 71 of the CCPA). Section 72(6) of the CCPA stipulates that if a child under the age of 14, or a child over the age of 14 is charged with certain offences (other than certain serious offences such as murder), the case is to be finally disposed of by a Children's Court.

[62] If, however, a child is tried before a court that is not a Children's Court, the court hearing the matter against the child will have all the powers of the Children's Court (see section 74 of the CCPA). Where a child is found guilty of murder before a court, that court should not remit the matter to a Children's Court for sentencing (see section 75(1) of the CCPA).

[63] None of that applies to this case, however, as OP was an adult at the time of the trial and could not have been tried before a Children's Court for this offence in any event. OP was, therefore, properly tried before, and sentenced in, the Circuit Court.

[64] The Circuit Court has the jurisdiction to sentence a child, but it cannot impose a death sentence on a child. Instead, the court may impose life imprisonment, and specify the period the child should serve before becoming eligible for parole. Section 78(1) and (3) of the CCPA provide:

> "78. — (1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, **but in place thereof such person shall be liable to be imprisoned for life**.
>
> …
>
> (3) Notwithstanding the provisions of the Parole Act, on sentencing any child under subsection (1), the court may specify a period which that child should serve before becoming eligible for parole." (Emphasis supplied)

[65] This section is relevant since it concerns the age of the child at the time the offence was committed. Although OP was an adult at the time of sentencing, he was a child at the time the offence was committed. The section does not specifically prevent a judge from imposing a determinate sentence that is provided for in section 3(1)(b) of the OAPA. In the absence of such an exclusion, it is reasonable to assume that the learned judge was empowered to impose a determinative sentence in a case such as the present. That interpretation would enhance the judicial discretion in imposing sentences.

[66] The learned judge could therefore have imposed a determinative sentence on OP and ordered, pursuant to section 3(1C)(b)(ii) of the OAPA, that he serves a pre-parole period of not less than 10 years. The learned judge did not allude to that option. She was not obliged to mention that option, nor was she obliged to impose a determinate sentence in OP's case. Her failure to mention the option is not fatal to the sentence that she imposed. She cannot be faulted for imposing the sentence that she did.

Conclusion and summary

[67] The learned judge properly directed the jury on the standard of proof in directing them that they must be sure of OP's guilt before they can convict him. Additionally, the learned judge's direction on provocation was clear and would not have confused the jury.

[68] While it is now an established principle that a court should give credit for time spent in pre-trial custody, the statutory minimum for the offence of murder, outlined in the OAPA curtails the court's discretion to give that credit, in the absence of a section 42K certificate. In the circumstances of this case, the learned judge did not err in not issuing such a certificate. Neither can it be said that the sentence is manifestly excessive. Accordingly, the orders of the court are as follows:

1. The application for leave to appeal is refused.

2. The sentence is to be reckoned as having commenced on 23 February 2017.