[2022] JMCA Crim 37

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS, P
THE HON MRS JUSTICE SINCLAIR-HAYNES, JA
THE HON MRS JUSTICE FOSTER-PUSEY, JA

SUPREME COURT CRIMINAL APPEAL NO 21/2019

NICKARDO PEYNADO v R

Ms Zara Lewis and Ms Zoya Edwards for the appellant

Ms Paula Llewellyn QC, Mr Daniel Kitson- Walters and Ms Vanessa Campbell for the Crown

24 May and 8 July 2022

SINCLAIR-HAYNES JA

[1] On 24 May 2022, we heard and determined two issues which emanated from this matter, the first, an application for *subpoena duces tecum* for the appellant's hospital records; the second, his substantive appeal against the sentence of 30 years' imprisonment with a stipulation that he should serve 25 years before the possibility of parole, for the offence of murder. The sentence was imposed by Bertram-Linton J.

[2] We made the following orders and promised to provide our written reasons. This is a fulfilment of that promise.

The orders

[3] Regarding the appellant's application for *subpoena duces tecum,* we ruled as follows:

> "The application to vary/discharge the order of the single judge of this court in respect of the application for a *subpoena duces tecum* is refused."

In respect of his appeal against his sentence we ordered that:

> "1. The appeal against sentence is allowed;
>
> 2. The sentence of 30 years' imprisonment and the stipulation that the appellant should not be eligible for parole before serving 25 years imposed by the learned judge in the Court below is set aside and the matter is remitted to the Supreme Court for re-sentencing.
>
> 3. The resentencing exercise is to be informed by evidence of a comprehensive psychiatric evaluation of the appellant which also considers any previous medical report and records made in respect of the appellant."

Background

[4] On 6 December 2018, Nickardo Peynado ('the appellant') pleaded guilty to the offence of murder in the Clarendon Circuit Court and, on 7 February 2019 was sentenced by Bertram Linton J ('the learned judge') to 30 years at hard labour with the possibility of parole after 25 years. By notice of application filed on 4 March 2019, the appellant sought leave of a single judge of this court to appeal the decision of the learned judge on the ground that the sentence was excessive. Leave was granted by the single judge and the appellant was notified by the registrar of the decision by way of correspondence dated 12 July 2021.

[5] On 12 November 2021, the appellant further sought, by notice of application, an order for *subpoena duces tecum,* of his medical records. On 18 March 2022, a single judge of appeal refused the application. The following, *inter alia,* were her reasons:

> "…However, certain grounds upon which the orders are sought are mere assumptions that cannot be substantiated, for example, '[t]he medical records will resolve the issues of the Applicant's mental health at the time when the offence was committed.' Further, the terms of the ***subpoena duces tecum*** sought by the applicant are too wide and vague. When a court issues such processes, usually a particular date or range of date is specified that the party to whom the process is directed can reasonably comply.
>
> …
>
> The Court is not minded to issue the process sought by the applicant, as I cannot appreciate the value that hospital records (if they exist), of admittedly 'undiagnosed mental condition' would bring to the appeal process. In any event, a *subpoena deuces* [sic] *tecum* is a writ, ordering a specified name person to attend a court and bring relevant documents. This would mean that the documents would be brought on the date scheduled for the hearing of the appeal.
>
> …
>
> I would however remind you, that the single judge of this court who granted the applicant leave to appeal his sentence had intimated that a psychiatric evaluation of the applicant could be helpful. Be guided accordingly."

The application for the production of the appellant's medical records before this court

[6] We heard the appellant's amended notice of application which was filed on 12 April 2022, for a *subpoena duces tecum* of his medical records, by which application, the appellant sought the following orders:

> "1. Permission granted to appeal the decision of the Honourable Mrs. Justice G Fraser made on March 18, 2022.
>
> 2. The decision of the Honourable Mrs. Justice G Fraser made on March 18, 2022 be varied or discharged.
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> 3. This said Amended Notice of Application be considered and determined by the full court.

4. Permission granted to Appellant to rely on the Affidavits of Larkland Wright and Zara Lewis both filed on November 12, 2021 in support of this Application.

5. Subpoena duces tecum be issued to the Southern Regional Health Authority to produce all medical records and reports being held at the May Pen Hospital regarding the assessment, diagnosis and treatment of Nickardo Peynado born on the 26th day of August, 1998 and resided at Treadlight District, May Pen P.O Clarendon.

6. The records produced should include and or incorporate and or disclose records regarding medical and nursing management of Nickardo Peynado, social and psychological interventions and referrals received from and sent to other agencies regarding his care to October, 2017." (Underlining as in original)

[7] Two main issues confronted the court in relation to the application and the appeal:

> The first, whether the learned judge erred in refusing to subpoena the hospital record.
>
> The second, whether the learned judge erred by failing to ensure that the requisite material to assist in her determination of an appropriate sentence was before the court.

Whether G Fraser JA (Ag) erred in refusing to subpoena the hospital records

[8] We refused the application because it was tantamount to an application for fresh evidence. Counsel also conceded that:

1. the application was in essence an application for fresh evidence which she did not have before the court.

2. The relevance of said evidence was not apparent especially since the court was not aware of what would be contained in the documents being subpoenaed.

The appeal

[9] At the hearing of the matter, counsel abandoned the original grounds of appeal and relied on supplemental grounds of appeal which were filed on 17 May 2022. By those grounds, the appellant's complaints were as follows:

> 1. The learned judge erred by not gathering all the material necessary to enable her to arrive at a proper sentencing decision.
>
> 2. The learned judge erred by failing to abide by and apply the guidelines as stipulated in the Sentencing Guidelines for Judges of the Supreme Court and Parish Courts of December 2017 and Criminal Justice (Administration) (Amendment) Act, 2015;
>
> 3. The sentence was manifestly excessive and unduly harsh in the circumstances.

[10] The appellant urged the court to allow his appeal and to set aside the sentence.

Whether the learned judge considered and applied the relevant law

[11] In sentencing the appellant, the learned judge referred to the antecedent report and probation report in relation to the applicant. She stated as follows:

> "The murder that was committed is really shocking and gruesome. The circumstances of the offence are also such that the court is left in quite a bit of quandary. Most times when these offences are looked at, we see some kind of connection, some kind of dispute, some kind of issues between the parties, not that any of these justify or condone what takes place, but often they attempt to explain why the issues that arose and the subsequent action may have been taken. In these circumstances, I do not have very much to look at in that regard. What I do have is an extremely aggravating set of circumstances

whereby a power saw and a machete, power saw and machete were used to inflict wounds to the victim –-the deceased who was, by all accounts, an older member of the community. And somebody who, based on the facts and based on the issues, was not offering any threat or any issues related to aggravation or provocations to the accused man.

I have noted the community report. I have noted the assessment and the recommendation and the interview with the deceased's husband. I have also seen that the accused man does not have any previous convictions.

I have taken note of the mitigating circumstances. He pleaded guilty at the first opportunity. He has a good community report and I must take note as well that he is in custody for one year and three months. He is a youthful offender. And sometimes it is useful to consider if a custodial sentence is necessary in these circumstances. I have come to the conclusion that a custodial sentence is necessary in these circumstances.

The statutory maximum for this type of offence is life imprisonment. The statutory maximum is tempered somewhat by the fact that the accused man pleaded guilty at the first possible opportunity. However, the aggravating feature would mean that even though he would benefit from the relevant discount in the circumstances, the heinous nature of the crime which is seemingly unprovoked would actually operate against a full discount in the circumstances.

The normal range from which we start here, as the law says we need to look at, is 15 years to life in the circumstances. I have considered everything. This one is particularly difficult and I have not ignored the fact that what was raised is that somebody is saying something must be wrong, but nobody has said what is wrong, nobody has said anything is wrong at all and we must have circumstances where punishment and sentencing is commensurate with the crimes that we are sentencing for.

I am going to be, in all the circumstances sentencing Mr. Peynado to 30 years' imprisonment with the possibility of parole after 25 years of imprisonment."

[12] Although the learned judge demonstrated her awareness of the law and the principles to be applied in determining an appropriate sentence, she nevertheless failed

to apply the relevant laws and guidelines to the facts of the instant case. There was ample evidence before her that the appellant might have been suffering from a mental malady (the appellant's grandfather's evidence and the social enquiry report). The learned judge demonstrated that she was alerted or ought to have been alerted to the fact that the appellant might not have been entirely *compos mentis*.

[13] The appellant's grandfather, with whom he had resided from his birth to age seven years old and returned at age 14 years old gave evidence that his mental faculty might have been impaired when the offence was committed. It was his grandfather's evidence that the appellant had "always been a good child" who "rarely ever disobeyed him". It was his further evidence that "whatever tasks [he asked] of him", he did.

[14] In October 2017, on the Monday before the incident, the appellant's grandfather instructed the appellant to collect some chicken for which he had already paid. At about 5:30 that morning, he heard the appellant in his room shouting, "the blood of Jesus is against you". The appellant, he said, was "displaying strange behaviour". He (the grandfather) attempted to open the door but was unable to because it was locked and the appellant refused to open it.

[15] He consequently called some of his neighbours and friends and informed them what was happening to the appellant. A crowd gathered outside of the house and he and some of the neighbours continued to ask the appellant to open the door. The appellant eventually opened the door but he continued to behave strangely and began shouting that he was not his grandfather. Eventually with the assistance of friends, they were able to "calm down" the appellant.

[16] The following Wednesday, the appellant asked his grandfather's permission to go to the shop to buy a snack and he permitted him. He was subsequently informed and he believed that the appellant went to the shop but fainted on his arrival. He was also informed that the appellant was taken by the owner of the shop and several other friends to the May Pen Hospital. The appellant was examined by the doctor on duty but was

discharged. His arrival at the hospital coincided with the appellant's discharge and he took the appellant home.

[17] The following Thursday, he realised that appellant was not improving because he continued to act strangely. The following day, he formed the view that he needed to get help for the appellant. He consequently left the appellant at home of his neighbours and travelled to Mandeville where he visited a spiritual doctor because he had formed the view that the appellant had been possessed by evil spirit because "he was no longer behaving as himself".

[18] In determining whether to grant the renewed application for leave to appeal against sentence and determining the appeal itself in which the mental capacity of the accused is in issue, our courts have long recognised the value of a psychiatric evaluation. The issue of the appellant's mental health was a live issue before the learned judge as it was his grandfather's evidence that the appellant was behaving "strangely". Further, the Department of Correctional Services Probation Aftercare Services Social Enquiry Report (Adult) indicated that the appellant:

> "indulged in marijuana use which might have triggered such detrimental thought processes."

[19] There was therefore ample evidence before the learned judge that the appellant might have been suffering from a mental illness. The learned judge therefore erred by her failure to request such an evaluation.

[20] The learned judge was cognisant of the fact that persons were expressing the view "that something must be wrong [with the appellant]". She also observed the absence of any motive and expressed her confusion with the case and the difficulty she had as a result in determining the sentence. As stated previously, it is apparent that the learned judge recognised or ought to have considered the possibility that the appellant might not have been *compos mentis* when the offence was committed.

[21] Although the learned judge stated that she assessed the relevant reports which were submitted, regarding the appellant, she however failed to demonstrate that she accorded the consideration required to certain important information contained therein. Ample evidence, as outlined below, was adduced before the learned judge which ought to have alerted her to the fact that he might have been mentally unwell. They were:

(a) The appellant's grandfather's evidence that the appellant may have had a mental problem.

(b) The social enquiry report which stated that persons in the community were concerned the appellant's behaviour on the day he committed the offence, because:

(1) he inflicted knife wounds to two individuals (including a minor).

(2) they were shocked because of the appellant's known personality of the view that "something must have triggered" his actions.

(3) the view expressed by the deceased's husband that the appellant was a "well-mannered young man" who once started taking company with the dissidents he smoked marijuana and participated in illicit activities.

[22] The appellant had also disclosed to the probation officer that he smoked marijuana and associated with persons who influenced him negatively. That confession together with his evidence that he was unable to recall "what happened", tends to indicate that he might, not have been mentally well when the offence was committed.

[23] The social enquiry report was also supportive of a finding that the appellant might indeed have had no recollection of the incident. The probation officer was of the view that the appellant's inability to recall the incident, might have been a consequence of peer pressure and the use of marijuana which triggered some detrimental thought processes "to negatively influence him". The report referred to a mental lapse but also stated that there was "no indication that Mr. Peynado has any intellectual or mental impairment" which would affect his ability to think and act rationally".

[24] The probation officer is not a physician. His opinion as to the appellant's mental state at the time of the commission of the offence is therefore of little probative value. However, his evidence regarding the appellant's use of marijuana, in light of the grandfather's evidence regarding the effect marijuana had on the appellant and his antecedents, provided the learned judge with sufficient evidence which ought to have alerted her that the appellant might have been suffering mentally when the offence was committed and, therefore, a psychological evaluation of the appellant needed to have been requested. The learned judge erred by her failure to request same.

[25] In light of the totality of the evidence concerning his behaviour and her correct observation as to the remarkable absence of any reason for the commission of the offence; together with his grandfather's evidence and that of the social enquiry report, it was therefore incumbent on the learned judge to have requested a psychiatric evaluation of the appellant's mental state to assist in her determination of an appropriate sentence to fit, not only the crime, but also the appellant, the offender. In failing to do so, the learned judge erred.

[26] In sentencing the appellant, the learned judge' was therefore bereft of the necessary information concerning his mental state. Her failure to request the production of essential information rendered the process flawed.

[27] It was for the forgoing reasons we considered it appropriate to remit the matter to the Circuit Court for re-sentencing and ordered that a detailed psychiatric evaluation

of the appellant to ascertain both his mental capacity at the time of the incident (with assistance from his medical record, if any exists, at the relevant time) and at present. Reliance was also placed on **Andrae Bradford v R** [2013] JMCA Crim 17 and **Valerie Witter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 53/1973, judgment delivered on 20 December 1973.