[2023] JMCA Crim 42

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO 97/2017

AUSTIN RICHARDS AND ONIEK WILLIAMS v R

Kemar Robinson for the 1st applicant

Robert Fletcher for the 2nd applicant

Ms Sophia Rowe and Kemar Setal for the Crown

17, 20 and 27 July 2023

Criminal Practice and Procedure - ambiguous plea - plea of guilty to murder - absence of requisite intention to commit murder - duty of the trial judge – options open on appeal

Sentencing - plea of guilty to murder - whether proper sentencing approach adopted - principles of sentencing considered - section 42 of the Criminal Justice Administration Act, 2015 and section 31 C of the Offences Against the Person Act applied

DUNBAR GREEN JA

ORAL JUDGMENT

[1] On 19 January 2018, the applicants, Messrs Austin Richards and Oneik Williams, pleaded guilty to the offence of murder before Daye J ('the learned judge'), in the Circuit Court, held in the parish of Clarendon.

[2] On 6 April 2018, they were each sentenced to life imprisonment at hard labour with parole ineligibility of 20 years. Mr Williams' sentence was ordered to run consecutively with another sentence that he was then serving for a gun related offence.

The basis for the pleas (as outlined by the prosecution)

[3] On 9 July 2015, at approximately 7:30 pm, 25 year-old taxi operator, Anthony Morgan ('the deceased'), loaded his taxi with five passengers, including the applicants, in May Pen, Clarendon, and headed towards Chapelton in the said parish. The applicants were seated in the rear of the vehicle. Mr Richards was seated directly behind the driver, and Mr Williams behind the front passenger. The other passengers were seated between them.

[4] On reaching a section of the Chapelton main road known as 'Woods', Mr Richards took out a gun, pointed it to the back of the driver's head and shot him. The taxi crashed into an embankment. Both applicants and a third man got out of the taxi and ordered the other passengers to run into nearby bushes. The passengers complied, and waited there until the police arrived. They then made a report to the police.

[5] Mr Williams was apprehended and, on 13 July 2015, he gave a cautioned statement to the police in which he indicated, among other things, that he, Mr Richards and another person boarded the taxi; the plan was to rob the driver of the taxi; he gave a gun to Mr Richards; Mr Richards shot the driver in his head; the car crashed; and they panicked and ran away.

[6] Mr Richards, who was subsequently taken into custody, also gave a cautioned statement. He indicated that Mr Williams gave him the gun; he took it out whilst being driven in the taxi; it accidentally went off and shot the driver; he did not mean to kill anyone; and he panicked and ran away.

[7] The deceased died from the gunshot injury to his head.

The appeal

[8] On 4 January 2022, a single judge of this court refused the applicants' applications for leave to appeal their sentences. The applications were renewed before us. Mr Williams was also permitted an extension of time to file and argue a supplemental ground of appeal

against conviction, in addition to his original ground against sentence. He also obtained permission to file an affidavit.

[9] With our leave, the following single supplementary ground of appeal was pursued by Mr Richards:

> "The sentence is manifestly excessive resulting from the Learned Trial Judge's failure to conduct a proper sentencing exercise."

[10] During the course of argument, Mr Williams was allowed to abandon his ground of appeal against sentence. In the result, the single ground advanced on Mr Williams' behalf was as follows:

> "The learned trial judge erred in accepting the plea of guilty to murder as the facts presented as the basis of the plea did not in law ground the offence of murder."

[11] These applications were heard together.

Whether Mr Richards' sentence was manifestly excessive

Submissions for Mr Richards

[12] At the outset, Mr Robinson, appearing for Mr Richards, indicated that the applicant's challenge was confined to the length of the pre-parole period and not the life imprisonment imposed by the learned judge. Counsel submitted that the sentencing exercise was woefully inadequate as the learned judge failed to follow the established sentencing procedure outlined in **Meisha Clement v R** [2016] JMCA Crim 26. In particular, the learned judge failed to: (i) identify a range; (ii) identify a starting point within the range; (iii) discount the sentence on account of the guilty plea; and (iv) deduct time spent on remand after conducting a proper sentencing exercise. Consequently, the learned judge arrived at a sentence that was manifestly excessive.

[13] Counsel relied on **Meisha Clement v R**, **Troy Smith, Precious Williams and Andino Buchanan v R** (**'Troy Smith et al v R'**) [2021] JMCA Crim 9; sections 42E, 42F and 42H of the Criminal Justice Administration Act, 2015 ('CJAA'); and the Sentencing

Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines').

[14] It was proposed that a sentence of life imprisonment with a parole ineligibility period of 15 years would be appropriate, using a starting point of 25 years, and after the following adjustments.

[15] It was recommended that three years be added to the starting point on account of the aggravating factors including: prevalence of the type of offence; the use of a firearm to commit the murder; the crime having been committed in the course of an attempted robbery; and the age of the deceased, that is, 25 years old. The adjusted figure would be 28 years.

[16] That figure should then be reduced by four years for the mitigating factors including: Mr Richards' age at the time of the murder, that is, 18 years old; his employment record; his explanation that the discharge of the firearm was accidental; his previous good character; the absence of any previous conviction; his dependent child; and co-operation with the police.

[17] The provisional sentence of 24 years should then be discounted by 25% on account of the guilty plea, and a credit of three years applied for the time spent on pre-sentence remand.

Submissions for the Crown

[18] In the absence of oral arguments from the Crown, we considered the written submissions that were filed. Although acknowledging that the sentencing exercise "could have been done in a more forensic fashion" it was submitted that there was sufficient application of the principles outlined in **Meisha Clement v R**, and the Sentencing Guidelines. The result was a sentence that fell within the accepted range and was therefore not manifestly excessive. It was also submitted that the learned judge had indicated the correct statutory range of "15 years to life imprisonment", in keeping with

section 3(1)(b) of the Offences Against the Person Act; and that although he did not state a starting point, there was no detriment since he had taken account of the mitigating and aggravating factors in arriving at the sentence.

[19] We were referred to multiple cases, including **Troy Barrett v R** [2022] JMCA Crim 24; and **Lincoln McKoy v R** [2019] JMCA Crim 35, in which the sentence for a single count of murder, with the use of a firearm, was life imprisonment with a parole ineligibility period of 25 years. It is to be observed that the sentences upheld in **Lincoln McKoy v R** and **Troy Barrett v R** were imposed after trials.

[20] It was further submitted that there was no failure by the learned judge to give a discount for the guilty plea; rather, he had exercised his discretion not to give a discount, in light of the gravity of the offence. This approach, it was argued, was consistent with the guidance in **Meisha Clement v R,** and the provisions of section 42E of the CJAA - that the application of a discount is a matter of discretion, and must be justified by the circumstances of the case.

[21] As regards Mr Richards' contention that his time spent on pre-sentence remand was not appropriately dealt with by the learned judge, the Crown pointed us to page 46, line 25 to page 47, lines 1 to 4 of the transcript where the learned judge remarked that the parole ineligibility period was 23 years adjusted downwards to 20 years after applying a credit of three years for time spent on pre-sentence remand.

[22] Finally, it was submitted, on the Crown's behalf, that the approach used by McDonald-Bishop JA in **Lincoln McKoy v R** was to be preferred were this court minded to disturb the sentence imposed. The result would be a sentence of 21 years and five months, using a starting point of 15 years, with 16 years added for the aggravating factors; a subtraction of nine and a half years for mitigating factors; an application of four and a half years' discount for the guilty plea; and a credit of three years for time spent on pre-sentence remand.

Discussion

[23] Since there was no challenge to the term of life imprisonment imposed, we will concern ourselves with whether the learned judge erred when he imposed a parole ineligibility period of 20 years.

[24] We are guided by the well-established principle - that there will generally be no disturbance of a sentence unless the sentencing judge erred in principle or the sentence is manifestly excessive or inadequate (see **R v Kenneth John Ball** (1951) 35 Cr App R 164, 165).

[25] At the start of his sentencing remarks, the learned judge observed that he could impose a sentence of life imprisonment with the minimum parole ineligibility period of 15 years as this was not an appropriate case for a community service order. That statement is consistent with section 3 of the Offences Against the Person Act which prescribes the sentencing options for the relevant category of murder. That section states, in part:

> "3. – (1) Every person who is convicted of murder falling within –
>
> …
>
> (b) section 2(2), shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years.
>
> …
>
> (1C) In the case of a person convicted of murder, the following provisions shall have effect with regard to that person's eligibility for parole, as if those provisions had been substituted for section 6(1) to (4) of the Parole Act-
>
> …
>
> (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;

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

[26] The learned judge's sentencing remarks also disclosed that he considered the following significant factors: Mr Richards was the perpetrator in possession of the firearm; it was his act that caused the killing; as the shooter, he should serve a longer sentence than the aider and abettor; it was a joint activity; he pleaded guilty although he tried to "neutralise the gravity of the attack to say that he did not intend to act"; he was 21 years old; the social enquiry report suggested that he did not fully grasp the far-reaching consequences of his act; he had no previous convictions; and his mother had indicated that he associated with his co-applicant who was known for criminal activities.

[27] The learned judge also said that he bore in mind that the applicant spent three years in custody and he was, therefore, obliged to reduce his sentence on that basis.

[28] In accordance with the statutory framework, the learned judge retained life imprisonment as the sentence to be imposed, and used a starting point of 15 years to set the minimum pre-parole period. He made no reference to section 42F of CJAA ('the deeming provision') which allows for an offender who pleads guilty to murder and is sentenced to life imprisonment, to derive some "tangible benefit" from the guilty plea.

[29] Section 42F of the CJAA provides:

> "Where the offence to which a defendant pleads guilty is one for which the Court may impose a sentence of life imprisonment, and the Court would have imposed that sentence had the defendant been tried and convicted for the offence, then, for the purpose of calculating a reduction of sentence in accordance with the provisions of this Part, a term of life imprisonment shall be deemed to be a term of thirty years."

[30] This provision has been interpreted in **Quacie Hart v R** [2022] JMCA Crim 70, and other recent cases from this court to mean that the starting point for calculating the pre-parole period for murder, when there is a guilty plea, must be below 30 years. Citing **Lincoln Hall v R** [2018] JMCA Crim 17, McDonald-Bishop JA observed, in **Quacie Hart**

v R, that section 42F of CJAA made it possible for a discount on the pre-parole period by capping the life imprisonment at 30 years.

[31] In that case, with a single victim for murder, a range of 15 years to 25 years was considered appropriate, and a starting point of 19 years was adopted.

[32] At paras. [18] to [21] of **Lincoln Hall**, Morrison P, in commenting on section 42F of the CJAA, stated:

> "[18] In the case of a sentence of life imprisonment, this naturally begs the question of how to approach the calculation of the actual level of discount for the guilty plea. This is the very question which section 42F seeks to address:
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> …
>
> [19] So the problem of calculation of a percentage of a sentence of indeterminate duration is resolved by resort to a deeming provision, essentially a statutory fiction by which something is decreed to be other than it is for some particular purpose (see **R v Verrette** [1978] 2 SCR 838, per Beetz J at page 845). It follows from this that, for this purpose at any rate, no issues can arise with respect to the identification of a starting point and the assessment of the impact of aggravating and mitigating factors with a view to arriving at the appropriate sentence.
>
> [20] In this case, there can in our view be no doubt that, had the appellant been tried and convicted for the murder for which he was charged, the court would have imposed a sentence of life imprisonment. The circumstances of the murder committed during the course of a home invasion in the dead of night were such as to have attracted no less. Accordingly, as it seems to us, the required approach to the calculation of the reduction in the appellant's sentence on account of his guilty plea would have been to treat the term of life imprisonment which the sentencing judge had in mind as though it were a sentence of 30 years' imprisonment.
>
> [21] That having been done, the next step is to determine the actual percentage by which the sentence should be reduced within the range indicated in section 42E(2)(b) ..."

[33] Section 42E of the CJAA provides for a reduction of the sentence upon a guilty plea for murders falling within section 2(2) of the Offences Against the Person Act such as in the instant case. There was no dispute that Mr Richards pleaded guilty on the first relevant date so the relevant part of that provision is as follows:

> "42E. – (1) Subject to subsection (3), where a defendant pleads guilty to the offence of murder, falling within section 2(2) of the Offences Against the Person Act, the Court may, in accordance with subsection (2), reduce the sentence that it would otherwise have imposed on the defendant had the defendant been tried and convicted of the offence.
>
> (2) Pursuant to subsection (1), the Court may reduce the sentence in the following manner –
>
> (a) where the defendant indicates to the court, on the first relevant date, that he wishes to plead guilty to the offence, the sentence may be reduced by up to thirty-three and one third percent..."

[34] In granting any such reduction the court must be guided by the factors outlined in section 42H, as follows:

> " …
>
> (a) whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;
>
> (b) the circumstances of the offence, including its impact on the victims;
>
> (c) any factors that are relevant to the defendant;
>
> (d) the circumstances surrounding the plea;
>
> ...
>
> (f) whether the defendant has any previous convictions;"

[35] The learned judge adjusted the starting point on the basis of the factors mentioned above but fell into error when he failed to show how the starting point was adjusted numerically in accordance with the aggravating and mitigating factors he found applicable. Neither did he show how those factors were balanced to arrive at the provisional sentence (that is, the sentence he would have imposed had Mr Richards been tried). He also fell into error by deciding against a discount on the sole basis that this was a grave offence involving the use of a firearm. He should have expressly used the factors set out in section 42H which the court is obliged to consider when deciding whether to give a discount and the level of discount.

[36] Failure on his part to abide those principles, required us to revisit the sentence imposed, using the correct methodology.

[37] We agree with McDonald-Bishop JA's observation, at para. [28] in **Quacie Hart v R** that:

> "[where the sentencing judge] had given life imprisonment, there would have been no scope for the operation of the Sentencing Guidelines. However, in murder cases, where life imprisonment is imposed, the court [should use] the Sentencing Guidelines and the arithmetical methodology introduced by case law to assist it in arriving at an appropriate minimum pre-parole period as it would be in determining a fixed term sentence. This ensures adherence to the proportionality and parity principles and aims at preventing arbitrariness."

[38] The correct sentencing approach was crystallized by McDonald-Bishop JA in **Daniel Roulston v R** [2018] JMCA Crim 20, as follows:

> "[17] Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:
>
> a. identify the sentence range;
>
> b. identify the appropriate starting point within the range;
>
> c. consider any relevant aggravating factors;

d. consider any relevant mitigating features (including personal mitigation);

e. consider, where appropriate, any reduction for a guilty plea;

f. decide on the appropriate sentence (giving reasons); and

g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."

[39] Given that the offence resulted from an incident that involved Mr Richards and another party both of whom had intended to commit a felony, that is, to rob the deceased, we consider as appropriate, a starting point of 18 years. That starting point would then be adjusted upwards to 28 years, on account of the following aggravating factors:

(i) the murder was committed with a gun that was carried to the scene of the crime;

(ii) the victim was providing transportation service to the public;

(iii) the victim was defenceless (he was shot in the back of his head);

(iv) the murder was committed while other members of the public (the passengers) were exposed to serious injury;

(v) the victim was only 25 years old; and

(vi) the country's high murder rate.

[40] That figure of 28 years would then be adjusted downward, on account of the mitigating factors, which include:

(i) the age of the applicant (18 years old at the time of the offence);

(ii) his cooperation with the police by voluntarily giving a cautioned statement;

(iii) his previous good character;

(iv) his having no previous conviction; and

(vi) his verbal expressions of remorse.

[41] Although counsel indicated that Mr Richards was the sole provider for his three-year old child there was no evidence to support it, or that he was the primary caregiver. Consequently, that will not be taken into account.

[42] When the mitigating factors are balanced with the aggravating factors, against the background of the sentencing objectives, specifically rehabilitation, deterrence and punishment, we find that the aggravating features are far more significant and weighty. Consequently, had the case been decided at a trial, an appropriate pre-parole period would have been 25 years.

[43] We must also have regard to the fact that Mr Richards pleaded guilty. Taking into account the factors under section 42H of the CJAA, a discount of 20% is in order. In particular, we give weight to the fact that the circumstances of this offence are horrific, and that any greater discount would be so disproportionate to the seriousness of the offence that "it would shock the public conscience". These adjustments result in a parole ineligibility period of 20 years. This is not only proportionate but falls well within the range of pre-parole periods upheld by this court where a single murder is committed with the use of a firearm.

[44] The authorities have made it plain that the sentencing judge must take fully into account time spent on pre-sentence remand unless there are exceptional reasons for not doing so. The Privy Council, in **Mohamed Iqbal Callachand and Another v State of Mauritius** [2008] UKPC 49, stated that the time spent in custody should not be only "a form of words" but "an arithmetical deduction" (see also **Romeo Da Costa Hall v The**

Queen [2011] CCJ 6 (AJ); **Meisha Clement v R**; **Charley Junior v R** [2019] JMCA Crim 16 and **Techla Simpson v R** [2019] JMCA Crim 37).

[45] Consistent with that primary rule, we now apply a credit of three years, as determined by the learned judge, to the 20 years. The result is a minimum parole ineligibility period of 17 years.

[46] Accordingly, there is merit in Mr Richards' sole ground of appeal, that the sentence imposed was manifestly excessive.

[47] Leave to appeal sentence is, therefore, granted to Mr Richards, and the hearing of the application is treated as the hearing of the appeal. The appeal is allowed and the minimum pre-parole period of 20 years is set aside; substituted therefor is a minimum pre-parole period of 17 years. The sentence, therefore, would be life imprisonment with a minimum pre-parole period of 17 years.

Whether Mr Williams' plea of guilty to the offence of murder should have been accepted by the learned judge

Submissions for Mr Williams

[48] Counsel for Mr Williams, Mr Fletcher, contended that the law imposes a duty on a trial judge to ensure that the factual basis of a guilty plea matches the ingredients of the offence being pleaded to, and, this is so even where there is no disagreement between the prosecution and the defence about the facts and the plea. Further, the trial judge has a duty to stop the proceedings and inquire into the matter to prevent a miscarriage of justice.

[49] Reliance was placed on Blackstone's Criminal Practice 2020, para. D12. 100, which states:

> "If an accused purports to enter a plea of guilty but, either at the time he pleads or subsequently in mitigation, qualifies it with words that suggest he may have a defence (e.g., 'Guilty, but it was an accident' or 'Guilty, but I was going to give it back'), then

> the court must not proceed to sentence on the basis of the plea but should explain the relevant law and seek to ascertain whether he genuinely intends to plead guilty."

[50] Counsel argued that the transcript is replete with sufficiently clear indicators that what Mr Williams advanced did not amount to the offence of murder; nor did a summary of the prosecution's case, which was firmly based on the confession of Mr Williams. He highlighted that the prosecution's case was that Mr Williams and his co-accused planned to rob the taxi driver but nothing on the record indicated that a robbery was attempted; and Mr Richards had indicated that the gun went off accidentally.

[51] Counsel also drew our attention to page 39 of the social enquiry report, where Mr Williams reportedly outlined the plan to rob the taxi driver, indicating that he warned his cousin (his co-accused/co-applicant) who had possession of the firearm, not to harm anyone.

[52] Counsel also referred to Mr Williams' affidavit, which, he said, was significant in two ways, viz.: (i) it maintained Mr Williams' account that he had no expectation or agreement that the firearm was to have been used in the way that it was; and (ii) having consulted with his counsel, he pleaded guilty even though he did not "have anything like that shooting in his mind". His understanding was that presence, as part of the plan, made him responsible for what transpired, it was explained.

[53] In support of his primary submission, counsel pointed to page 5 of the transcript, where Mr Williams addressed the learned judge, as follows:

> "The accused: Sir, mi a ask you if you have little leniency on me, because mi was there when the accident happen, Sir.
>
> His Lordship: The incident?
>
> The accused: The incident but is not me do it Sir..."

[54] Counsel referred to and relied on **Troy Smith et al v R**, particularly para. [53], and argued that in the instant case, if the learned judge had to direct a jury, he would

have had to leave manslaughter to them. Counsel also relied on the principle enunciated in **Pearlina Wright v Regina (1988) 25 JLR 221**, that "when a person pleads guilty, the [trial] judge, as the tribunal of fact, should sentence on the set of facts which are most favourable to the accused".

Submissions for the Crown

[55] The main contention by the Crown was that the learned judge did not misdirect himself by not considering the offence of manslaughter as an alternative to murder. It was submitted that the conviction for murder was justified on the facts since Mr Williams was present, together with the principal perpetrator (physically and in mind), during the commission of the act (the killing), and had done no overt act to show that he had distanced himself from it. In those circumstances, it was argued, the learned judge was entitled to conclude that Mr Williams was not merely present. Furthermore, the applicants' actions, of boarding the taxi together and fleeing the scene together after the shooting, were additional circumstances from which the learned judge could infer joint participation in the murder of the deceased. In the absence of evidence to indicate that Mr Williams did not aid or abet the murder, the learned judge had no legal basis to consider manslaughter, it was submitted.

[56] It was the Crown's further submission that, for the lesser offence to have been considered, there needed to be evidence that Mr Williams had a lesser intention than the principal.

[57] Reliance was placed on **R v Clyde Sutcliffe and Randolph Barrett** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 148 and 149/1978, judgment delivered 10 April 1981, in which the court rejected the argument, by the appellants, that the common plan to rob did not include a common plan to kill. On this point, the Crown also placed reliance on **Joel Brown and Lance Matthias v R** [2018] JMCA Crim 25, and **R v Drew** [1985] 2 All ER 1061. In the latter case, the trial judge refused to entertain an application for a change of plea where the defendant seemed to have entered a plea out of fear, and the review court held that only in rare

cases should a judge exercise his discretion to entertain an application to change an unequivocal plea.

[58] The Crown also relied on **Tierney-Campbell v R** [2020] EWCA Crim 1194 in which the court made the observation that provided that the trial court applied the correct principles, in determining an application for a change in plea, the appellate court would not likely interfere with the trial judge's exercise of discretion.

Discussion

Did the basis of the plea disclose facts that established the commission of the offence of murder, by Mr Williams?

[59] The starting point of this analysis is the general statement that where a person takes part in an unlawful and violent attack on another person that results in death, he will be guilty either of murder or of manslaughter, according to whether he had the *mens rea* for murder (see paras. 33 and 69 of **R v Jogee and Ruddock v The Queen** [2016] UKPC 7 ('**R v Jogee and Ruddock'**).

[60] On the facts of the instant case, as disclosed in the prosecution's outline of the facts that formed the basis of the plea at the arraignment, Mr Williams could not escape liability for the killing of the deceased. The critical question, therefore, was whether he had the *mens rea* for murder.

[61] In **R v Jogee and Ruddock**, the Board cited, with approval, the ruling in **R v Collision** (1831) 4 Car & P 565. In the latter case, two men went out by night to steal apples. They were detected by the landowner's watchman. One of the men attacked the watchman with a bludgeon that he was carrying, and caused him serious injury. On the trial of the second man for assault and wounding with intent to murder, the trial judge ruled, among other things, that "[t]o make the prisoner a principal, the jury must be satisfied that when he and his companion went out with a common illegal purpose of committing the felony of stealing apples, they also entertained the common guilty

purpose of resisting to death, or with extreme violence, any persons who might endeavour to apprehend them…".

[62] As regards that case, the Board observed at para. 22 of the judgment in **R v Jogee and Ruddock:**

> "This ruling highlighted the importance of identifying the common purpose. If it was only to steal apples, the defendant was not guilty of the greater offence with which he was charged. He was guilty of that offence only if the common purpose included using severe violence to resist arrest, should the occasion arise."

[63] And at paras. 26 and 27, the Board continued:

> "26. The evidential relevance of the carrying of a weapon on a criminal venture has been a common theme in case law. Its evidential strength depends on the circumstances...
>
> 27. In a line of cases the courts recognised that even where there was a joint intent to use weapons to overcome resistance or avoid arrest, the participants might not share an intent to cause death or really serious harm. If the principal had that intent and caused the death of another he would be guilty of murder. Another party who lacked that intent, but who took part in the attack which resulted in an unlawful death, would be not guilty of murder but would be guilty of manslaughter, unless the act which caused the death was so removed from what they had agreed as not to be regarded as a consequence of it: *R v Smith (Wesley) [1963] 1 WLR 1200* …" (**Italics as seen in the original)**

[64] In **R v Jogee and Ruddock,** at para. 26, also, the Board approved the following statement in Professor Glanville Williams' Criminal Law, The General Part, 2nd ed (1961), page 397:

> "The knowledge on the part of one criminal that his companion is carrying a weapon is strong evidence of a common intent to use violence, but is not conclusive."

[65] After referring to a line of cases that followed **Chan Wing-Siu and others v The Queen** [1985] AC 168, the Board rejected the "foresight test" that guilt was based on what the principal offender might do.

[66] In **Troy Smith et al v R**, this court had to decide whether the trial judge was duty bound to leave manslaughter for the jury's consideration as regards the appellant who played the role of driver to the scene of the killing. Applying the principles in **R v Jogee and Ruddock**, it was decided that the trial judge did not go far enough, in so far as she left only two options to the jury. Those were: was the appellant, Mr Buchanan, present on the scene with the intent to aid and abet the commission of the robbery and murder, or not there at all? This court concluded that a third option - that he may have been present with the intent only to aid and abet the offence of robbery - should also have been left with the jury.

[67] In the instant case, there was an intention to rob with a gun. The provision of the gun, by Mr Williams, was evidence of a shared intention to use violence. However, it was important for the learned judge to direct his attention to all the facts and the relevant explanations, with a view to making an assessment as to whether they sufficiently evinced an intention, by Mr Williams, to kill or cause grievous bodily harm.

[68] We agree with Mr Fletcher that if this case had gone to trial, manslaughter would have had to be left to the jury, in the light of Mr Williams' explanation for providing the gun to Mr Richards. He maintained that the intention for its use was to only frighten the deceased. The jury, in all likelihood, would have been directed to consider that, although Mr Williams had agreed to robbery with intent to use violence, the giving of the gun to the co-applicant was not conclusive of an intention to murder or cause grievous bodily harm.

[69] Mr Williams' participation in the intended robbery did not necessarily mean that he intended to be a party to the murder; it was possible (based on his explanation in this court) that he lacked the requisite intention to kill or cause grievous bodily harm. Indeed,

the basis for the plea did not disclose an intention, on the part of the principal either, to kill or cause grievous bodily harm. The facts as outlined disclosed that he said he did not intend to shoot the deceased and that the shooting was accidental. He, nevertheless, pleaded guilty to murder and has not attempted to change that plea.

[70] In all the circumstances, and in light of the applicable law regarding parasitic accessory liability, as laid down in **R v Jogee and Ruddock**, manslaughter would have had to be considered in respect of Mr Williams.

[71] The principles in the cases considered on joint liability, in our view, have put to rest the Crown's primary argument that the circumstances of this case provide conclusive evidence that Mr Williams shared a common intent with the co-applicant to kill the deceased. There was a plan between the applicant and his co-applicant to rob the deceased; both of them were seated in the back seat; Mr Williams had given the gun to the co-applicant who later shot the deceased in the back of his head; the car crashed; and they panicked and ran. There was nothing to suggest that Mr Williams' participation went beyond the scope of the common enterprise to rob which was disclosed.

[72] On the facts outlined for the plea, and authorities reviewed, there was no basis for a plea of murder to have been accepted.

Duty of the trial judge in the circumstances

[73] Mr Williams gave an unequivocal plea of guilty to murder, and his lawyer explained to the court that he had taken instructions from him which were consistent with the plea to murder. However, an examination of the transcript and other material placed before us, including Mr Williams' oral statement to the learned judge after the plea was taken, and the comments attributed to him in the social enquiry report, indicates that the learned judge ought to have been sufficiently alerted to the possibility that Mr Williams lacked the requisite intention for murder. Nevertheless, he made no enquiries of Mr Williams to ascertain what he was saying or attempting to say after his plea was taken and up to the time he was sentenced.

[74] In our view, the learned judge was required to make the necessary enquiries, not only in light of Mr Williams' explanations; but on the basis of the facts put before him by the prosecution.

[75] That approach would have been consistent with the principle in **Revitt and others v Director of Public Prosecutions** [2006] 1 WLR 3172, paras. 17 and 18, which we accept as an accurate statement of the law, that:

> "17 If after an unequivocal plea of guilty has been made, it becomes apparent that the defendant did not appreciate the elements of the offence to which he was pleading guilty, then it is likely to be appropriate to permit him to withdraw his plea – see *R v South Tameside Magistrates' Court, Ex p Rowland* [1983] 3 All ER, 689, 692, per Glidewell J. Such a situation should be rare, for it is unlikely to arise where the defendant is represented and, where he is not, it is the duty of the court to make sure that the nature of the offence is made clear to him before a plea of guilty is accepted.
>
> 18 It may happen, and again this is likely to be rare, that the court hearing an application to withdraw a guilty plea will or should appreciate that the facts relied upon by the prosecution do not add up to the offence charged. In such circumstances, justice will normally demand that the defendant be permitted to withdraw his plea."

[76] The fact that Mr Williams was represented by counsel was not determinative of whether the learned judge carried out an enquiry. That intervention would have been consistent with the duty imposed on a trial judge to act in the interests of justice, when a plea of guilty is qualified by words that are suggestive of a defence, before sentencing (see Blackstone Criminal Practice 2020, D12.100).

[77] The learned judge had the jurisdiction to allow Mr Williams to change his plea from guilty to not guilty, for murder, at any time before he was sentenced. In **Lloydell Richards v The Queen** (1992) 41 WIR 263, at page 269, the Board approved Lord Reid's observation in **S (an infant) v Recorder of Manchester** [1971] AC 481, that:

> "It has long been the law that when a man pleads 'Guilty' to an indictment the trial judge can permit him to change his plea to 'Not Guilty' at any time before the case is finally disposed of by sentence or otherwise."

[78] At page 270, the Board observed that there can be "no finality in the 'acceptance' [of the plea] until sentence is passed".

[79] In **The King v Ingleson** [1915] KB 512, the appellant entered a plea of guilty, in the mistaken belief that he was guilty, when he had no felonious intent to steal. The conviction was quashed and a retrial ordered because the absence of a felonious intent was inconsistent with a plea of guilty. The court followed the decision in **Rex v Baker** (1912) 7 Cr App Rep 217, where it was held that "if the prisoner's plea of guilty ought not to have been accepted, he must be sent back to be tried".

[80] The authorities have made it plain that a trial judge's interference with unequivocal pleas of guilt should be rare, particularly where the defendant is represented by counsel. Therefore, the instant case should be viewed strictly in the context of its peculiar circumstances.

The correct approach open to this court

[81] According to the learned authors of Blackstone's Criminal Practice 2023, at para. D12.99:

> "Should the court proceed to sentence on a plea which is imperfect, unfinished, or otherwise ambiguous, the accused will have a good ground of appeal. Since the defect in the plea will have rendered the original proceedings a mistrial, the Court of Appeal will have the options either setting the conviction and sentence aside and ordering a re-trial...or of simply quashing the conviction... If the former course is chosen... the court may either then and there direct that a not guilty plea be entered or order that the accused be re-arraigned in the court below..."

[82] We accept the foregoing guidance and adopt it as the proper approach. We do not find **Pearlina Wright v Regina**, cited by Mr Fletcher, to be helpful to the defining issues in this appeal.

[83] We have already concluded that manslaughter would have been made out on the basis of the facts relied on by the prosecution. Accordingly, we would permit Mr Williams to change his plea. For this reason, the appropriate course would be to quash the conviction for murder, set aside the sentence, and remit the case to the next sitting of the Circuit Court for the parish of Clarendon for re-arraignment of Mr Williams, for a not guilty plea to be entered to the offence of murder, and a plea be entered (for the first time) to the offence of manslaughter.

[84] Accordingly, the orders of the court are:

> 1. In respect of the applicant, Austin Richards, the application for leave to appeal against sentence is granted
>
> 2. The hearing of the application is treated as the hearing of the appeal.
>
> 3. The appeal against sentence is allowed.
>
> 4. The sentence of life imprisonment is affirmed. The minimum pre-parole period of 20 years' imprisonment is set aside and substituted therefor is a minimum pre-parole period of 17 years' imprisonment.
>
> 5. The sentence is to be reckoned as having commenced on 17 November 2017, the date on which it was imposed.
>
> 6. In respect of the applicant, Oneik Williams, the application for leave to appeal conviction is granted.

7. The hearing of the application is treated as the hearing of the appeal.

8. The appeal is allowed.

9. The conviction is quashed and the sentence set aside.

10. The case is remitted to the next sitting of the Circuit Court for the parish of Clarendon for the applicant to be re-arraigned for a plea of not guilty to be entered to the offence of murder and a plea be entered to the offence of manslaughter.