[2022] JMCA Crim 16

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 80/2018

CORNELIUS ROBINSON v R

Lambert Johnson instructed by Johnson & Company for the applicant

Miss Natallie Malcolm and Miss Domonique Martin for the Crown

28 February, 4 and 25 March 2022

SIMMONS JA

[1] On 13 February 2015, the applicant, Mr Cornelius Robinson, pleaded guilty in the Circuit Court for the parish of Westmoreland, to an indictment charging him with the offence of murder. On 19 February 2015, he was sentenced to life imprisonment with a stipulation that he serves 25 years before being eligible for parole.

The applications for extension of time in which to appeal and for permission to appeal

[2] On 12 October 2018, the applicant filed an application in this court for an extension of time within which to appeal as well as an application for permission to appeal sentence. His explanation for the delay in seeking permission to appeal was that his family had failed to retain the services of an attorney on his behalf although he had requested that

they do so and that he thought the necessary papers had been signed and that his appeal has a good prospect of success.

[3] His application for permission to appeal sentence was based on the following grounds:

(a) That he did not receive a discount for his early plea of guilty on the first occasion.

(b) That he had an excellent probation report and no previous convictions.

(c) That he is not a threat to society as the committal of the offence was out of character.

[4] The application for permission to appeal sentence was considered by a single judge of appeal on 4 June 2021 and was refused. It does not appear from the record, that the judge considered the application for extension of time. The applicant therefore renewed his application before this court as is his right.

[5] On 23 February 2022, the original grounds were amended and encapsulated in the following ground:

> "The Learned Sentencing Judge was wrong in principle in his approach to sentencing the [applicant] in that he failed to properly assess the following:-
>
> (i) That having regard to the [applicant's] very early plea of guilty the Learned Sentencing Judge did not give sufficient weight and discount to the exceptionally early plea of guilty and expressed remorse.
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> (ii) That sufficient weight was not given [to] the excellent antecedents and lack of any previous convictions.
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> Accordingly, the sentence imposed is manifestly excessive and warrants the intervention of the Court of Appeal."

[6] On 4 March 2022, the court had the benefit of hearing submissions from counsel. At the conclusion of the hearing, we made the following orders:

> (1) The application for extension of time in which to appeal is granted.
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> (2) The application for permission to appeal sentence is granted.
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> (3) The hearing of the application is treated as the hearing of the appeal.
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> (4) The appeal against sentence is allowed.
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> (5) The sentence of life imprisonment with the stipulation that the applicant serves 25 years before being eligible for parole is set aside. Substituted therefor is a sentence of life imprisonment with the stipulation that the applicant serves 24 years 11 months and 10 days, taking into account the 21 days spent in custody.
>
> (6) The sentence should be reckoned as having commenced on 19 February 2015.

[7] It was indicated to the parties that the reasons would be provided and this judgment is a fulfilment of that promise.

Background

[8] On 26 January 2015, at about 6:50 am, the deceased, 14-year-old Santoya Campbell, left home clad in her school uniform. When she failed to return home, a missing person's report was filed and investigations commenced into her whereabouts. On 27 January 2015, her body was discovered in Frome District in the vicinity of the Cabarita River bridge. The body was in plastic bags with its hands and feet bound.

[9] During subsequent investigations, the applicant was identified as a person of interest. The applicant was interviewed by the police and in his statement, he admitted that he knew the deceased and her mother. He did not, however, indicate that he knew the deceased's whereabouts. Investigations continued and a grey Nissan motor car belonging to the applicant was seized. A forensic examination was done of the trunk of the said car and what appeared to be blood was found on the spoiler.

[10] The applicant turned himself in to the police on 29 January 2015 and on 5 February 2015, he confessed during a question and answer session that he had killed the deceased. He indicated that he knew her from 2007 and had engaged in sexual intercourse with her on one occasion. He also indicated that the deceased had come to his place of business on 26 January 2015 and asked for money. He strangled her because she had threatened to expose their sexual relationship unless he paid her.

[11] After he killed the deceased, he placed her body in two plastic garbage bags along with her personal items including her telephone. The body was transported in the trunk of his car to the location where it was discovered at about 11:00 pm on the night of 26 January 2015. He disclosed to the Probation Aftercare Officer, who prepared the social enquiry report, that he kept the body in the back section of his office until all the shops had closed at the location. He also indicated that he knew the deceased from she was in primary school and had agreed, at the request of her mother, to assist her with lunch money. The deceased, according to him, got more demanding and in January 2015, he asked her mother not to send her to his place of business. Early in the month of January, the deceased informed him that she had missed her menstrual period. She also asked him for a phone. He ignored her and she threatened to tell her mother and his wife about their relationship. In mid-January, her pregnancy was confirmed after he provided her with a pregnancy test. They were advised by a doctor that it was too late to perform an abortion and he bought a pill for her to end the pregnancy. On the morning of 26 January 2015, they had another dispute about money and the deceased threatened to tell his wife

about their relationship. He stated that he got angry and held her by the throat until she died.

[12] The post mortem report stated the cause of death as asphyxia from suffocation, consistent with the closure of the nostrils and mouth. It was revealed that the deceased was pregnant with what was estimated to be a two month old foetus at the time of death.

Submissions

For the applicant

[13] Mr Lambert Johnson, on behalf of the applicant, submitted that this court was entitled to consider the sentence afresh as the learned judge, although indicating that the applicant's sentence was being discounted on account of his guilty plea, failed to indicate the percentage by which the sentence was being reduced. He submitted that the applicant was entitled to a discount of 50% as there was no evidence pointing to the involvement of the applicant in the murder and the plea was given at the earliest opportunity. Reference was made to **R v Evrald Dunkley** (unreported) Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered on 5 July 2002 and **Troy Jarrett and Jermaine Mitchell v R** [2017] JMCA Crim 38, in support of that submission.

[14] Counsel suggested that an appropriate starting point in the determination of the sentence was 25 years. He indicated that the following were the aggravating factors:

(i) the nature of the relationship between the applicant and the deceased;

(ii) the applicant's knowledge that she was pregnant;

(iii) the fact that the applicant placed the body in plastic garbage bags and kept it all day at his work place; and

(iv) the applicant's attempt to secrete the body.

[15] The mitigating factors were:

(i) there was no pre-meditation;

(ii) no weapon was used in the commission of the offence;

(iii) the applicant cooperated with the police;

(iv) the applicant had no previous convictions; and

(v) the applicant's good character.

[16] Counsel submitted that the sentence should be reduced by one month to take account of the 14 days which the applicant spent in custody. It was further submitted that the period before which the applicant would be eligible for parole should be reduced to 18 years. In this regard, Mr Johnson relied on **Kevin Young v R** [2015] JMCA Crim 12, in which the stipulation that the applicant serve 30 years before being eligible for parole was reduced to 20 years. Counsel pointed out that, that case had gone to trial. Particular reference was made to paragraph [13] where Morrison JA (as he then was) stated:

> "[13] …, the unusual features of the case – the applicant's expression of remorse, his age and his good character – were plainly factors which militated in the applicant's favour."

[17] Reliance was also placed on **Tyrone Gillard v R** [2019] JMCA Crim 42, in which the period for the appellant's eligibility for parole was reduced from 22 years to 20 years following a guilty plea. Specific reference was made to paragraph [19], where F Williams JA stated:

> "[19] However, in our view, the learned judge in the instant case failed to pay sufficiently close regard to the principles applicable to sentencing on a guilty plea, resulting in the stipulation of a period to be served before parole that might be said to be manifestly excessive, and thus entitling or requiring this court to intervene."

<u>For the Crown</u>

[18] Ms Malcolm conceded that the learned judge erred in principle in his approach to sentencing as he did not indicate a starting point in the calculation of the sentence. In addition, there is uncertainty as to the discount that was applied to take account of the applicant's guilty plea and there is no indication on the record, that he was credited for the time spent in custody. It was therefore submitted that, by virtue of section 14(3) of the Judicature (Appellate Jurisdiction) Act, the court may revisit the issue.

[19] Counsel did, however, make the point that this court should not intervene merely because it would have imposed a different sentence. Ms Malcolm stated that based on **Alpha Green v R** (1969) 11 JLR 283 and **R v Ball** (1952) 35 Cr App Rep 164, this court should only intervene where the sentencing judge erred in principle. Reference was also made to **Troy Smith, Precious Williams and Andino Buchanan v R** [2021] JMCA Crim 9 ('**Troy Smith**'), in which Edwards JA stated at paragraph [159]:

> "[159] …the learned trial judge did not indicate a starting point nor did she illustrate how she reduced or increased that number based on the mitigating and aggravating factors she identified. Further, having not stated a starting point, she did not indicate what would have been the appropriate sentence had the matter gone to trial. As a result, she did not demonstrate what deduction she made if any for the guilty plea. We are, therefore, of the view that this warrants the court's intervention."

[20] Where the discount for the guilty plea is concerned, Ms Malcolm referred to **Demar Shortridge v R** [2018] JMCA Crim 30, in which the court indicated that prior to the enactment of the Criminal Justice (Administration) (Amendment) Act, 2015 ('CJAA'), the amount of credit for a guilty plea was a matter solely for the discretion of the judge. Ms Malcolm submitted that, based on that case, any discount that was applied by the learned judge would be based entirely on his discretion. It was also submitted that based on **R v Buffrey** (1993) 14 Cr App R (S) 511, the learned judge was correct in the exercise of his discretion not to credit the applicant with the full one third reduction of his sentence, as was the practice before the enactment of the CJAA.

[21] Counsel argued that, although the learned judge did not use the terms "aggravating" or "mitigating factors", it was clear from his sentencing remarks that he considered the factors which were for the applicant and those which were against him. Counsel identified them to be as follows:

i. Mitigating – the applicant's remorse, excellent antecedents and early guilty plea.

ii. Aggravating – the loss of a young life, the pregnancy of the deceased, the sexual relationship between the deceased, who was under 16 years and the applicant, the manner of the killing and his failure to admit guilt on the first opportunity.

[22] It was submitted that the following features should be considered by the court:

(1) the prevalence of murders in Jamaica, particularly of young children;

(2) the prevalence of adult men engaging in sexual intercourse with girls under the age of 16 years;

(3) the applicant's position of 'trust' as he was asked by her mother to assist the deceased with lunch money;

(4) the efforts made by the applicant to ensure that the pregnancy of the deceased was not revealed; and

(5) the dumping of her body near to her school in an attempt to mask the murder.

[23] Ms Malcolm submitted that the aggravating factors far outweigh the mitigating factors and "[have] substantially reduced if not completely [wiped] out the mitigating effect of the applicant's previous good character" (see **Lincoln McKoy v R** [2019] JMCA Crim 35).

[24] It was also submitted that the imposition of a life sentence without eligibility for parole before 25 years was appropriate in the circumstances of this case. In this regard counsel referred to sections 2(2) and 3(1)(b) of the Offences Against the Person Act, which provide that such a murder attracts a sentence of life imprisonment or such other term not being less than 15 years. Reference was also made to **Demar Shortridge**, in which the court used a starting point of 30 years, having accepted the appellant's plea of guilty for the offence of murder. The court found that the sentence of life imprisonment with the stipulation that the appellant serve 25 years before being eligible for parole was within the range of possibilities that were open to the learned judge and did not warrant the court's interference.

[25] Counsel also relied on **Gawayne Thomas v R** [2022] JMCA Crim 11, in which Laing JA (Ag) stated that the cases indicate a range of 18 to 29 years before eligibility for parole, where an appellant has pleaded guilty to murder.

[26] Ms Malcolm submitted that **Kevin Young**, **Tyrone Gillard** and **Troy Jarrett and Jermain Mitchell**, that were relied on by the applicant, could be distinguished from the instant case.

[27] She stated that in **Kevin Young**, there was no breach of trust as in the instant case and there was no attempt to hide the body of the deceased. It was also submitted that in the instant case unlike **Kevin Young**, the murder was committed in an attempt to conceal another crime.

[28] Where **Tyrone Gillard** is concerned, Ms Malcolm submitted that, in that case, the revisiting of the sentence was warranted because the judge erred in his calculation of the sentence.

[29] **Troy Jarrett and Jermain Mitchell**, it was argued, can be distinguished on the basis that the appellants were in their twenties unlike the applicant in the instant case who was 37 years old at the time of the commission of the offence.

[30] In the circumstances, it was submitted that the sentence was not manifestly excessive and should only be disturbed to take account of the time which the applicant spent in custody.

Discussion and analysis

[31] Section 14(3) of the Judicature (Appellate Jurisdiction) Act provides:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case, shall dismiss the appeal."

[32] However, as indicated by Hilbery J in **R v Ball** at page 165:

> "…this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses as to character he may have chosen to call. **It is only when a sentence appears to err in principle that the Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene**". (Emphasis added)]

[33] The above statement of principle by Hilbery J in **R v Ball** was adopted by this court in **Alpha Green v R**, **Meisha Clement v R** [2016] JMCA Crim 26 and more recently, in **Patrick Green v R** [2020] JMCA Crim 17.

[34] At the time when the applicant was sentenced, the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), with which we are now familiar, were not in existence. In addition, the learned judge did not have the benefit of the guidance provided in **Meisha Clement v R** and **Daniel Roulston v R** [2018] JMCA Crim 20. However, he was still required to approach the process in a systematic way. In this regard, he would have been guided by cases such as **R v Evrald Dunkley**.

[35] In the sentencing process, a judge is required to consider and apply what has been described by Lawton LJ in **R v Sargeant** (1974) 60 Cr App R 74, as the "four classical principles of sentencing". Lawton LJ said:

> "What ought the proper penalty to be? We have thought it necessary not only to analyse the facts, but to apply to those facts the classical principles of sentencing. Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing."

[36] In **Meisha Clement v R**, Morrison P stated the principle thus:

> "[43] On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[37] Harrison JA (as he then was), in **R v Evrald Dunkley**, stated on page 3 that "the aim sentencing is to satisfy, the goals of: (a) [r]etribution, (b) [d]eterrence, (c) reformation and (d) protection of the society or any one or a combination of [them], depending on the circumstances of the particular case". Harrison JA also suggested a road map by which the appropriate sentence is to be determined. He stated at pages three to four that:

> "The sentencer commences this process after conviction by determining, at the initial stage, the type of sentence suitable for the offence being dealt with. He or she first considers whether a non-custodial sentence is appropriate, including a community service order. If so, it is imposed. If not, consideration is given to the other options, ranging from the suspended sentence to a short term of imprisonment. This is the approach adopted in England, and

generally employed in Jamaica, as a useful guide to sentencing and outlined in the case of **R v Linda Clarke** [1982] 4 Cr. App. R(S.) 197. That case recommended that after having considered the above options, the sentencer may consider:

> 'If a partially suspended sentence is inappropriate, what is the best possible total sentence which can be imposed bearing in mind the circumstances of the case and the record of the offender'. (Emphasis added)

If therefore the sentencer considers that the 'best possible sentence' is a term of imprisonment, he should again make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise. The factors to be considered in mitigation of a sentence of imprisonment are, whether or not the offender has:

(a) pleaded guilty;

(b) made restitution or

(c) has any previous conviction.

These factors must be considered by the sentencer in every case before a sentence of imprisonment is imposed." (Emphasis as set out in the original)

[38] In this matter, the learned judge correctly identified the principles of sentencing. However, he did not identify a starting point and although he stated that a discount was being given for the guilty plea, the amount of that reduction is unclear. It also appears, based on the record, that he did not take into account the time which the applicant spent in custody. The learned judge did, however, identify the aggravating and mitigating factors.

[39] In light of the lack of clarity in the sentencing process and in accordance with the established practice of the court, we will proceed to consider the question of sentence afresh.

[40] The procedure to be adopted in arriving at an appropriate starting point was set out in the Sentencing Guidelines and given further clarity in **Meisha Clement v R**. In that case, Morrison P stated:

> "[26] 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**, 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] 2 All ER 1138, 1142), 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'.
>
> [27] In seeking to arrive at the appropriate starting point, it is relevant to bear in mind the well-known and generally accepted principle of sentencing that the maximum sentence of imprisonment provided by statute for a particular offence should be reserved for the worst examples of that offence likely to be encountered in practice. By the same token, therefore, it will, in our view, generally be wrong in principle to use the statutory maximum as the starting point in the search for the appropriate sentence.

The learned President also stated:

> "[29] **But, in arriving at the appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence. Although not a part of our law, the considerations mentioned in section 143(1) of the United Kingdom Criminal Justice Act 2003 are, in our view, an apt summary of the factors which will ordinarily inform the assessment of the seriousness of an offence. These are the offender's culpability in committing the offence and any harm which the offence has caused, was intended to cause, or might foreseeably have caused**.
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> [30] Before leaving this aspect of the matter, we should refer in parenthesis, with admiration and respect, to the recent judgment of the Court of Appeal of Trinidad and Tobago in **Aguillera and others**

v The State (Crim. Apps. Nos. 5,6,7 and 8 of 2015, judgment delivered on 16 June 2016). In that case, after a full review of relevant authorities from across the Commonwealth, the court adopted what is arguably a more nuanced approach to the fixing of the starting point. Explicitly influenced by the decision of the Court of Appeal of New Zealand in **R v Tauer and others** ([2005] NZLR 372), the court defined the starting point as '… the sentence which is appropriate when aggravating and mitigating factors relative to the offending are taken into account, but which excludes any aggravating and mitigating factors relative to the offender'. So factors such as the level of premeditation and the use of gratuitous violence, for instance, to take but a couple, would rank as aggravating factors relating to the offence and therefore impact the starting point; while subjective factors relating to the offender, such as youth and previous good character, would go to his or her degree of culpability for commission of the offence.

[31] We have mentioned **Aguillera and others v The State** for the purposes of information only. But it seems to us that, naturally subject to full argument in an appropriate case, the decision might well signal a possible line of refinement of our own approach to the task of arriving at an appropriate starting point in this jurisdiction.

[32] While we do not yet have collected in any one place a list of potentially aggravating factors, as now exists in England and Wales by virtue of Definitive Guidelines issued by the Sentencing Guidelines Council (SGC), the experience of the courts over the years has produced a fairly well-known summary of what those factors might be. Though obviously varying in significance from case to case, among them will generally be at least the following (in no special order of priority): (i) previous convictions for the same or similar offences, particularly where a pattern of repeat offending is disclosed; (ii) premeditation; (iii) use of a firearm (imitation or otherwise), or other weapon; (iv) abuse of a position of trust, particularly in relation to sexual offences involving minor victims; (v) offence committed whilst on probation or serving a suspended sentence; (vi) prevalence of the offence in the community; and (vii) an intention to commit more serious harm than actually resulted from the offence. Needless to say, this is a purely indicative list, which does not in any way purport to be exhaustive of all the possibilities.

[33] As regards mitigating factors, P Harrison JA (as he then was), writing extra-judicially in 2002, cited with approval Professor David Thomas' comment that '[m]itigating factors exist in great variety, but

> some are more common and more effective than others'. Thus, they will include, again in no special order of priority, factors such as (i) the age of the offender; (ii) the previous good character of the offender; (iii) where appropriate, whether reparation has been made; (iv) the pressures under which the offence was committed (such as provocation or emotional stress); (v) any incidental losses which the offender may have suffered as a result of the conviction (such as loss of employment); (vi) the offender's capacity for reform; (vii) time on remand/delay up to the time of sentence; (viii) the offender's role in the commission of the offence, where more than one offender was involved; (ix) cooperation with the police by the offender; (x) the personal characteristics of the offender, such as physical disability or the like; and (xi) a plea of guilty. Again, as with the aggravating factors, this is not intended to be an exhaustive list." (Emphasis added)

[41] The procedure was further addressed in **Daniel Roulston v R** by McDonald-Bishop JA, who stated:

> "[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:
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> a. identify the sentence range;
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> b. identify the appropriate starting point within the range;
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> c. consider any relevant aggravating factors;
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> d. consider any relevant mitigating features (including personal mitigation);
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> e. consider, where appropriate, any reduction for a guilty plea;
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> f. decide on the appropriate sentence (giving reasons); and
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> g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."

[42] By virtue of section 3 of the Offences Against the Person Act ('the Act'), a person who is convicted of murder may be imprisoned for life or for a term of years. It has not been suggested that the sentence of life imprisonment, imposed on the applicant, was

not appropriate. Issue has only been taken with the period for eligibility for parole. Section 3 of the Act states:

> "3.-(1) Every person who is convicted of murder falling within –
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> (a) section 2(1)(a) to (f) or to whom subsection (1A) applies, shall be sentenced to death or to imprisonment for life;
>
> (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…"

Section 2(2) states:

> (2) Subject to subsection (3), every person convicted of murder other than a person –
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> (a) convicted of murder in the circumstances specified in subsection (1)(a) to (f); or
>
> (b) to whom section 3(1A) applies,
>
> shall be sentenced in accordance with section 3(1)(b).

Section 3(1C) states:

> "(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-
>
> (a) where a court imposes a sentence of imprisonment for life pursuant to subsection (1)(a), the court shall specify a period, being not less than twenty years, which that person should serve before becoming eligible for parole; or
>
> (b) where, pursuant to subsection (1)(b), a court imposes-
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> (i) a sentence of imprisonment for life, the court shall specify a period, being not less than fifteen years; or
>
> (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."

[43] As was submitted by the Crown, this is a murder to which section 3(1)(b) applies. The applicant would, therefore, be sentenced in accordance with section 3(1C)(b), with the result that the minimum period which could be stipulated for eligibility for parole is 15 years.

[44] In **Gawayne Thomas v R**, which was referred to by the Crown, Laing JA stated that the range of sentences of imprisonment before eligibility for parole in cases where the appellant pleaded guilty to murder ranges from 18 years to 29 years.

[45] In **Demar Shortridge**, where the appellant admitted his guilt very soon after the commission of the offence and pleaded guilty, a sentence of imprisonment for life with a stipulation that the appellant serve 25 years before being eligible for parole was upheld by this court. In that case, the appellant, like the applicant in this case, received a good community report.

[46] In **Troy Smith**, Edwards JA at paragraph [160], indicated that an examination of cases from this court has revealed that the range was between 20 to 30 years and in some cases, 30 to 45 years. The learned judge of appeal stated:

> "[160] The question now arises as to whether, in applying the proper approach to this case, the sentence imposed by the learned trial judge was still outside of the range of appropriate sentences so as to be manifestly harsh and excessive. Counsel submitted that an examination of the cases reveals a range of sentences for murder of between 20-30 years. We see no basis to disagree with that, except to say further examination would reveal cases at an even higher range of between 30 to 45 years."

In that case, two of the appellants pleaded guilty shortly after the trial commenced.

[47] In order to arrive at an appropriate starting point, the seriousness of the offence must be taken into account. In so doing, this court may consider the offender's culpability

in committing the offence as well as any harm that the offence caused, was intended to cause or might have caused (see **Meisha Clement v R**).

[48] A reasonable starting point, in our view, would be 25 years' imprisonment before being eligible for parole, in light of the serious nature of the offence and the circumstances of its commission, including, the applicant's efforts to conceal the body of the deceased.

[49] The aggravating factors are: (i) the relationship between the parties as the applicant was assisting the deceased with lunch money at the request of her mother; (ii) the applicant's knowledge that the deceased was pregnant at the time; (iii) the fact that the murder was committed in order to conceal the applicant's relationship with the deceased; (iv) the prevalence of the offence of murder in Jamaica; (v) the applicant's denial of any knowledge of her whereabouts when questioned by the police; (vi) the deceased's age and (vii) the wrapping of the body of the deceased in garbage bags and keeping it in his office for the day.

[50] The mitigating factors are (i) the applicant's early guilty plea; (ii) his remorse; (iii) his favourable antecedents and social enquiry report; and (iv) the fact that the commission of the offence was not premeditated.

[51] When the aggravating factors are taken into account and balanced with the mitigating factors, we form the view that the aggravating factors far outweigh the mitigating factors. The applicant was 37 years old at the time of the commission of the offence. His account of how he killed the deceased, who was a 14-year-old child, by holding and squeezing her throat while she fought him; that he continued to squeeze her throat even though they both fell to the ground, is particularly heinous. An appropriate period for eligibility for parole would be between 30 years and 32 years had he gone to trial.

[52] Where the guilty plea is concerned, the applicant was eligible for a discount of approximately 30% at the time. The question of the extent of the discount to be allowed in a particular case is a matter for the discretion of the court and is directly related to the

circumstances of each case. In **Demar Shortridge**, Morrison P in his discussion of this issue stated:

> "[15] So the question is whether the judge's order that the appellant should serve at least 25 years before parole in this case incorporated a sufficient discount for his plea of guilty. The extent of the allowable discount for a guilty plea is now governed by the Criminal Justice (Administration)(Amendment) Act, 2015, which provides for a reduction in sentence of up to 50%, depending on the stage of the proceedings at which the plea is offered and the nature of the offence with which the defendant is charged (see sections 42D and 42E).
>
> [16] But when the appellant was sentenced in 2013, the matter was entirely governed by the common law, in accordance with which the amount of credit which a guilty plea should attract was a matter for the discretion of the trial judge (see **Joel Deer v R** [2014] JMCA Crim 33, per Phillips JA at paragraph [8]). In discussing this question in **Meisha Clement v R** (at paragraph [39]), the court referred to previous decisions in which discounts ranging from 25-50%, depending on the circumstances of the particular case, had been approved. Reference was also made to the English case of **R v Buffrey** (1993) 14 Cr App R (S) 511, 514, in which Lord Taylor CJ observed that, as a general rule, 'something of the order of one-third would very often be an appropriate discount from the sentence which would otherwise be imposed on a contested trial'…
>
> [18] But each case must be judged on its own facts and ultimately the period of imprisonment to be specified for service before parole and the level of discount to be allowed for a guilty plea are matters for the discretion of the sentencing judge."

[53] Counsel for the applicant spent a considerable amount of time on the applicant's early guilty plea which, no doubt, has saved a considerable amount of time and resources. We have, however, noted that as the investigations progressed, the applicant became a person of interest and what appeared to be blood was found on the spoiler of his car. That substance was sent for forensic testing. In those circumstances, we are of the view that a 20% discount for his guilty plea is appropriate. We form the view that a larger discount would be disproportionate to the seriousness of the offence and inappropriate for this applicant. The court must show its abhorrence for this type of crime. In **Regina**

v Alfred Mitchell (1995) 32 JLR 48 at page 49, Wolfe JA (as he then was) adopted the principle in **R v Sergeant** (1975) 60 Cr App R 74 at page 77, where Lawton LJ stated, that the only way for the court to do so "…is by the sentence [it passes]". Lawton LJ also stated that whilst "courts do not have to reflect public opinion. On the other hand, the courts must not disregard it". The punishment must fit the offender as well as the crime (see **R v Sydney Beckford and David Lewis** (1980) 17 JLR 202). This would reduce the period to 24 years on our application of the prescribed methodology. It follows that a sentence of 25 years before eligibility for parole could not be said to be manifestly excessive as it falls within the range of sentences for offences of this nature. However, the learned judge failed to take into account the time spent in pre-sentence custody.

[54] With respect to the time spent in custody, it is settled that full credit must be given. This issue was addressed in **Meisha Clement v R**, where Morrison P stated:

> "[34] … 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, para.9), an appeal from the Court of Appeal of Mauritius –
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> > '... 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'.
>
> [35] This decision was applied by the Caribbean Court of Justice in **Romeo DaCosta Hall v The Queen** ([2011] CCJ 6 (AJ), para. [32]), an appeal from the Court of Appeal of Barbados, in which Wit JCCJ, in a separate concurring judgment, remarked the emergence of '[a] worldwide view ... that time spent in pre-trial detention should, at least in principle fully count as part of the served time pursuant to the sentence of the court'."

[55] In the case at bar, the applicant spent 21 days in custody. He was, therefore, entitled to a reduction of his sentence. When this reduction is applied, the period before which he would be eligible for parole would be 24 years 11 months and 10 days.

Conclusion and disposal of the appeal

[56] Applying the principles as set out above, we have concluded that although the learned judge erred in his approach to sentencing, the sentence imposed was not manifestly excessive; it fell within the range of sentences imposed for the offence of murder where there has been an admission of guilt. However, the applicant must be credited for the time spent in custody.

[57] It is for the above reasons that we made the orders set out at paragraph [6], above.