[2010] JMCA Crim 75

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 93/2005

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

DANIEL ROBINSON v R

Floyd Obrian Green instructed by Wentworth Charles for the applicant

Miss Kathy-Ann Pyke and Mrs Paula Archer-Hall for the Crown

2 November and 20 December 2010

HARRISON, JA

[1] Daniel Robinson was convicted of the offence of manslaughter, he having pleaded guilty to that offence on 17 June 2005, in the Portland Circuit Court before Daye J on an indictment which charged him with murder, that he on 30 November 2002 murdered Veta Rookwood. The learned trial judge accepted the plea of manslaughter on facts which were outlined by the Crown. He was sentenced to serve a term of 20 years imprisonment at hard labour.

[2] On 2 November 2010, we heard submissions in an application for leave to appeal against sentence. We treated the hearing of the application as the hearing of the appeal. The appeal was allowed; the sentence of 20 years imprisonment set aside and in lieu thereof a sentence of 15 years was substituted, which should commence on 17 September 2005. We promised then to put our reasons in writing so this is a fulfillment of that promise.

[3] The facts as outlined by the Crown were that on Wednesday, 29 November 2002, the deceased, Miss Veta Rookwood, and her daughter Charlene Davis retired to bed along with Charlene's child. They all shared the same bed. At about 2:30 a.m. on 30 November 2002, Charlene was startled out of her sleep. She awoke to see the applicant, whom she had known before, in their bedroom. He had lived in the same house with herself and her deceased mother and had been engaged in an intimate relationship with the deceased. The deceased, she said, held on to the applicant's hand which held a knife and she begged him not to kill her. He then pushed her on a couch and sat next to her. He told her that whilst he was hiding in the ceiling, he had overheard a conversation between her and some other persons earlier that day and that they were "dissing" him. He led the deceased outside of the house and Charlene could hear them talking. After a while, Charlene said, she heard her mother say, "Eddy, what you a do, you a go kill me". Charlene said the deceased voice sounded hoarse as if she was being choked and thereafter Charlene heard no more sounds coming from her mother.

[4] The applicant returned to the room and demanded of Charlene where her mother had kept her money. A struggle ensued between them and Charlene escaped. She went to one Princess' house and at about 5:15 a.m., the police from Buff Bay Police Station was summoned.

[5] Charlene returned to the premises later in the morning and found the deceased lying on her back. She appeared to be dead. The post mortem examination revealed that the cause of death was asphyxiation due to strangulation.

[6] On Tuesday, 14 September 2004, at about 2:00 p.m. the applicant was taken into custody at the Oracabessa Police Station. Detective Sergeant Reid, who knew him before, identified himself to him and informed him of the allegations. He was arrested and charged for the offence of murder and when cautioned, he said "Officer, me never know say she would a dead when me strangle her. Officer, me never mean fi kill har, A Mr. Maragh mek me kill har".

[7] After the facts were outlined by the prosecution, counsel on behalf of the applicant informed the learned trial judge that there were differences in a "few respects" with regard to the facts as outlined by Crown Counsel. He stated:

> "M'Lord, the facts as outlined by Crown Counsel, it (sic) differs in a few respects. Firstly, m'Lord, the caution as recorded by the officer, we admit it is in part true because, part (sic) we do not admit, he say he said, m'Lord, he did say to the officer what my client instructs me, I did not mean to kill her, I never knew she would die as opposed to the officer have (sic) it as saying me never know she would a dead when me strangle har. We never use no such word

> as strangle, we did not use any word that a Mr. Maragh mek me kill har either."

[8] At the stage of imposing sentence, the learned trial judge stated:

> "Your account slightly differs from what the Prosecution says about what happened. Where there is a conflict in your account and you plead guilty I have to look at the facts and allegations in light of what you said. I am looking at what you say happen (sic) in making or in giving the sentence that I am suppose (sic) to pass."

[9] This is basically a correct statement of the law - see **R v Newton** (1982) 4 Cr App R (S) 388 where the headnote reads:

> "Where there is a plea of guilty but a conflict between the prosecution and defence as to the facts, the trial judge should approach the task of sentencing in one of three ways: a plea of not guilty can be entered to enable the jury to determine the issue, or the judge himself may hear evidence and come to his own conclusions, or the judge may hear no evidence and listen to the submissions of counsel, but if that course is taken and there is a substantial conflict between the two sides, the version of the defendant must so far as possible be accepted."

[10] We do agree with the learned trial judge that there were slight differences in the accounts but he was correct nevertheless to base his sentence on the account given by the applicant.

[11] Leave was sought and granted to argue a single ground of appeal, viz:

> "That based on the evidence as presented and also due to the fact that I plead to the lesser charge, that the sentence is harsh and manifestly excessive."

[12] We did take note of the way in which the submissions relating to mitigation of

sentence were made in the court below. Mr McDonald who appeared for the applicant stated:

> "M'Lord, he told me that this is one of the rarest occasions which (sic) got into a fight and in that fit of temper he lost his self-control and choked her with his fingers. He had no intention whatsoever to cause any serious bodily injury to her, much more to cause death.
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> …
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> …he has no history of violence. Again, m'Lord, he understands that (sic) that for this offence he will have to be sent to prison. In this particular case, m'Lord, the fact that he confess (sic) to the police officer, it is my submission that this is not an accused man who need to be taken out of society for a long period. This is an accused man who has been prepared from day one to plea (sic) to guilty for the crime committed. He is an accused man who did not waste any judicial time by going through the process of having a preliminary enquiry conducted. This is an accused man who perhaps deserve (sic) a short shocking sentence."

[13] Mr McDonald had also asked the court to consider that the applicant was a reasonably good father whose two children, five years and 17 years old, were dependent on him. He had also said that the applicant had been gainfully employed and that his last job was as a watchman.

[14] In imposing sentence, the learned trial judge made it quite clear that he had taken several factors into account. The applicant, he said, had pleaded guilty, had shown remorse, had a previous conviction for a minor offence over 20 years ago, and had no previous history of violence recorded against him.

[15] However, the learned trial judge held certain strong views in relation to those

persons who perpetrate violence against women in the society. He stated:

> "… not only must I give a sentence that deter (sic) you but I must give a sentence that deter (sic) other men in the society when they see this sentence they know that basically you are not supposed to touch a woman at all."

[16] Mr Floyd Green who appeared before us addressed the court in mitigation of sentence. He submitted that a sentence of 20 years imprisonment was manifestly excessive having regard to all the circumstances of this case, including the antecedents of the applicant and he having expressed remorse for the killing. He submitted that while deterrence is one of the factors in the determination of an appropriate sentence, that aspect of the sentence should not be disproportionate to the circumstances of the particular offence. He argued that the learned trial judge failed to consider the applicant's propensity for rehabilitation and had failed to address critical and fundamental aspects of the social enquiry report, such as the fact that the appellant had been a contributing member of society and had been in gainful employment.

[17] Mr Green also submitted that there was no record that the applicant was ever involved in violent conduct before the date of the incident and that his only previous conviction for possession of ganja was recorded over 20 years before the incident. He referred the court to the following cases which he said should give the court some guidance on the appropriate sentence:

1. **Beckford and Brown v R** [2010] JMCA 26
2. **R v Dyall Whittaker** (1974) 12 JLR 1641
3. **R v Neville Collins** (1992) 29 JLR 263

He invited the court to follow the decision in the **Collins** case where a verdict of manslaughter was substituted for the verdict of murder and a sentence of 12 years imprisonment at hard labour was imposed. In both **Collins** and the instant case, the parties had lived together as man and wife and there was a domestic dispute which led to the killing.

[18] Now, it is quite clear to us that although the learned trial judge said he had also taken into account the factors set out in paragraph 14, in considering an appropriate sentence, he seemed to have focused his attention in the end, solely on the deterrent aspect of punishment.

[19] In **R v Sydney Beckford and David Lewis** (1980) 17 JLR 202 the court was faced with the task of determining what was an appropriate sentence in a gang rape offence and Rowe JA (as he then was) stated:

> "There is no scientific scale by which to measure punishment, yet a trial judge must in the face of mounting violence in the community impose a sentence to fit the offender and at the same time to fit the crime. Lawton LJ in **R v Sergeant** (1975) 60 Cr. App. 74 at p. 77, reminded judges of the four classical principles which they must have in mind and apply when passing sentence. We make no apology for the extensive quotation:
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> > 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.

I will start with retribution. The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crimes, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand, courts must not disregard it. Perhaps the main duty of the court is to lead public opinion. Anyone who surveys the criminal scene at the present time must be alive to the appalling problem of violence. Society, we are satisfied, expects the courts to deal with violence. The weapons which the courts have at their disposal for doing so are few. We are satisfied that in most cases fines are not sufficient punishment for senseless violence. The time has come, in the opinion of this Court, when those who indulge in the kind of violence with which we are concerned in this case must expect custodial sentences.

But we are also satisfied that although society expects the courts to impose punishment for violence which really hurts, it does not expect the courts to go on hurting for a long time, which is what this sentence is likely to do. We agree with the trial judge that the kind of violence which occurred in this case called for a custodial sentence. This young man has had a custodial sentence. Despite his good character, despite the excellent background from which he comes, very deservedly he has had the humiliation of hearing prison gates closing behind him. We take the view that for men of good character the very fact that prison gates have closed is the main punishment. It does not necessarily follow that they should remain closed for a long time.

I turn now to the element of deterrence, because it seems to us the trial judge probably passed this sentence as a deterrent one. There are two aspects of

> deterrence: deterrence of the offender and deterrence of likely offenders. Experience has shown over the years that deterrence of the offender is not a very useful approach, because those who have their wits about them usually find the closing of prison gates an experience which they do not want again. If they do not learn that lesson, there is likely to be a high degree of recidivism anyway. So far as deterrence of others is concerned, it is the experience of the courts that deterrent sentences are of little value in respect of offences which are committed on the spur of the moment, either in hot blood or in drink or both. Deterrent sentences may very well be of considerable value where crime is premeditated. Burglars, robbers and users of firearms and weapons may very well be put off by deterrent sentences. We think it unlikely that deterrence would be of any value in this case. We come now to the element of prevention. Unfortunately, it is one of the facts of life that there are some offenders for whom neither deterrence nor rehabilitation works. They will go on committing crimes as long as they are able to do so. In those cases the only protection which the public has is that such persons should be locked up for a long period. This case does not call for a preventive sentence.
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> Finally, there is the principle of rehabilitation. Some 20 - 25 years ago there was a view abroad, held by many people in executive authority that short sentences were of little value, because there was not enough time to give in prison the benefit of training. That view is no longer held as firmly as it was. This young man does not want prison training. It is not going to do him any good. It is his memory of the clanging of prison gates which is likely to keep him from crime in the future."

[20] In our judgment, there was merit in the submissions made by Mr Green. The learned trial judge had taken too restricted a view of his approach for the sentence he had imposed. We were particularly concerned, as Lawton LJ was in **Sergeant**, with

whether deterrence on its own would have the likely effect in this case bearing in mind the applicant's antecedents, the social enquiry report and the particular circumstances of the case. We were therefore of the view that justice would have been better served with a reduction of the sentence. It was for these reasons that we set aside the sentence of 20 years and substituted a sentence of 15 years imprisonment at hard labour to commence on 17 September 2005.