[2018] JMCA Crim 30

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 88/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

DEMAR SHORTRIDGE v R

Ravil Golding for the appellant

Miss Keisha Prince and Joel Brown for the Crown

6, 23 March and 31 July 2018

MORRISON P

[1] On 30 September 2013, the appellant pleaded guilty to the offence of murder in the Clarendon Circuit Court before F Williams J (as he then was) ('the judge'). The particulars of the indictment upon which the appellant was charged were that, between 2 and 3 March 2013, in the parish of Clarendon, he murdered Miss Tasheena Lewin ('the deceased').

[2] In a statement given to the police very soon after the offence was committed, the appellant admitted to having arranged with two acquaintances of his to accompany

him to the house of the deceased. There, early in the morning of 3 March 2013, the men kicked off the door and one of the appellant's companions fired two shots, hitting the deceased and her father.

[3] In the same statement, the appellant said that he had been pressured into participating in this dreadful act by a woman who had urged him to kill the deceased. This woman was said to have been the mother of a man ('Foota') against whom the deceased had made an allegation of rape and who was then in police custody. The deceased was therefore the complainant in the case against Foota.

[4] This woman was in due course also charged with the murder of the deceased. But, at some later stage of the proceedings, the appellant told the court (by way of an undated letter addressed to the judge) that the woman knew nothing about the matter. In fact, the appellant said, he was the one who got the other men to kill the deceased, because Foota was his friend.

[5] The appellant pleaded guilty at an early stage of the proceedings and the court ordered a social enquiry report on him. This report when received revealed the appellant to be 20 years of age, suffering from no known physical or mental health conditions and having no previous convictions. Members of his community described him as a person of quiet disposition, who had previously displayed "no form of violent tendency". Some expressed shock and disbelief at his involvement in the deceased's murder, and most indicated the need for leniency in his sentencing.

[6] On 11 October 2013, having considered the social enquiry report, the judge sentenced the appellant to imprisonment for life, with a stipulation that he should serve a minimum of 25 years in prison before becoming eligible for parole. In his brief sentencing remarks, the judge said this:

> "A plea in mitigation [has] been made on your behalf and it now just falls for me to give the sentence that I consider to be appropriate in your case. I must confess that for me, this has been somewhat of a difficult job because having regard to your antecedent history, and the social enquiry report, up to this stage, it would appear that there was no indication that you would have committed an offence such as this. However, having regard to the particular facts and circumstances of this case, and what it is that is being indicated that you participated in, it really is one of the, if not the most serious crime [sic] that could be imagined.
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> So, there are a number of matters that would have been taken into account in your favo[u]r. For example, your age, that you are still relatively youthful. Also what I will consider in your favo[u]r, is the fact that you have pleaded guilty at a very early stage and that is something that any court has to consider in reducing any possible sentence that will be passed at the end of the day. Of course, in a matter of this nature, the Court has to have regard, as I said, to the particular facts and circumstances and to have regard to what might be considered the public interest because here it is that we have a particular offence, and this is a kind of offence that is too prevalent in our country today and that is in fact on the rise and is on the rise throughout the country, but in particular, the parish in which the offence was committed. So, these are matters I need to take to account.
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> The authorities indicate that where the offence is prevalent or where there are a lot of crimes of that nature occurring, then what the Court has to consider or the greatest emphasis, is the object of deterrence. That is, to put off the particular offender from reoffending some time in the future and from also deterring like-minded persons from committing similar offences. Prevention is another aspect that will have to be given some emphasis in this particular

> case, which is to, in a sense, remove the particular offender from the society, so that it is impossible for the person to reoffend, at least for a particular period.
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> The Court will consider as well, because of your age and the plea of guilty, the object of rehabilitation, but even though that is something that is normally emphasized, the cases of youthful offenders. The Court has to balance that against the public interest and the seriousness of this particular offence. So, doing the best it can, in all the circumstances of this case, it will be life imprisonment, and the stipulation will be, for the serving of 25 years before parole."

[7] On 31 October 2013, the appellant applied for leave to appeal against his conviction and sentence. In two separate rulings given on 11 April and 10 May 2017 respectively, single judges of this court granted the appellant leave to appeal against sentence, but refused leave to appeal against conviction.[1] When the matter came on for hearing before us on 6 March 2018, Mr Ravil Golding, who appeared for the appellant, sought and was granted leave to argue the following supplemental ground of appeal:

> "1. The learned Trial Judge erred when sentencing the Appellant to life imprisonment and requiring him to serve 25 years in prison before being eligible for parole in failing to adequately take into consideration:
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> a. The fact that the Appellant had pleaded guilty at a very early stage of the proceedings;
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> b. The fact that the Appellant had already spent approximately eight (8) months in custody; and

[1]At the time of the first ruling, it was thought that the appellant had applied for leave to appeal against sentence only, but it subsequently emerged that he had also applied for leave to appeal against the conviction.

c. To [sic] other factors personally pertaining to the Appellant such as his age the fact that he was hither to [sic] of unblemished character and had no previous conviction;

d. To [sic] other factors relating to the circumstances of the murder itself such as the fact that the Appellant did not inflict any injuries on the deceased or any other person."

[8] On 6 March 2018, we heard submissions from Mr Golding (in relation to the appeal against sentence only) and Mr Joel Brown for the Crown. On 23 March 2018, we refused the application for leave to appeal against the conviction. However, we allowed the appeal against sentence in part, by varying the period of 25 years to be served before eligibility for parole to 24 years. We also ordered that this sentence should be reckoned as having commenced on 11 October 2013. These are the reasons that were then promised for this decision.

[9] Mr Golding's principal submission was that the judge had failed to give any or any sufficient discount in the sentence to reflect the fact that the appellant had pleaded guilty at a very early stage of the proceedings. In this regard, Mr Golding submitted, while the judge did not indicate what level of discount the appellant received for pleading guilty, "certainly it must have been very small". Mr Golding also pointed out that the appellant had given assistance to the police in their investigations and that the case against him, which was weak, was entirely based on his own statement. Finally, Mr Golding commented that the judge had failed to balance the aggravating against the

mitigating factors in the manner sanctioned by the authorities, such as **Meisha Clement v R** [2016] JMCA Crim 26 and other cases.

[10] As aggravating factors in this case, Mr Golding referred to the obvious premeditation of the murder of the deceased and the fact that it involved the murder of a potential witness for the prosecution in criminal proceedings. As mitigating factors, on the other hand, he relied on the appellant's age, his previous good character, his early plea of guilty and the fact that he had shown a degree of remorse.

[11] Mr Brown accepted that the judge may not have made a sufficient allowance for the fact that the appellant had pleaded guilty or for his age (which Mr Brown described as "his biggest mitigating factor"). He accordingly submitted that, in all the circumstances, on the basis of the relevant authorities, a sentence of life imprisonment, with a stipulation that the appellant should serve 19 years before becoming eligible for parole (taking into account the time spent in custody), would be appropriate.

[12] Both counsel agree that the now accepted approach to fixing the length of sentences is as set out in this court's guideline judgment in **Meisha Clement v R**, and the subsequent Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') (see especially, paragraphs 7-9). By that approach, the sentencing judge should, first, identify an appropriate starting point, reflecting the intrinsic seriousness of the offence and the general range of sentences for like offences given by the courts; and, second, adjust that figure to give effect to aggravating factors, on the one hand, and mitigating

factors on the other. Relevant mitigating factors will include any time spent by the defendant in custody pending trial and, where applicable, the fact that the defendant pleaded guilty.

[13] It is also common ground that the judge did not approach the matter in this structured way. However, this is perhaps not surprising, given that the judge dealt with this matter in 2013, a few years before some of the important sentencing decisions out of this court and the Sentencing Guidelines were issued. But, despite this, it seems to be clear from the sentencing remarks which we have set out above (at paragraph [6]) that, in arriving at the appropriate sentence in this case, the judge had in mind all the important matters relevant to sentencing, such as deterrence, prevention, punishment and the prospects of rehabilitation. In addition, the judge was also mindful of the factors peculiarly relevant to the appellant himself, such as his youth, his clean criminal record, his generally favourable social enquiry report and the fact that he pleaded guilty.

[14] Mr Golding realistically accepted that a stipulation that the appellant should serve 30 years or more before becoming eligible for parole would have been well within the usual range of sentences for murder. In this regard, he referred us to our recent decision in **Jason Palmer v R** [2018] JMCA Crim 6, in which the applicant was convicted after a trial for what this court described (at paragraph [3]) as "the gruesome murder" of an elderly pensioner. After sentencing him to life imprisonment, the trial judge ordered that he should serve a minimum of 30 years before parole. In reference

to this sentence, this court observed (at paragraph [6]) that there was "… no reason to suppose … that the 30 year period before parole fixed by [the judge] was in any way out of range".

[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".

[17] Assuming that a stipulation that the appellant should serve at least, say, 30 years before becoming eligible for parole would have been appropriate upon conviction after a trial in this case, the judge's stipulation of at least 25 years before parole upon the appellant's guilty plea represents a discount of just slightly under 17%. While this level of discount cannot by any measure fit Mr Golding's characterisation of it as "very small", we accept that it is, on the face of it, somewhat below the usual range of discount sanctioned by previous decisions of this court in comparable circumstances.

[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. A particularly egregious feature of this case was that the appellant's stated motive for his involvement in the killing of the deceased was to prevent her giving evidence for the prosecution against Foota. In considering an appeal against sentence in similar circumstances in **David Ebanks v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 43/2006, judgment delivered 11 November 2008, paragraph 5, Panton P referred with explicit approval to the sentencing judge's comment that "[i]n every incident where the witness is threatened or intimidated with a view to preventing that witness giving truthful evidence, the ability of our courts to dispense justice is undermined". We entirely agree.

[19] Accordingly, with this consideration firmly in mind, we came to the conclusion that the judge's decision that the appellant should serve at least 25 years before parole,

taking into account his plea of guilty, was not so far outside the range of possibilities open to him as to justify this court's interference.

[20] However, in our view, the question of time spent in custody pending trial is governed by different considerations. The applicable principle, as derived from the decisions of the Privy Council in **Callachand and Anor v The State** [2008] UKPC 49, and the Caribbean Court of Justice in **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ), is that full credit should generally be given to a defendant for the time spent by him or her in custody pending trial. This should as far as possible be done by way of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing (see also the Sentencing Guidelines, paragraph 11.1).

[21] The record indicates that the appellant was taken into custody within a day or two of the offence, that is, very close to the beginning of March 2013. He was sentenced on 11 October 2013, by which date he had been in custody for approximately seven and a half months. It is therefore on this basis, and making allowances for ease of calculation of the sentence, that we decided to reduce the time to be served by the appellant before parole from 25 to 24 years.

[22] These are the reasons for the court's decision given on 23 March 2018.