[2022] JMCA Crim 40

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 97/2017

TIMOTHY SMITH V R

Ms Nancy Anderson for the appellant

Adley Duncan for the Crown

21 September 2021 and 29 July 2022

DUNBAR-GREEN JA

Introduction

[1] On 10 October 2017, following a trial before E Brown J (as he then was) ('the learned judge') and a jury in the Home Circuit Court, Mr Timothy Smith ('the appellant') was convicted for the murder of Miss Dihema Brooks ('the deceased'). He was sentenced to 20 years' imprisonment at hard labour with the stipulation that he should serve a minimum of 15 years before becoming eligible for parole.

[2] On 23 February 2021, a single judge of this court granted him leave to appeal his sentence but refused his application in respect of the conviction.

[3] The matter came before us as a renewed application for leave to appeal the conviction and an appeal against sentence. However, at the commencement of the hearing, counsel for the appellant, Miss Nancy Anderson (of blessed memory), sought and obtained permission to abandon the original grounds of appeal and certain of the supplemental grounds filed on 3 September 2021. She also obtained permission for the

supplemental grounds to stand as properly filed. Before us, she advanced two grounds of appeal. The first was that "the sentence was manifestly harsh and excessive, unfair and unjust as the sentencing judge failed to take into account (a) the time the appellant was in custody prior to trial, (b) an appropriate range of sentences and pre-parole periods for the offence and (c) the principles for the sentencing process". The second ground was that "the delay of the trial and the appeal breached the appellant's constitutional right to a fair trial within a reasonable time contrary to section 16(1) of the Charter of Fundamental Rights and Freedoms, Chapter III of the Constitution".

[4] Having heard and considered the submissions of counsel, we concluded that there was no merit in either ground of appeal. Consequently, on 21 September 2021, we made the following orders:

> "1. Application for leave to appeal against conviction is dismissed.
>
> 2. The appeal against sentence is dismissed.
>
> 3. The sentence of 20 years' imprisonment at hard labour with a stipulation of 15 years before eligibility for parole is affirmed.
>
> 4. The sentence is to be reckoned as having commenced on 10 November 2017."

[5] We indicated then that our reasons would follow. We now fulfil that promise.

Background

[6] The main witness for the Crown recounted how his mother ('the deceased') was stabbed multiple times and left for dead by the appellant. The incident unfolded this way. On the morning of 26 December 2012, Richard Folkes ('Master Folkes'), the minor son of the deceased, was inside his home, along with his two brothers, Gavin and Glenroy Kerr, while the deceased was outside painting a wall. He heard a voice say, "Hey gal, a dead you fi dead" and when he looked through the front door, the appellant was seen chasing and stabbing the deceased in the back. She was running in the direction of the house.

On reaching the step, the appellant "kick away her foot" and she fell. The appellant then stabbed her in the back. According to Master Folkes, the deceased cried out, "Mark, Mark, Timothy stab me, Timothy stab me". As she lay gasping and coughing up blood, the appellant ran down the pathway.

[7] Master Folkes indicated that the appellant was his mother's best friend and he would see him almost every day. He had known the appellant since he was an infant. At the time of the stabbing incident, he was able to observe the appellant's face at close proximity for some 14 seconds and over a distance of about 9 feet.

[8] On 9 January 2013, Parthasarathi Pramanik, a forensic pathologist, observed stab wounds to the upper right chest, right arm and upper back of the deceased. He indicated that either the injury to the right chest or upper back could have been fatal on its own. At trial, the appellant gave an unsworn statement from the dock. He denied the allegations against him and asserted that it was his friend, "Dan Dan", who was the assailant. His account of what the deceased supposedly said was, "Mark, Mark, Timothy friend stab me".

The sentencing exercise

[9] The appellant's antecedent report revealed that he was born on 15 December 1990. He was, therefore, 26 years old at the date of sentencing. His high school education was curtailed because of financial difficulties. He earned a living by playing football at the professional level and had a favourable reputation in the community. He had a previous conviction, in April 2009, for felonious wounding. In counsel's plea in mitigation, it was revealed that the appellant had spent close to five years in custody, awaiting trial. The appellant himself drew the learned judge's attention to his self-authored plea in mitigation, which stated, among other things, that he had a good heart and mind and was "begging … like father to a struggling son, not to make [his] life go to waste in prison for the rest of [his] days…[and that the judge should allow him] one chance to prove to [his] mother, who would like to see[him] turn out to something good".

[10] At the start of his sentencing remarks, the learned judge observed that he could impose a sentence of life imprisonment with the prescribed minimum pre-parole ineligibility period of 15 years' imprisonment or, alternatively, a determinate term of imprisonment (which carries a pre–parole ineligibility period of 10 years' imprisonment). However, recognising that cases differ, at the very least, by their circumstances, he ruled out the maximum penalty of life imprisonment, and instead, imposed a determinate sentence of 20 years' imprisonment, on the basis of the appellant's relatively young age and prospects for rehabilitation.

[11] The learned judge said that he bore in mind the tragic circumstances of the killing against the background of Jamaica's high murder rate; the manner of the killing and the number of serious wounds inflicted on the deceased, which, to his mind, were indicative of a clear intention to kill; the fact that the appellant had chased the deceased to her dwelling and stabbed her "brutally" in front her 12-year old son, leaving psychological scars which persisted some five years later; the appellant's previous conviction for a violent crime; and the "weapon of choice" used to commit the murder. He had also taken account of the appellant's age; the time spent in custody (which he indicated would be rounded upwards to five years); the favourable responses from the community; and the appellant's hopes and dreams to make something of himself. The learned judge also referred to and applied the sentencing principles of rehabilitation and deterrence.

Whether the sentence was manifestly harsh, excessive, unfair and unjust

Submissions for the appellant

[12] Miss Anderson's main contention was that the learned judge had failed to follow the suggested sentencing approach outlined in **Meisha Clement v R** [2016] JMCA Crim 26, which had been in existence at the time of sentencing. She contended that no account was taken of the appropriate range of sentences for similar offences; the time spent on pre-sentence remand; and pre-parole periods imposed in like circumstances. Such failure, counsel argued, resulted in a sentence that was manifestly harsh, excessive, unfair and

unjust. We were urged to set aside the sentence and impose, instead, a sentence of 15 years' imprisonment with a 10-year period of parole ineligibility. Counsel for the appellant also contended that while the learned judge had mentioned the five years in pre-trial custody there was no way to determine if he had applied it.

Submissions for the Crown

[13] Counsel for the Crown, Mr Duncan, conceded that the learned judge did not follow the approach in **Meisha Clement v R**. Nevertheless, he submitted that the learned judge's reasoning was sufficiently clear to account for the sentence which was imposed, and, in the circumstances of the case, that sentence was by no means harsh or excessive. Mr Duncan also argued that the fact that the learned judge indicated the time spent on pre-sentence remand meant that he intended to apply the credit. However, whether he did so was a question of how his sentencing remarks were interpreted. Counsel also posited that should a re-sentencing exercise become necessary, this court was entitled to find no need for an adjustment to the sentence which was imposed.

Discussion

Applicable sentencing principles

[14] The appellate court's review of sentences is guided by the well-established principle that there will generally be no disturbance of a sentence by the lower court unless the sentencing judge either erred in principle or the sentence is manifestly excessive or inadequate (see Hilberry J in **R v Ball** (1951) 35 Cr App R 164, 165).

[15] The established principles that should guide a sentencing judge and the approach of this court were summarized at paragraphs [42] and [43] of **Meisha Clement v R** where Morrison P, writing on behalf of the court stated:

> "[42] … **Alpha Green v R** [(1969) 11 JLR 283, 284] … the court adopted the following statement of principle by Hilbery J in **R v Ball** [(1951) 35 Cr App R 164]:

> 'In the first place, 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 to character he may have chosen to call. It is only when a sentence appears to err in principle that this 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.'
>
> [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." (Emphasis mine)

[16] This approach was refined in **Daniel Roulston v R** [2018] JMCA Crim 20, by McDonald-Bishop JA, wherein, at paragraph [17], she 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:
>
> a. identify the sentence range;
>
> b. identify the appropriate starting point within the range;
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> 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)."

[17] The Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') which was promulgated subsequent to the trial of the present case (in 2018), is broadly consistent with the sentencing approach outlined above and has been upheld by this court in several cases. At Appendix A of the Sentencing Guidelines, the normal range for this offence is stated to be 15 years – life imprisonment.

[18] The relevant provisions of the Offences Against the Person Act which prescribe the sentencing options for this category of murder and which the learned judge alluded to at the start of his sentencing remarks, follow. Section 3(1)(b) provides that:

"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."

[19] Sections 3(1C)(b)(i) and (ii) provide that:

"(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; 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. "

[20] It was with these principles and authorities in mind that we reviewed the sentencing approach by the learned judge.

Did the learned judge err?

[21] We were asked to determine, firstly, whether the learned judge, in the instant case, failed to apply one or more of the principles outlined above, and further whether any such failure resulted in the sentence that was passed being manifestly excessive. In conducting the review, we were mindful that even if it was found that the learned judge fell in error in the application of one or more of those principles, such a finding would not automatically result in a conclusion that the sentence was manifestly excessive. Instead, it would be necessary for this court to examine the particular circumstances of this case afresh and, in so doing, determine what effect, if any, the error in principle might have had on the sentence imposed.

[22] It was conceded by counsel appearing for the Crown that the standard methodology indicated in **Meisha Clement v R** was not followed. We agreed that the learned judge ought to have set an appropriate starting point within the range of sentences for this offence, based on the circumstances of this case and the level of culpability of the appellant, and then go on to calculate the appropriate sentence, making adjustments, as deemed necessary, on the basis of other relevant aggravating factors and mitigation including personal mitigation. The requirement, thereafter, was to apply the credit of five years which he accepted the appellant spent in pre-sentence custody.

Having failed to follow that standard approach, the learned judge erred in principle. This required us to revisit the sentence imposed.

[23] Significant factors pointed to by the learned judge were that: the killing was perpetrated with an offensive weapon; there were multiple stabs wounds inflicted, two of which could have been singularly fatal; and the killing was a brazen attack on the deceased in broad daylight, at her home, in the presence of her young son. We believed that, in the light of such egregious circumstances, and the several decisions of this court, on equally egregious facts, a starting point of 25 years' imprisonment was appropriate. We then considered the aggravating features, mirrored in the learned judge's reasons – that is, the prevalence of murders in the community and to a lesser degree the appellant's previous conviction for a violent offence. These factors increased the notional figure to 30 years' imprisonment. Next, we took account of the mitigating factors enumerated by the learned judge, *viz*, the positive community report, the appellant's relatively young age at the time of the offence; and his capacity for reform. After balancing the aggravating factors with the mitigating factors, we determined that the aggravating factors far outweighed the mitigating ones, and that an appropriate sentence was 25 years' imprisonment. The remaining considerations were in respect to the credit for time spent on pre-sentence remand (which the learned judge indicated would be rounded upwards to five years) and the setting of the parole ineligibility period.

Time spent on pre-sentence remand

[24] The authorities have made it plain that the sentencing judge must take fully into account time spent in pre-sentence custody unless there are exceptional reasons for not doing so. The Privy Council, in particular, has said that it should not be only "a form of words" but "an arithmetical deduction" (see **Callachand and Another v State** [2008] UKPC 49; **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).

[25] The principles were summarised at paragraph [67] of **Techla Simpson v R** as follows:

> "a. there is a primary rule that full credit must ordinarily be given to pre-trial incarceration;
>
> b. the credit should as far as possible be done by way of an arithmetical deduction;
>
> c. a sentencing judge has a discretion, in certain circumstances, to depart from the primary rule; and
>
> d. one of the exceptions that the sentencing judge may apply is where the pre-trial incarceration overlaps with imprisonment or remand in respect of unconnected offences."

[26] The Sentencing Guidelines, at guideline 11.3, outline the sentencing procedure to be undertaken by the courts where the applicant/appellant has spent time on pre-sentence remand. It provides that "[in] pronouncing the sentence arrived at…, the sentencing judge should state clearly what he or she considers to be the appropriate sentence, taking into account the gravity of the offence and all mitigating and aggravating factors, before deducting the time spent on remand".

[27] There being no exceptional circumstances disclosed for not applying credit for pre-sentence custody, the learned judge was required to apply a credit of five years to the provisional sentence. The standard approach of stating the provisional sentence, in terms of a figure (after the adjustments for aggravating and mitigating factors), and then subtracting the time (in this case, five years), was not followed. Nonetheless, in our view, the learned judge did show, in sufficiently clear terms, that he had intended to impose the determinate sentence of 20 years' imprisonment, in light of several factors including the time spent in pre-sentence custody and had in fact done so. After considering the aggravating and mitigating factors, the learned judge said:

> "… I bear it in mind too that you have been in custody since 2013 and that I indicated to your counsel [sic] I round that off to five years, since we are so close to the end of the year

> and I keep in mind as well the responses from the community and your hopes and dreams to make something of yourself.
>
> The maximum sentence for [m]urder is life imprisonment, but since you are only 26 I will not impose a sentence of imprisonment for life. I will make it a determinate sentence, but of course, there is a minimum period that you would have to serve before you can be considered for parole, if at all you become eligible for that…
>
> Having said all of that, the sentence of the Court is imprisonment for 20 years and you are to serve 15 years before being eligible for parole." (Page 180 of the transcript.)

[28] We believed, by those remarks, the learned judge sufficiently disclosed his awareness that full credit ought to be given and stated how he had taken account of it, in arriving at the determinate sentence of 20 years' imprisonment (that is, by rounding "it" upwards to five years), which we understood to mean he was deducting five years from what he had in mind at that point.

[29] **Sylvan Green et al v R** [2021] JMCA Crim 23 was found to be distinguishable from the instant case. In that case, the sentencing judge indicated that, "all the applicants had been in custody and [time spent on pre-sentence remand] had to be taken into account", but did not express arithmetically, how he had applied the four years' pre-sentence custody to the sentence imposed on the various appellants. In delivering the court's reasons for reducing each applicant's determinate term of imprisonment - to give full credit for the four years spent in pre-sentence custody - McDonald-Bishop JA said, at paragraph [55]:

> "…[This] court was unable to definitively say whether [the trial judge] had applied any arithmetic formula and, if so, what was the extent of the deduction he made. As a result, it was not established to the court's satisfaction that the applicants were fully credited for the time spent on pre-sentence remand."

[30] As indicated earlier, on our own review of the appellant's sentence, we felt that a sentence of 25 years' imprisonment was appropriate before the application of the credit

of five years. After applying that credit to the fixed term sentence of 25 years, we arrived at a sentence of 20 years' imprisonment which was consistent with the term of years imposed by the learned judge.

Pre-parole ineligibility period

[31] In challenging the reasonableness of the pre-parole ineligibility period of 15 years' imprisonment, imposed by the learned judge, Miss Anderson asserted that a pre-parole period of 10 years was more appropriate but she gave no compelling reason for that position. Counsel merely stated that 10 years was the statutory minimum pre-parole ineligibility period for determinate sentences. The learned judge did not disclose the reason for increasing the prescribed minimum period applicable to determinate sentences (that of 10 years).

[32] We considered **Kelvin Downer v R** [2022] JMCA Crim 12**,** a decision in which a determinate sentence of 25 years' imprisonment was upheld, on appeal, in equally egregious circumstances, but the pre-parole of 15 years was reduced to 10 years. In that case, the appellant had spent nine years on pre-trial remand and the co-accused had spent five years. Although the sentencing judge made references to those facts, he, nevertheless, imposed similar sentences on both the co-accused and the appellant, without explaining how he had applied the credit in each case. Straw JA, who delivered the court's reasons, said, at paragraph [38]:

> "It cannot be said therefore, with any certainty, that he had applied any separate mathematical consideration of nine years and five years respectively before imposing the determinate sentences of 25 years…"

[33] In those circumstances, the court subtracted five years from the pre-parole period and went on to explain, at paragraphs [41] to [46], why the reduction was considered on the pre-parole period and not on the fixed period of 25 years' imprisonment.

[34] The reasoning in **Kelvin Downer v R** suggests that a decision whether to reduce the pre-parole period, is dependent on the circumstances of the specific case. The

reduction of the pre-parole ineligibility period, in that case, was to satisfy the appellant's entitlement to credit for time spent on pre-sentence remand. It was plain to us, in the instant case, that the learned judge had taken account of the five years spent in pre-sentence custody when arriving at the fixed term of 20 years' imprisonment, so, there was no need to disturb the pre-parole period imposed. So too, we believed that the horrific circumstances of the killing justified a pre-parole ineligibility period of 15 years' imprisonment, which is well within the range of pre-parole periods upheld by this court where a single murder is committed with the use of a knife.

[35] We considered, for example, that in **Janet Douglas v R** [2018] JMCA Crim 7, the body of the deceased was found on the Hillyfield Road in the parish of Clarendon with 18 wounds to her upper body, nine of which were stab wounds to her lungs, heart, pulmonary artery and abdominal cavity. An open ratchet knife with bloodstains on the handle and blade was found 15 yards from the deceased. The applicant was sentenced to life imprisonment with the requirement to serve 40 years before becoming eligible for parole. On appeal, the sentence of life imprisonment was affirmed but the pre-parole period reduced to 20 years' imprisonment. We also considered that in **Josephas Bennett v R** [2017] JMCA Crim 29, the appellant entered the house of the deceased in the early morning and stabbed him to death. He was sentenced to life imprisonment, with a stipulation that he should serve a period of 40 years' imprisonment before becoming eligible for parole. This court set aside the judge's stipulation that the appellant should serve 40 years' imprisonment before becoming eligible for parole, ordering, instead, that he should serve 25 years' imprisonment before becoming eligible for parole.

[36] Given the horrific circumstances of this case, we were satisfied that the sentence was not manifestly excessive.

The effect of delay and the constitutional right to a fair hearing

Submissions for the appellant

[37] It was Miss Anderson's submission that due to the State's inordinate and extraordinary delay in bringing the appellant's case to trial and appeal within a reasonable time, his constitutional right to a "fair hearing within a reasonable time" was breached. Counsel relied on the Privy Council decision in **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26, and also this court's decision of **Melanie Tapper and another v R** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 28/2007, judgment delivered 27 February 2009. In that case the trial commenced some three years after the appellant was arrested and charged and the appeal was heard nearly five years after the appellant's conviction, provoking Smith JA, of this court, to conclude, "such delay, without more [constituted] a breach of the appellant's constitutional right to a fair hearing within a reasonable time". The sentence of 18 months' imprisonment with hard labour was reduced to a period of 12 months' imprisonment suspended for 12 months. Counsel also pointed to paragraphs 27 and 28 of the Board's opinion where the following principle in **Boolell v The State** [2006] UKPC 46 was referenced as being representative of the law in Jamaica:

> "(i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) [section 20 in Jamaica] of the Constitution, whether or not the defendant has been prejudiced by the delay.
>
> (ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all."

[38] The remedy, counsel submitted, is found at paragraph 26 of the Board's decision in **Melanie Tapper v Director of Public Prosecutions** where the following dictum in **Attorney General's Reference (No 2 of 2001))** [2004] AC 72, was affirmed:

> "…If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant."

Submissions for the Crown

[39] Mr Duncan went to the facts of this case to distinguish it from **Melanie Tapper v Director of Public Prosecutions** where the delay was attributable to the State. Here, he submitted, the reason for the delay was wholly unknown and, in the absence of evidence, it should not be presumed that it was caused by the State.

Discussion

[40] In the instant case, the appellant was arrested on 16 January 2013 and tried between 25 September 2017 and 9 October 2017; a delay of approximately five years. The notice of appeal against conviction and sentence was filed on 24 November 2017 and heard in September 2021; a post-trial delay of almost four years. There was no evidence before us as to the reasons for either the pre-trial delay or the delay in hearing the appeal. However, the reasons for the post-trial delay are apparent.

[41] In **Melanie Tapper v Director of Public Prosecutions**, the appellant was arrested and charged in 1997 for offences arising out of events in 1994 and 1995. The trial before the Resident Magistrate's Court (now the Parish Court) should have begun in January 1998 but after multiple adjournments, the Director of Public Prosecutions entered a *nolle prosequi*, for the prosecution of the matter to commence in the Home Circuit Court. This action was challenged in the Constitutional Court. Judgment was given in February 1999. That court stayed the voluntary bill and remitted the case to the Resident Magistrate's Court. The trial in the Resident Magistrate's Court commenced in January 2000 and continued intermittently until May 2003. The appellant was convicted and notices of appeal were, in due course, lodged. The record of appeal was received in the Court of Appeal on 9 August 2007; the appeals were heard over eight days between

March and April 2008; and the decision was given on 27 February 2009. The appeals against conviction were dismissed. With respect to the appeal on sentence, Smith JA remarked as indicated earlier. That case proceeded on the basis of section 20(1) of the Constitution, the predecessor to section 16(1) of the Charter of Fundamental Rights and Freedoms ('the Charter'). Leave to appeal to the Privy Council was sought and obtained. The appeal before the Privy Council was dismissed.

[42] We make the observation that since the decision of **Melanie Tapper v R**, the Jamaica Constitution was amended to provide for the Charter. Section 13(2) is reproduced here:

> " (2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society –
>
> (a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and
>
> (b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights."

[43] Section 16(1) of the Charter provides that:

> "16. – (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[44] In **Julian Brown v R** [2020] JMCA Crim 42 (at paragraphs [86] and [87]), this court discussed, broadly, the implication of the amendment on the right to a fair trial within a reasonable time. In considering the issue of delay, this court concluded that "for there to be a breach of section 16(1) of the Charter, there must be evidence that the delay complained about is due to the action or inaction of organs of the State"; and "furthermore, the right is not absolute, and, so, can be limited by the State if the breach

is demonstrably justified in a free and democratic society as provided for in section 13(2) of the Charter". McDonald-Bishop JA, writing on behalf of the court, explained in great detail the impact of the amendment, at paragraphs [89] - [93], thus:

> "[89] It means then that the enquiry into an alleged breach of section 16(1) cannot properly start and end with the length of the delay. The mere fact of delay, without more, is not sufficient to ground liability within the Charter. The investigation of the issue must necessarily involve a balancing exercise with consideration being given to other relevant factors within the context of the circumstances of the particular case. This balancing exercise is necessary because the constitutional right of the applicant to a fair trial within a reasonable time is to be balanced against 'the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica'.
>
> [90] Professor Peter Hogg, in his most useful text, Constitutional Law of Canada, Fifth Edition, Volume 2, examined section 1 of the Canadian Charter of Rights and Freedoms, which is similar to section 13(2) of our Charter. He, among other things, explained the evidence required in Charter cases, which we have accepted as a correct statement of the law applicable to Charter cases in this jurisdiction. He noted, in part (page 120):
>
> > '... With respect to evidence in Charter cases, in the stage-one inquiry into whether the law infringes a Charter right, the burden of proof does rest on the individual asserting the infringement. That, however, is simply a consequence of the rule of civil procedure that 'the one who asserts must prove'. The burden of proof is the normal civil one, uncomplicated by any doctrine that the government need have only a 'rational basis' for its legislation. Once the stage-one inquiry has been answered yes, there is no presumption that the law is a reasonable limit that can be demonstrably justified in a free and democratic society. On the contrary, the burden is on the government to prove that the elements of s. 1 justification are present.'

> [91] Therefore, within the context of the Charter, the onus was on the applicant to not only assert but to establish in the court below a prima facie infringement of his constitutional right at the instance of the State. Once it was established that the State was responsible for the delay, which was such as to infringe his right to a trial within a reasonable time, then an evidential burden, as well as the legal burden, would have shifted to the State to demonstrably justify the breach, in accordance with section 13(2) of the Charter. It would then be upon the failure of the State to justify the breach that the issue of constitutional redress in the form of a reduction in sentence (or otherwise) would have properly arisen for consideration. This is so because if the breach were justified, then the delay, even if lengthy, would not be unconstitutional and the applicant would have been entitled to no relief under the Constitution.
>
> [92] In our view, the pre-Charter authorities must now be carefully read in the light of the Charter. Therefore, the dictum of Smith JA in **Melanie Tapper v R**, which was relied on by the applicant, that delay, without more, constitutes a breach of section 20(1) of the Constitution (now section 16(1)) had to be re-evaluated within the context of the letter, sense and spirit of the Charter. As a result, that case provided no material support for the applicant's arguments that his sentence ought to have been reduced by this court because of breach of his constitutional right to a fair trial within a reasonable time.
>
> [93] The foregoing analysis led this court to the conclusion that the length of the delay in the circumstances of the case, albeit regrettable, did not automatically mean a breach of the applicant's constitutional right under section 16(1) of the Charter, as contended by him. The court could not properly arrive at a finding that there was a breach because the reason for the delay was never disclosed to the court. Furthermore, the delay may have been justifiable in a free and democratic society."

[45] The court also concluded that there was no material placed before it to demonstrate that the applicant's constitutional right to a trial within a reasonable time was breached, nor was the issue of delay raised before the trial judge.

[46] In **Flowers v The Queen** [2000] UKPC 41, a case applied in **Julian Brown**, the appellant was tried on three separate occasions between 1992 and 1997 for the offence of capital murder. He was convicted in 1997 and sentenced to death. He applied to this court for leave to appeal his conviction. His application was heard and refused. The appellant, argued, among other things, at the Privy Council, that the delay in the proceedings instituted against him constituted a breach of his right to a fair trial within a reasonable time under section 20(1) of the Constitution of Jamaica. The delay between the date the appellant was charged to the date of the commencement of his last trial was a period of almost six years.

[47] In determining the issue of delay, the Board considered that the issue was not raised in the courts below and opined that this was a weighty factor against the appellant's submissions. It then went on to state the factors that the court should have regard to:

> "45. [These] factors are: **the length of the delay**, **the reason for the delay**, **the defendant's assertion of his right**, and **prejudice of his right**, **and prejudice to the defendant**. In *Bell* the Board acknowledged the relevance and importance of these four factors, stating that the weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case." (Emphasis mine)

[48] In considering the prejudice to the appellant, the Board stated that the court ought to consider whether there was an oppressive pre-trial incarceration; anxiety and concern of the accused; and the extent to which the delay had impaired his defence.

[49] In **Rummun v State of Mauritius** [2013] UKPC 6, the Privy Council stated that there are three factors that the court ought to have regard to where there is an assertion of breach of the right to a fair hearing in a reasonable time: "(i) the complexity of the case; (ii) the conduct of the Appellant; [and] (iii) the conduct of the administrative and judicial authorities". The appellant's attitude towards the delay must also be closely examined (see **Celine v State of Mauritius** [2012] UKPC 32), and delay for which the

State is not responsible, cannot be prayed in aid by an appellant (see **Taito v R** [2002] UKPC 15).

[50] Several authorities from this court have also underscored that the reasons for the delay must be established by the appellant. We considered, as examples, **Lincoln Hall v R** [2018] JMCA Crim 17, where there was an inordinate delay of over 11 years between the date of arrest and the trial date but in the absence of reasons for the delay, this court declined to make an assessment regarding the effect of the delay on the appellant's sentence. Similarly, at paragraph [68] of the decision in **Kemar Effs v R** [2022] JMCA Crim 9, P Williams JA stated, "in the post Charter era, in the absence of *prima facie* evidence of infringement of one's constitutional right at the instance of the State, the State would be unable to discharge its burden on proving whether the breach was demonstrably justifiable". In the instant case, there being no evidence to that effect, as regards the pre-trial delay, this court was unable to make the determination.

[51] We agreed entirely with the reasoning that for this court to assess the impact of any period of delay on the appellant's right under the Charter, he would need to show that the State has breached his right to a fair hearing within a reasonable time. The appellant's attitude towards the delay would also be a factor to be considered. No such evidence was put before us nor was the matter raised in the court below. We therefore found no basis on which to uphold the claim that the period of pre-trial delay amounted to a constitutional breach.

[52] As regards the appellant's contention about post-trial delay, the record revealed that within the period of time that his case was in this court, the appellant made an application for leave to appeal which was considered by a single judge who refused leave to appeal his conviction. A renewed application for leave to appeal his conviction followed. It was that application which was the subject of this appeal. In those circumstances, we did not consider any period of delay to be inordinate. While those circumstances did not suggest inordinate delay, any delay over the period is regretted.

Conclusion

[53] The appellant having not pursued his appeal against conviction, that aspect of his appeal was dismissed. In terms of the appeal against sentence, there was no compelling reason for this court to interfere with the sentence imposed by the learned judge. Although he erred in principle, by failing to employ the sentencing approach outlined in **Meisha Clement v R**, the sentence imposed was within the range of sentences which the court was empowered to grant for this offence, in like circumstances. The result was a sentence that was reasonable and proportionate; not "manifestly harsh and excessive, unfair and unjust". Although there was recognisable delay, constitutional relief could not be justified, as, among other things, there was no evidence as to what had caused the delay.

[54] For all those reasons, we made the orders at paragraph [4] above.