[2023] JMCA Crim 28

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CRIMINAL APPEAL NO COA2020CR00013

NORMAN THOMAS v R

Ms Jacqueline Cummings instructed by Archer Cummings & Co for the applicant

The applicant appeared by videoconference platform from the correctional facility

Mrs Kimberley Dell Williams, Mrs Christina Porter and Miss Kathrina Watson for the Crown

21 and 23 June 2023

Criminal Law – Criminal procedure – Counsel – Conduct of defence – Plea of guilty – Whether guilty plea improperly entered – Whether there was misconduct by defence counsel

Criminal Law – Murder – Sentence – Whether sentence manifestly excessive – Offences against the Person Act, section 3(1C)(b)

ORAL JUDGMENT

BROOKS P

[1] On 29 January 2016, 57-year-old Mr Norman Thomas entered the business place where his 21-year-old girlfriend, Miss Kyria Nelson, worked in the parish of Saint Ann. He was armed with a knife. The cautioned statement that he subsequently gave to the police indicates that she rebuffed his attempts to touch her. He persisted. She resisted. At the

end of their subsequent wrestling, he had inflicted three stab wounds to her neck, one stab wound to her chest, 13 incised wounds to her face, neck, chest and hands, and three scratches. The total was 20 injuries. He surrendered to the police and was subsequently arrested and charged with murder.

[2] He appeared before the Circuit Court for the parish of Saint Ann and, on 6 February 2020, pleaded guilty to murder. The learned sentencing judge, after having been provided with a social enquiry report on Mr Thomas, sentenced him to imprisonment for life and ordered that he should serve 15 years' imprisonment before becoming eligible for parole.

[3] Mr Thomas has applied for leave to appeal this sentence. At the hearing of the application (although he did allude to it in his written application), however, he went further. He not only contends that the sentence is manifestly excessive, but he asserts, via affidavit evidence, that he was badly advised by counsel who appeared for him then, and that he "erroneously pleaded guilty" to the offence. In one of his proposed grounds of appeal, he asserts that he "was force [sic] to plead guilty by [his] attorney for something that [he] did not do". He said that he told his counsel that he was not guilty but that the defence counsel advised him that it was best that he pleaded guilty. He indicates that defence counsel did not tell him that he could plead not guilty to murder but guilty to manslaughter. He asserts that the defence counsel told him that the sentence that he would receive if he pleaded guilty would be seven to 10 years.

[4] The defence counsel, who appeared for Mr Thomas in the Circuit Court, has since died and there is no evidence to rebut Mr Thomas' assertion as to the interaction between them. There is, however, evidence from one of the prosecutors who appeared at first instance. The prosecutor, Ms Ruth-Anne Robinson, deposed that, on 13 January 2020, learned defence counsel proposed to the prosecuting team that they should agree to Mr Thomas pleading guilty to manslaughter. The prosecutors, however, rejected the proposal.

[5] Before this court, Ms Cummings, who appeared for Mr Thomas (she did not appear in the court below), accepted that considering the affidavit of Ms Robinson, it could not properly be argued that the defence counsel failed to consider the issue of manslaughter for Mr Thomas' benefit. Instead, Ms Cummings submitted that the learned judge erred in imposing the maximum sentence of life imprisonment, although he imposed the minimum allowable period before Mr Thomas would be eligible for parole. Learned counsel submitted that the learned judge ought to have imposed a fixed or determinate sentence and less time than he did for the period before Mr Thomas would be eligible for parole. Learned counsel stressed that this approach was justified by the fact that Mr Thomas had no previous convictions and a good community report.

The conduct of defence counsel

[6] Ms Cummings is quite correct to have adopted her position in respect of Mr Thomas' assertions. As their Lordships of the Privy Council stated in **Leslie McLeod v The Queen** [2017] UKPC 1 at para. 13: "[a]llegations against advocates are easy to make and all too common". In that case, their Lordships advised that where such allegations are made it is best for the appellate court to analyse the complaint by hearing the appellant and the counsel involved. The appellate court would then consider the evidence as a whole in order to decide the issue joined between the appellant and counsel. They stated in para. 18:

> "There may or may not be a plain conclusion to be drawn one way or the other on the factual dispute....the only proper course is for...the Court of Appeal [to determine] the factual issue between the appellant and counsel. How that court goes about its resolution must be for it to decide....The Court of Appeal must decide whether it needs to hear the appellant, if he wishes to give evidence, and, if it does, whether it is also necessary to hear [defence counsel]. The latter decision no doubt falls to be made after hearing the appellant, if that is what occurs. It is not the law that merely by making a complaint an appellant can require counsel to be cross examined, but this may in a particular case be the correct course for the court to take. For the present, the opportunity

> to deal with the case in any way the court thinks fit should be preserved by a direction that both the appellant and [defence counsel] attend the further hearing in the Court of Appeal, unless in the meantime that court makes some different order."

[7] The court considered Mr Thomas' complaint against the defence counsel and will treat it as an application to appeal against conviction. He was present on the electronic platform for the hearing of the application. We considered his affidavit evidence, and we heard his complaint orally, although not under oath. In this case, as it was in **Franklyn Williams v R** [2018] JMCA Crim 19, counsel was not available to the court to provide his account. In **Franklyn Williams v R**, the defence counsel had left the jurisdiction, although he had sworn to an affidavit as to the relevant facts. In this case, as said before, the defence counsel has died.

[8] It is noted from the transcript, however, that Mr Thomas' plea of guilt was unhesitating and unequivocal. This is recorded on page 2 of the transcript of the proceedings:

> "REGISTRAR: Mr. Norman Thomas, please stand.
>
> Mr. Norman Thomas, you are charged for the offence of Murder. The particulars of this offence are that you, Mr. Norman, Thomas, on the 29th of January 2016 in the parish of St. Ann, murdered Kyria Nelson.
>
> How say you Mr. Norman Thomas, are you guilty or not guilty?
>
> ACCUSED, MR. NORMAN THOMAS: Guilty."

[9] Mr Thomas' allegation that he was forced to plead guilty by his counsel cannot be accepted.

[10] It must also be said that manslaughter was not properly available to Mr Thomas in these circumstances. Even on his account, he was the aggressor throughout. He was a man on a mission that day. He felt disrespected and used by this young lady and went

armed with his knife to confront her. He accosted her and continued to impose himself on her physically. Even if, as he says, she rushed to her bag, in which he thought that she had acid, that would have been an attempt at self-defence. He cannot then say he was provoked or thought that it was necessary to defend himself when he inflicted those 20 injuries on her. His present attempt to accuse defence counsel of being wanting in the circumstances is futile.

The sentence

[11] Ms Cummings is not on good ground on the matter of sentence, either. It has often been stated that this court will not disturb a sentence imposed at first instance unless it is demonstrated that the judge at first instance made an error in principle, or the sentence is so high or low that it is plainly wrong (see **Meisha Clement v R** [2016] JMCA Crim 26 at para. [42]).

[12] The learned judge had two options open to him pursuant to section 3(1C)(b) of the Offences against the Person Act. He could have imposed a sentence of life imprisonment and stipulated a period, "being not less than fifteen years" before eligibility for parole, or he could have imposed a different sentence and stipulated a period "being not less than ten years" before eligibility for parole. The learned judge chose the former option.

[13] The manner of the commission of this murder, especially the number of wounds that Mr Thomas inflicted on this young lady, was such that the learned judge made no error in principle in deciding to impose the life sentence. The probation after-care officers, who prepared the social enquiry report in this case, described Mr Thomas' offence as a "horrific act" against the victim. The officers said that the young lady's family appeared to be still grieving over her death. The learned sentencing judge was entitled to take those facts into account. He is recorded on page 19 (typewritten) of the transcript as saying:

> "When you look at the amount of stab wounds, multiple, is like you went on a rapid [sic]. You never care where it reach [sic] or where it never reach [sic] and the end result is death. A young girl, young woman, rather, at the time of her death she was only 21, she has not lived any life."

[14] The learned sentencing judge did select a range for the period for Mr Thomas to serve before becoming eligible for parole. He selected a starting point of 17 years and subtracted two years for pre-sentence remand time. There was therefore no miscarriage of justice despite the flawed approach.

Summary and conclusion

[15] Mr Thomas' complaints are without merit. The transcript of the proceedings show that he entered his plea voluntarily and, therefore, his attempt to retract it at this stage cannot be accepted. His complaint about the sentence is similarly misplaced. The learned sentencing judge, having considered the nature of the attack on the victim, was entitled to impose the sentence that he did.

[16] As a result, Mr Thomas' application for leave to appeal his conviction and sentence is refused. The sentence is to be reckoned as having commenced on 6 February 2020, being the day on which it was imposed in the court below.