[2022] JMCA Crim 67

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 94/2013

ANDREW WHITMORE v R

Mrs Emily Shields and Ms Maria Brady for the appellant

Miss Kathy-Ann Pyke for the Crown

19, 21 October, 13 and 16 December 2022

LAING JA (AG)

[1] On 6 December 2013, Mr Andrew Whitmore ('the appellant) was convicted for the offence of murder in the Circuit Court for the parish of Saint Ann, holden at Saint Ann's Bay, after a trial before a judge ('the learned trial judge') sitting with a jury. The learned trial judge, on the same day sentenced him to life imprisonment at hard labour, to serve a period of 25 years before being eligible for parole. It was also recommended that the appellant receive anger management and counselling while he is in prison.

[2] A single judge of this court refused the appellant's application for leave to appeal against his conviction and sentence. The appellant renewed before us his application to appeal against his sentence only.

[3] We heard this appeal and on 13 December 2022, we made the following orders:

1. The application for leave to appeal against sentence is granted.

2. The hearing of the application is treated as the hearing of the appeal.

3. The appeal against sentence is allowed in part.

4. The sentence of life imprisonment is affirmed.

5. The stipulation that the appellant should serve 25 years before becoming eligible for parole is set aside. Substituted therefor is the stipulation that the appellant should serve a period of 24 years and 22 days before becoming eligible for parole, taking into account the 11 months and nine days spent on pre-sentencing remand.

6. The sentence is reckoned to have commenced on 6 December 2013, the date it was imposed.

[4] At the time of making the above orders we promised to give written reasons for our decision and this is a fulfilment of that promise.

The evidence

[5] At the trial, the prosecution led evidence that on 10 October 2010, at about 11:00 pm, Mr Damian Campbell, a security guard at the Royal Decameron Hotel in Runaway Bay, Saint Ann, was on duty at the east side of the hotel. The deceased, who was also a security guard, was on duty as well. Mr Campbell heard an unusual sound of an object falling and shortly thereafter he saw the appellant, an employee of the hotel, walking in the direction of the kitchen. Mr Campbell spoke to the deceased and they went to the area where the sound was heard. Mr Campbell observed a garbage bag containing meat. Mr Campbell and the deceased assumed different positions near that area and were observing the bag from concealed positions.

[6] Mr Campbell observed the appellant walking in the direction of the bag and he spoke to the deceased using his telephone. He heard the deceased give instructions to stop and not move and, on hearing this, Mr Campbell ran in the direction of the main gate with the intention of apprehending the appellant. After spending about 5 minutes at the main gate Mr Campbell went back in the direction of where he had earlier seen the appellant. He saw him and shouted telling him not to move and the appellant ran. Mr Campbell returned to the main gate then armed himself with a baton and returned to the spot he had earlier seen the appellant. He did not see the appellant but saw the deceased lying face down in the water. Her hands were tied behind her back with what appeared to be a garbage bag. She appeared to be dead. A report was made to the police who attended and processed the scene of the crime. The death was subsequently determined to have been caused by asphyxia following drowning, which the doctor explained meant that the drowning led to suffocation because drowning caused the cutting off of the flow of oxygen as a result of the lungs not being able to carry out their function.

[7] The report of Mr Campbell led the police to the appellant's house on 11 October 2010 where he handed to the police, parcels containing meat. He also handed over clothes and a pair of white sneakers which were wet and had what appeared to be sand on them. The police took the appellant into custody, and on the same day he gave a cautioned statement in which he stated that the deceased had fallen over a railing into the water. At his trial the appellant challenged the accuracy of portions of his cautioned statement and asserted that it was Mr Campbell and another man that had killed the deceased and that he had only witnessed the murder.

The submissions

[8] Counsel for the appellant, Mrs Shields, was given leave to abandon the original grounds of appeal and to argue instead the single amended ground before the court which is in the following terms:

> "1. The sentence of life imprisonment with a mandatory minimum period of twenty-five (25) years before the

> [appellant] is eligible for parole is manifestly excessive in all the circumstances of the case and the circumstances of the offender."

[9] Mrs Shields submitted that whereas the learned trial judge for the most part appears to have applied the correct principles in the sentencing process, incorrect weight was attached to the aggravating factors and there is not sufficient arithmetic deduction using the mitigating factors. The result of this, counsel argued, was that the actual sentence in respect of the period to be served by the appellant before becoming eligible for parole, is manifestly excessive.

[10] Counsel also argued that the notional starting point for purposes of balancing the aggravating and mitigating factors should have been the mandatory minimum sentence for murder of 15 years. It was submitted that the aggravating factors were identified by the learned trial judge to be:

a. lack of remorse;

b. lying in an attempt to cover up the crime; and

c. the deprivation of the children of the deceased of their mother as a result of her death.

It was further submitted, following the decision of this court in the case of **Delton Smikle v R** [2020] JMCA Crim 48, that the use of lack of remorse as an aggravating factor should be approached with caution.

[11] Counsel argued that against these aggravating factors should be weighed the following mitigating factors:

a. the appellant had no previous convictions;

b. he was employed and lost his employment as a result of the crime he committed;

c. he earned an honest living before the commission of the crime;

d. he was a family man who was married with children that he honourably cared and provided for;

e. he cooperated with the police immediately after the commission of the crime; and

f. the members of the community were said to have been shocked to learn of the charges against him.

[12] Counsel posited that cases such as **Lincoln McKoy v R** [2019] JMCA Crim 35 do not assist this court in its analysis and especially in determining a notional starting point in the instant matter, because the circumstances of the commission of the offences and the circumstances of the offenders are markedly different between the instant and the cited cases. Additionally, there are degrees of gruesomeness and as a consequence, cases such as **Gawayne Thomas v R** [2022] JMCA Crim 11 are similarly unhelpful having regard to the particularly grisly decapitation committed by the appellant in that case.

[13] The position was advanced by Mrs Shields, that if one year is added for each aggravating factor and one year deducted for each mitigating factor, the result would be a period that, but for the statutory minimum term of years, would have been below 15 years which the appellant must serve before becoming eligible for parole. However, if two years were added for each of the aggravating circumstances and one year deducted for each of the mitigating circumstances, the result would be a period of approximately 15 years before the appellant is eligible for parole.

[14] In response, it was submitted by Ms Pyke, on behalf of the Crown, that the aggravating factors identified by the learned trial judge were:

a. the appellant's arrogance and anger problem;

b. the senseless killing of the deceased;

c. the appellant showed no remorse; and

d. the appellant lying and casting blame on others for the offence.

The mitigating factors were identified to be:

a. the appellant is a brilliant young man;

b. the appellant has no previous convictions;

c. the appellant's antecedent report showed him to be a man who had been productive; and

d. the appellant can be rehabilitated.

[15] The Crown conceded that the learned trial judge did not demonstrate how she weighed the mitigating factors against the aggravating factors or show by a mathematical calculation how she arrived at the 25 years to be served in prison before the appellant becomes eligible for parole. However, it was submitted that when the reasons for sentencing are taken as a whole, it is demonstrable that the correct principles of sentencing were considered in arriving at the sentence which was handed down. Counsel went further and suggested that there were more aggravating factors than had been identified by the learned trial judge to include, the relationship between the appellant and the deceased by virtue of their connection with the hotel, the fact that the deceased had been immobilised and accordingly suffered helplessly before eventually dying.

[16] Counsel emphasised the point that proportionality and uniformity are cornerstones of the sentencing guidelines and to that extent, it is necessary to consider similar cases, and whereas there will be differences in the circumstances of the offences and of the appellants in the various cases, that does not prevent the utilization of common threads which may be present in order to achieve a level of uniformity in sentences.

[17] It was submitted by Ms Pyke that when a comparison is made with other cases it is demonstrable that the sentence imposed on the appellant is not outside the appropriate

range for convicted persons in similar circumstances. The case of **Jason Palmer v R** [2018] JMCA Crim 6 was relied on. In that case, the defendant was sentenced to life imprisonment and ordered to serve 30 years before becoming eligible for parole. On appeal, this period was reduced to 25 years, but only because the trial judge had not, as is required, deducted the time he had spent in custody. Reliance was also placed on the case of **Lincoln Mckoy v R** in which the defendant was sentenced to life imprisonment with a stipulation that he serve a minimum of 25 years before becoming eligible for parole. Counsel admitted that it was not ideal to compare cases in which the defendant had pleaded guilty with the instant case in which the appellant went to trial. However, she used the case of **Gawayne Thomas** to illustrate her position that if an appellant who had pleaded guilty and had received a discount on that basis was found to have been correctly mandated to serve 25 years before becoming eligible for parole, that weakens the argument on behalf of the appellant in this case that the period of 25 years was manifestly excessive.

Analysis

[18] In reviewing the sentence imposed by the learned trial judge, we were mindful of the jurisdiction of this court based on section 14(3) of the Judicature (Appellate Jurisdiction) Act ('JAJA') and the guiding principle that this court ought not to interfere with a sentence imposed unless the sentencing judge erred in principle and not merely on the basis that we are of the view that a different sentence should have been imposed (see **R v Ball** (1951) 35 Cr App 164 at 165 and **Meisha Clement v R** [2016] JMCA Crim 26 ('**Clement v R**')).

[19] Section 3(1)(b) of the Offences Against the Persons Act ('the Act') provides that a person who is convicted of murder in circumstances as obtained in the case of the appellant, "shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than 15 years". We were of the view that the sentence of life imprisonment was wholly appropriate given the seriousness of the offence and the circumstances in which it was committed.

[20] The imposition of the sentence of life imprisonment was not being challenged. What we were being asked to consider was whether the minimum period specified of 25 years

before the appellant can become eligible for parole is manifestly excessive. This period was specified pursuant to section 3(1C)(b)(i) of the Act, which provides that where a court imposes a sentence of life imprisonment pursuant to section 3(1)(b), the court shall specify a period, being not less than 15 years, which that person should serve before becoming eligible for parole.

[21] The learned trial judge did not have the benefit of the learning outlined in **Clement v R** or of the Sentencing Guidelines for Use by judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), as the trial pre-dated those authorities. This court has repeatedly stated that this does not prevent the application of the sentencing procedure set out in **Clement v R** having regard to cases such as **R v Everald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002, which outlined the general principles encapsulated in **Clement v R**. It has been observed by Brooks JA (as he then was) in **A v R** [2018] JMCA Crim 26 that the failure to use a starting point, by itself, will not necessarily result in a sentence being set aside. However, in this case, that fact, combined with the lack of a clear indication of the weighing of the mitigating factors against the aggravating factors resulted in the learned trial judge failing to demonstrate by a mathematical calculation how she arrived at the 25 years to be spent by the appellant before being eligible for parole.

[22] The correct approach in cases where the judge has not demonstrated the methodology employed in arriving at a sentence is illustrated in the case of **Lincoln McKoy v R** [2019] JMCA Crim 35 in which McDonald Bishop JA explained the process as follows at para. [43]:

> "[43] We note that the learned trial judge did not expressly set out the methodology in sentencing that the court now routinely employs by choosing a range of sentences, a starting point and by making the necessary adjustments for aggravating and mitigating factors through the application of an acceptable mathematical formula. There is, therefore, no demonstration of how he had arrived at the sentence imposed. For this reason, the court cannot hold, without more, that the learned trial judge did not err in principle in sentencing the applicant. It, therefore, falls on this court to determine the appropriate sentence that

> ought to have been imposed after an application of the relevant principles."

[23] The guidance in **Clement v R** is now well established and will guide this court in its assessment of what is an appropriate sentence. It is unnecessary to quote extensively from the judgment, save to the extent that the submission of counsel for the appellant suggests, in our view, erroneously, that the starting point for purposes of calculating the period to be served before parole should be 15 years. We noted that Morrison P, in referring to the starting point, explained the concept of the starting point at para. [26] as follows:

> "[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** [RMCA no 55/2001, judgment delivered on 5 July 2002, page 3] 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] EWCA Crim 1. Para 4], 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.'"

[24] The identification of an appropriate starting range and an appropriate starting point within that range was also suggested in the case of **Daniel Roulston v R** [2018] JMCA Crim 20 which followed and further developed the guidance which had been offered in **Clement v R**.

[25] The submission of counsel for the appellant in this regard, is flawed, in that it suggests a default starting point of 15 years, by virtue only of it being the minimum period the appellant must serve before being eligible for parole, pursuant to section 3(1C)(b)(i) of the Act. However, that is not the default position. If one used this approach which we were being invited by counsel to adopt, no proper account would be taken of the range of sentences which would be appropriate, nor would there be a consideration of the point within that range which would be appropriate as the starting point. Consequently, the

intrinsic seriousness of the offence and the circumstances thereof, would not be considered and these are relevant factors which would assist in determining the sentencing range and the starting point.

[26] We considered a number of factors which are relevant to the offending. The offence was committed in the vicinity of a hotel by an employee against a security officer whose duties included protecting the hotel's and its guests' property. It was committed by the appellant in an effort to escape the consequences of his crime, which was the larceny of the hotel's property, namely its meat. The crime, and its proximity, must have shocked the employees and guests of the hotel as well as the wider community. Additionally, there would be an immediate impact on the deceased's family, and in particular, her five children, who lost their mother's emotional and financial support. The death of the deceased by drowning is likely to have been particularly horrifying as she, being bound, helplessly struggled to get oxygen into her lungs, which were eventually filled with seawater instead. It was our view, having regard to the egregious and senseless nature of the crime, that a starting point within the range of 25 to 30 years, was appropriate. We considered a starting point of 28 years to fit the circumstances of this case.

[27] We accepted the submission of Mrs Shields that the appellant's lack of remorse ought not to have been considered to be an aggravating factor in the circumstances of this case. However, it could not be reasonably argued that he cooperated with the police, having regard to his lack of honesty in his cautioned statement. We did not conclude that the fact that the appellant attempted to blame others for the offence should be considered an aggravating factor. However, we formed the view that the conduct of the appellant in deflecting blame to innocent persons, and the dishonest manner in which he utilised his intelligence and brilliance in this regard, diminished the mitigating weight to be attached to what the learned trial judge found to be his sharp mind. We revisited the circumstances of the offence and the aggravating and mitigating factors relative to the offence that we had previously identified in fixing the starting point. Having done so, we formed the opinion that they sufficiently accounted for those elements which we found on Ms Pyke's submissions to be relevant aggravating factors. Moreover, we did not identify any separate aggravating

factors relevant to the appellant himself, and we were satisfied that, as a consequence, there was no risk to the appellant of the double counting of aggravating factors.

[28] In respect of factors in mitigation, we found that there were no personal circumstances of the appellant which were relevant. The appellant was 22 years old at the time of sentencing. He had a history of being gainfully employed and was employed at the time of the incident. He is married with two children, then aged three and five years' old who were dependent on him for support. However, there was no contrition or acceptance of responsibility for the crime which would amount to a factor in mitigation. A deduction of these personal mitigating factors and the fact that he had no previous convictions would serve to reduce the starting point to a period of 25 years.

[29] It was therefore, our opinion, that the sentence imposed by the learned trial judge that the appellant is to serve 25 years' imprisonment before becoming eligible for parole is not manifestly excessive and is within the established range of sentences for murder committed in circumstances such as these.

Time spent on pre-sentencing remand

[30] We were advised and counsel were agreed that the appellant spent a period of 11 months and nine days on remand prior to his sentencing for which he was not given credit in accordance with the pronouncement of the Judicial Committee of the Privy Council, that there should be full credit for time spent in custody (see **Callachand and Another v The State** [2008] UKPC 49). The sentence was duly adjusted to take into account this period.

Disposition

[31] Accordingly, we made the orders at para. [3] above for the reasons stated herein.