[2019] JMCA Crim 11

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 26/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

WORRELL WINT v R

Ravil Golding for the applicant

Miss Patrice Hickson for the Crown

15 January and 22 March 2019

EDWARDS JA

[1] This is an application for leave to appeal against sentence only. The applicant was tried in the Trelawny Circuit Court by Gayle J sitting with a jury, on an indictment containing one count for the offence of wounding with intent. He was convicted and sentenced to 25 years imprisonment at hard labour. His application for leave to appeal against his conviction and sentence was considered by a single judge of this court and was refused. The single judge of appeal saw no basis on which to disturb the conviction and sentence. The applicant has renewed his application before this court, as he is permitted by law to do.

[2] At the hearing of the application, counsel Mr Ravil Golding, frankly and admirably, we believe, conceded that an examination of the judge's summation revealed no basis to

launch a challenge to the applicant's conviction. Counsel, on behalf of the applicant, requested and was granted permission to abandon the original grounds of appeal filed against conviction and sentence, and to argue the supplemental grounds of appeal against sentence, filed 10 January 2019. He, therefore, argued that based on the supplemental grounds of appeal, the sentence of 25 years, imposed on the applicant, was manifestly excessive.

The grounds of appeal

[3] The supplemental grounds of appeal were:

> "a. The learned trial Judge erred when sentencing the Applicant to twenty-five (25) years imprisonment at hard labour which sentence is manifestly excessive and outside of the range of sentences as contained in the now Sentencing Guidelines for Judges of the Supreme Court and Parish Courts of December 2017;
>
> b. The learned trial Judge fell into error because he failed to take into consideration some of the factors relevant to sentencing of convicted persons."

The facts

[4] The events which led to the arrest, charge and conviction of the applicant were undeniably startling. This summary of the facts is taken from the learned trial judge's summation. On the night of 4 July 2010, the applicant and the complainant were gambling, when a dispute arose between them over the 'princely' sum of $50.00. They both "collar up", which is a colloquialism for the fact that they both held on to each other. They were parted and warned to behave. The evidence was that the persons in the shop tried to push the complainant outside, but he held onto the applicant and dragged him

outside. The complainant then moved to a window on the outside and the applicant was heard threatening to kill him. The applicant was then seen moving towards the complainant and hitting at the complainant in his head. The complainant staggered and fell to the ground. The applicant stood over him, and held his chin, "going down with a knife to stab him". The applicant was asked whether he was going to kill the complainant to which the applicant is supposed to have said "[k]ill him yaa, because everybody in di shop and nobody to split the difference" or words to that effect. The complainant was unarmed.

[5] The applicant stabbed the complainant several times. Two of the resulting injuries to the head and back proved to be near fatal. The complainant suffered debilitating injuries to his brain and lung.

[6] Three doctors gave evidence at the trial outlining the injuries suffered by the complainant. Dr Christopher Fletcher gave evidence that he was in the accident and emergency section of the Percy Junor Hospital when the complainant was brought in. Several doctors attended to the complainant that night, and he was one of them. The complainant was unconscious and had lost a lot of blood. He had multiple lacerations to his body. He had lacerations to the forehead, chin, two deep lacerations to the left arm, one deep wound to the left upper back penetrating the lung, and a deep wound to the left side of the head, penetrating the brain. The wound to the left side of the head and the one to the back were very serious and resulted in serious complications. The doctor's evidence was that great force was used to get past the skull into the brain, and great force was also used to penetrate the fat and bones to get to the lungs.

[7] Various complications arose from those wounds. Due to the wound to the left foetal skull, the complainant's conscious level fell and he was unable to effectively communicate, that is, "he could not say where he was, who he was with, who he was talking to". He had weakness to the right upper limb, and his lung was also punctured preventing air from getting inside. The latter injury required immediate surgery. The stab wound to the brain, Dr Fletcher said, would have disabled the complainant immediately. The wound to the lung would also have had a disabling effect but not as immediate.

[8] Dr Ghazzan Ahamad also gave evidence. He too saw the complainant at the hospital on the night of the incident when he was brought into the Accident and Emergency section. He said he saw him again on 10 July 2012. At that time, the complainant had to be treated for seizure, secondary to a penetrating head trauma. The complainant could not communicate but was able to understand "some things". The description given by Dr Ahamad of the complainant's condition some two years after the incident may be summarised as follows:

i. weakness in the right upper and lower limbs;

ii. facial weakness;

iii. a surgical scar to the left side of the head, and another non-surgical scar beside the surgical scar;

iv. a scar relating to surgical drainage inserted in the left chest to decompress the collapsed

lungs, and another non-surgical scar to the upper back;

v. bruises to the left knee and forehead; and

vi. incoherency.

[9] A third doctor, Dr Rory Dixon, gave evidence that he is an orthopaedic surgeon specializing in bones. He saw the complainant at the Sir John Golding Rehabilitation Clinic on 17 August 2010. At that time, the complainant had several scars, and was weak on the right side, both in his upper and lower limbs, and he had difficulty speaking. His right upper leg was paralysed. There was little improvement in speech, despite speech therapy, and he concluded that the complainant would have a speech impairment for the rest of his life. He could only walk with assistance, the weakness in his right upper limb was permanent, and his right arm would never function again. The doctor found that the complainant was brain damaged in an area of his brain which affected his ability to speak, and he concluded that the complainant would never be able to walk or speak properly again. The complainant would also be required to take medications to prevent seizures. He had lost 60% of his total bodily function.

[10] The injuries left the complainant so severely incapacitated that he had to use a walker to amble about, assisted by others, and his speech was permanently impaired.

[11] The applicant's version of the events was that an incident did take place with the complainant, but he claimed the complainant was the aggressor. In his cautioned statement to the police, he said:

> "Mi hold on pon di wall and him pull mi off di wall and two of us drop. After mi drop, mi see a knife... and mi pick it up. Di man get on top of mi and start to lick mi in a mi face and lick mi all over and then mi start to fist him wid di knife in a mi hand. After mi start to lick back, mi find sey di man let goh mi."

[12] The applicant gave an unsworn statement in which he claimed that after a quarrel and minor tussle with the complainant about money, the complainant took something from his pocket and threatened to kill him if he did not get back his money. He also said he was pulled outside by the complainant and they both fell and a knife dropped. He held the knife whilst they wrestled. The complainant 'fist' him in the face all over and he 'fist' back the complainant, who then let him go and he ran off.

[13] He admitted several previous convictions, one of which was for unlawful wounding for which he was sentenced to 12 months imprisonment in 1998, and another for malicious destruction of property, for which he received a suspended sentence in 1995. There was a more recent conviction in 2012 for simple larceny, which the judge did not mention in his sentencing remarks. The remaining two convictions were for ganja which the judge also did not consider in arriving at his sentence.

Submissions

For the applicant

[14] Counsel for the applicant submitted that the principles and guidelines relating to sentencing have been set out in a number of decisions in the court, notably in **Meisha Clement v R** [2016] JMCA Crim 26, **Demar Shortridge v R** [2018] JMCA Crim 30 and

Jason Palmer v R [2018] JMCA Crim 6. He pointed out that the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 (the Sentencing Guidelines), which are now of 'some importance', were not in existence in 2014 when the applicant was tried and convicted. Counsel argued that by virtue of the principles enunciated in the cases, and by virtue of the Sentencing Guidelines, the sentencing judge "is not at large". Counsel pointed to the recognition in the guidelines of the need for greater objectivity, transparency, predictability and consistency in sentencing.

[15] Counsel submitted that based on the authorities and the Sentencing Guidelines, the trial judge should seek to ascertain the normal range of sentences for that kind of offence, and having identified the norm, he should look at any aggravating and mitigating factors affecting the commission of the offence, and pertaining to the offender himself.

[16] Counsel pointed out that, under the Offences Against the Person Act, the maximum sentence for wounding with intent is life imprisonment. He, nevertheless, noted that pursuant to the Sentencing Guidelines, the normal range of sentence for that offence is five - 20 years, with a usual starting point of seven years.

[17] Mr Golding also drew a comparison with the normal range of sentence for the offences of manslaughter and attempted murder, being three - 15 years, with a starting point of seven years for the former, and 10-20 years, with a starting point of 12 years, for the latter. Based on the 'doctrine of proportionality', he said, the sentence imposed was disproportionate.

[18] Counsel suggested that a starting point of 12 years was appropriate based on the egregious nature of the offence. Counsel admitted that, in the instant case, the fact that the complainant was unarmed, ought to be considered an aggravating factor which would affect sentence. Counsel however, urged this court to accept, as a mitigating factor, the fact that the complainant was the aggressor. He also readily conceded that the number and severity of the wounds received would also be an aggravating factor.

[19] Counsel also conceded that the applicant had five previous convictions, but argued that only two were of any relevance and those were taken into account by the trial judge. He argued that, although two of those convictions were for violent offences, they were already spent, as they had been committed more than 15 years prior to the offence in the instant case. Therefore, counsel maintained, the trial judge was wrong to take those previous convictions into consideration. Counsel submitted that, taking into account the fact that the applicant was hardworking, quiet and gainfully employed, a sentence of 13 years was appropriate.

For the Crown

[20] Counsel for the Crown, Miss Patrice Hickson, argued that the trial judge had the option to impose a sentence as high as life imprisonment. She argued further that, from a reading of the learned trial judge's summation, it was evident that the learned judge had addressed his mind to the seriousness of the offence.

[21] Counsel pointed out that the trial judge had described the complainant as being in a "vegetative state". This, she said, was because the complainant could not speak or

walk properly. Counsel submitted that this case was at the top of the spectrum of wounding with intent cases. Counsel argued that whilst she was of the view that 25 years was not a totally inappropriate sentence in this case, she would be inclined to suggest a starting point of 15 years.

[22] Counsel further argued that the previous convictions should be taken into account as an aggravating feature, as the applicant was a repeat offender. She pointed out that the previous convictions were for violent offences and, in her opinion, the applicant had graduated to far more serious offences. She posited that two to three years ought to be added to take account of the previous convictions. She also suggested that the fact that the complainant was unarmed was also an aggravating feature for which a further period should be added, which would move the sentence further upwards. As a mitigating factor, counsel considered that the complainant was said to have been the aggressor. She suggested, therefore, that a period of 19 years imprisonment would be an appropriate sentence.

Discussion and analysis

[23] The sole issue which arose in this application is whether the sentence imposed by the trial judge was manifestly excessive, in light of established principles and taking into account the established guidelines.

[24] The sentence imposed by a sentencing judge who has heard evidence, seen the witnesses and the accused, and has assessed his antecedents, ought not to be disturbed by this court, unless that judge erred as a matter of principle. In **R v Alpha Green** (1969)

11 JLR 283 at 284, and **R v Trevor Smith** (1968) 11 JLR 46 at 48, the court restated the principles applicable to a Court of Appeal when reviewing a sentence of imprisonment. In both cases this court adopted the statement of Hilberry J in **R v Ball** [1951] 35 Cr App Rep 164 at page 165, where he said:

> "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 the Court will intervene."

[25] The trial judge cannot be faulted for taking account of the savagery of the attack and the debilitating effect it had on the complainant in sentencing the applicant. He took into account the main aims of sentencing; the severity of the injuries suffered by the complainant; and the impact that those injuries had on the quality of his life. He also concluded that a custodial sentence was appropriate in this case and that the term of imprisonment would have to be a long one. However, having made that determination, he failed to state the point from which he started, and what, if any, mitigating or aggravating factors he took into account. He did refer to the applicant's two previous convictions for violent offences, and the fact that he was asked not to take them into account, but failed to indicate whether he had, in fact, taken them into account in determining sentence. Whilst it is true that the trial judge did consider the general

principles of sentencing, in failing to indicate how he had arrived at a sentence of 25 years imprisonment at hard labour, he fell into error.

[26] We have no doubt that the circumstances of this offence called not only for a custodial sentence, but also for a period of imprisonment to be imposed which reflected the gravity and severity of the applicant's actions, and the debilitating effect it had on the complainant. This case of wounding with intent could easily be considered one of the worse of the worst ever seen in practice.

[27] In **Evrald Dunkley v R** (unreported), Court of Appeal, Jamaica, Resident Magistrate's Criminal Appeal No 55/2001, judgment delivered 5 July 2002, at page 4, Harrison JA outlined the approach to be adopted by judges in order to arrive at an appropriate sentence. Firstly, the judge should decide whether, in the particular case, a custodial sentence is appropriate. Secondly, the judge ought to determine the length of the sentence, as a starting point, that he would impose for such an offence. Thirdly, the judge should consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise.

[28] Since **Evrald Dunkley v R**, and influenced for the most part by that decision, this court developed a comprehensive approach to sentencing for the guidance of judges in the case of **Meisha Clement**. In that case, Morrison P, who delivered the judgment of the court, sought to explain the notional concept of the starting point. In doing so, he referred to the case of **R v Saw and Others** [2009] EWCA Crim 1, at paragraph 4, where 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".

[29] Morrison P went on to state that:

> "In seeking to arrive at the appropriate starting point, it is relevant to bear in mind the well-known and generally accepted principle of sentencing that the maximum sentence of imprisonment provided by statute for a particular offence should be reserved for the worst examples of that offence likely to be encountered in practice." (Paragraph [27])

[30] This court made it clear that, based on the above principle, the sentencing judge ought not to impose a statutory maximum when searching for an appropriate sentence, unless it is a case which falls into the category of the worst example of that offence likely to be encountered. This court also stressed in **Meisha Clement** that:

> "...in arriving at the appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence."

[31] In **Meisha Clement** this court identified several factors that ought to be considered when making an assessment as to the seriousness of a particular offence as follows:

> (a) the offender's culpability in committing the offence; and
>
> (b) the harm that the offence has caused, intended to cause or might foreseeably have caused.

[32] An in-exhaustive list of aggravating factors commonly considered in the jurisdiction was also compiled in **Meisha Clement**. These were:

(a) previous convictions for same or similar offences;

(b) premeditation;

(c) use of a firearm (imitation or otherwise) or other weapon;

(d) abuse of a position of trust;

(e) whether the offence was committed whilst on bail or on probation, or whilst serving a suspended sentence;

(f) prevalence of the offence in the community; and

(g) the intention to commit a more serious harm than actually resulted from the offence.

[33] An in-exhaustive list of mitigating factors were also set out in **Meisha Clement** such as:

(a) age;

(b) good character;

(c) reparation or restitution (in the appropriate case);

(d) whether provocation is a feature;

(e) capacity for reform;

(f) incidental losses the offender suffered (eg loss of employment);

(g) time spent on remand;

(h) role in the commission of the offence;

(i) co-operation with the police;

(j) personal characteristics;

(k) any plea of guilty; and

(l) any delay in trial and sentence.

[34] In **Meisha Clement**, which predated the Sentencing Guidelines, the suggested approach to sentencing that sentencing judges should take, was to:

(i) identify the range of sentences usually imposed for such offences or like offences in similar circumstances;

(ii) identify the appropriate starting point;

(iii) consider any relevant aggravating features;

(iv) consider any relevant mitigating features (including personal mitigating features of the offender)

(v) consider, where appropriate, any reduction for a guilty plea;

(vi) give credit for time served;

(vii) decide the appropriate sentence; and

(viii) give reasons.

[35] Pursuant to section 20 of the Offences Against the Person Act, the offence of wounding with intent carries a maximum of life imprisonment. Appendix A of the Sentencing Guidelines, which were established and issued after the decision in **Meisha Clement**, lists the normal range for wounding with intent as five - 20 years, with the usual starting point being seven years.

[36] The approach to sentencing, suggested in the Sentencing Guidelines under the heading "The sentencing process" at paragraph 6, is not very different from that suggested by this court in **Meisha Clement**. Paragraph 6 of the Sentencing Guidelines states:

> "6.1 Assuming that the sentencing judge has gathered all the material necessary to enable him or her to arrive at a proper sentencing decision, the first step in the process is to determine the normal range of sentences for the particular offence under consideration.
>
> 6.2 This should usually be done by reference to the circumstances of the offence and the offender, the sentencing table in Appendix A, previous sentencing decisions and any submissions made by counsel for the prosecution and counsel for the offender.
>
> 6.3 Having determined the normal range, the sentencing judge should then sentence the offender in accordance with the following steps:
>
> (i) identify the appropriate starting point within the range for the particular offender;
>
> (ii) consider the impact of any relevant aggravating features;

(iii) consider the impact of any relevant mitigating features (including personal mitigation);

(iv) consider, where appropriate, whether to reduce the sentence on account of a guilty plea;

(v) decide on the appropriate sentence;

(vi) make, where applicable, an appropriate deduction for time spent on remand pending trial; and

(vii) give reasons for the sentencing decision."

[37] In explaining the notion of the starting point, the Sentencing Guidelines state at paragraph 7.1 that:

> "…The starting point is a notional point within the normal range, from which the sentence may be increased or decreased to allow for aggravating or mitigating features of the case."

[38] Paragraph 7.2 provides that:

> "In arriving at the appropriate starting point in each case, the sentencing judge must make an assessment of the intrinsic seriousness of the offence, taking into account the offender's culpability in committing it and the harm, physical or psychological, caused or intended to be caused, or that might foreseeably have been caused, by the offence."

[39] The guidelines then cites paragraph [29] of **Meisha Clement** and goes on to state at paragraph 7.3 that:

> "The starting point therefore, represents, on a purely provisional basis, the sentence which the sentencing judge considers to be appropriate for the offence, before adjustment, upwards or downwards, on account of any particular aggravating or mitigating factors in the case."

[40] Paragraphs 7.4 to 7.6 of the guidelines provide that:

> "7.4 Accordingly, the maximum period of imprisonment provided by statute for a particular offence, which is usually reserved for the worst examples of that offence likely to be observed in practice, will not normally be an appropriate starting point for sentencing purposes.
>
> 7.5 A list of usual starting points for particular offences is set out in Appendix A. The suggested usual starting points reflect experience gathered over time as well as previous sentencing decisions of the Court of Appeal. It is expected that adherence to them will assist in the achievement of one of the key goals of sentencing guidelines, which is to achieve consistency and coherence in sentencing.
>
> 7.6 **However, the usual starting points set out in Appendix A are intended to be indicative only. While it is expected that sentencing judges will generally find it convenient to adopt them, the starting point ultimately chosen in each case must be the product of the sentencing judge's fresh consideration of what the particular case requires**." (Emphasis added)

[41] In this case, the trial judge failed to indicate the range and the starting point within that range at which he began. He also failed to indicate what, if any, aggravating or mitigating circumstances he took into account that may have impacted the starting point,

before imposing sentence. This court must, therefore, revisit the issue, in principle, in order to determine whether the sentence of 25 years was manifestly excessive.

[42] Counsel for the applicant was of the view that the sentence of 25 years for a wounding with intent charge was disproportionate, when juxtaposed with similar or lesser sentences for murder or manslaughter. Counsel cited two cases in support of his contentions. The first, **Demar Shortridge v R**, was a case of murder, involving a guilty plea. The sentence was life imprisonment with a possibility of parole after 25 years. That sentence was reduced to 24 years by this court, to take account of time spent in custody pending trial. The second, **Jason Palmer v R**, was also a case of murder, for which the appellant was sentenced to 30 years imprisonment, which was reduced by this court to 25 years imprisonment, to take account of the five years that the appellant had spent in custody, pending trial.

[43] However, the question of an appropriate sentence in this case, should be considered against the background of the maximum penalty legislated for this offence. The maximum sentence of life imprisonment, legislated for wounding with intent under section 20 of the Offences Against the Person Act, is the same for non—capital murder and manslaughter. Therefore, the legislators in their wisdom, thought it prudent, in the interests of justice, and for the protection of the public (taking into account the fact that there may be circumstances, in cases involving either of these offences, where the nature of the offending would call for a similar sentence), to prescribe the same maximum penalty for these different offences. Therefore, a sentence is not disproportionate, merely because a lesser sentence might have been given for a different but equally serious

offence. The circumstances of every case, the aggravating and mitigating factors involved, will always, in all likelihood, differ.

[44] Although the maximum sentence for wounding with intent is the same as for murder and manslaughter, the range of sentences for each of those offences, established by the Sentencing Guidelines, is different. Bearing in mind the differences in the range of sentences (five-20 for wounding with intent, which is higher than that for manslaughter at three-15, where for murder it is 15-life and attempted murder is 10-20 years) and the differences in the varying circumstances of the offending and the offenders, it may not necessarily always hold true that the sentence for the offence of wounding with intent, will always be less onerous than that in a case of murder or manslaughter, depending on how close to the top of the range a particular case falls, in terms of its intrinsic seriousness.

[45] We are of the view that based on the intrinsic seriousness of this offence and its near fatal effect, the usual starting point should not be applied in this case. The question which next arises is what the appropriate starting point should be in the circumstances of this case.

[46] In the case of **Regina v Earl Simpson** (1994) 31 JLR 397, involving assault occasioning grievous bodily harm, where the appellant threw acid on his pregnant girlfriend, the court took the view that, the circumstances of that particular case were so exceptional, that a sentence outside the normal range was appropriate. In that case, the maximum sentence of life imprisonment was imposed and the Court of Appeal found no

reason to disturb that sentence. Therefore, there is authority for the proposition that the court may lawfully impose a sentence at the top of or above the range, in an unusual or exceptional case.

[47] In **Sylburn Lewis v R** [2016] JMCA Crim 30, the accused was given a sentence of 28 years imprisonment for the offence of wounding with intent. This was a decision handed down 28 October 2016, before the Sentencing Guidelines were issued. In that case this court accepted that a starting point at the top of the range of 18 years imprisonment, would have appropriately reflected the intrinsic seriousness of the offence committed by that appellant. The court considered the premeditation in the attack and the intention to commit a more serious harm than what actually resulted (evidenced by the appellant's words "you dead now"), to be plainly aggravating factors. The court then found mitigating circumstances in the fact that the appellant had no previous convictions. The court also took into account the fact that he had spent two years in custody. It concluded that 17 years was an appropriate sentence in that case.

[48] In that case however, the injuries received by the complainant were machete injuries to the right hand severing three fingers, and multiple machete injuries to the left foot and left hand, breaking the bone in his arm. The complainant was hospitalized for three weeks and had to undergo three operations to his arm. We cannot say that those injuries, serious as they were, were as debilitating as those experienced by the complainant in the instant case.

[49] As indicated, the range for wounding with intent set out in Appendix A of the sentencing guidelines is five-20 years, with a starting point of seven years. However, the intrinsic seriousness of this case, to include; the near fatal harm inflicted on the complainant; the fact that the complainant was unarmed; and the fact that the applicant expressed a desire to inflict fatal harm to the complainant, taken together with previous sentencing decisions on equally or similarly serious cases, suggests that the instant case is exceptional in nature and the sentence should fall outside the range. A departure from the usual starting point would also be justified in this case.

[50] We cannot imagine a more intrinsically serious offending than what has occurred in this case. While the complainant still lives, he will never again enjoy a wholesome life or even a partially wholesome life. The trial judge described it as a "vegetative state". We are content to describe it, as it is described in evidence by the doctors, which speaks for itself. The physical harm that was caused was debilitating to say the least, and based on two of the wounds and the expressed desire to kill, it is foreseeable that, but for the skill of the doctors, it may have been fatal.

[51] In Blackstone's Criminal Practice 2002 at paragraph E1.17 page 1787, the learned editors, in referring to cases considered worst of the worst said:

> "...In considering whether a particular offence is one of the worst examples of its kind, sentencers should have regard to range of cases which is actually encountered in practice 'and ask themselves whether the particular case they are dealing with comes within the broad band of that type' but 'should not use their imaginations to conjure up unlikely worst possible kinds of case' (per Lawton LJ in *Ambler* (1975) CSP A1-4C01)."

[52] The instant case may indeed be considered one of the worst examples of its kind ever encountered in practice.

[53] We therefore take the view that, whilst a starting point of 25 years would be too far outside the norm, a starting point of 19 years would be appropriate, taking into account, as we have said, the egregious nature of the offence. Having established a starting point of 19 years, the next step is to consider whether there are any aggravating factors that may impact it so as to take it further up the range. Generally, aggravating factors may relate to both the offence and the offender. At paragraph 8.1 of the Sentencing Guidelines, it warns the sentencing judge to guard against double counting, in that aggravating factors relating to the offence, may have already played a part in the choice of starting point. Those, therefore, should not play any further part in moving from the starting point upward.

[54] In this case, we have already treated the intrinsic seriousness of the offence and the harm it caused as a factor in identifying the appropriate starting point. It will be given no further consideration as an aggravating feature.

[55] Another feature of this case is that the accused had five previous convictions. The sentencing judge considered only two - that of unlawful wounding and malicious destruction of property. Both were considered by him to be crimes of violence - as well they should. It is not entirely clear, though, whether or not he took them into account. Counsel for the applicant submitted that they should not be considered an aggravating

feature because they had occurred more than 15 years prior to that in the instant case, and were therefore spent. Counsel for the Crown was of the view they should be taken into account.

[56] The treatment of these two previous convictions was of some concern to this court. On the one hand, they were committed a long time ago. On the other hand, they are indicative of a violent characteristic intrinsic to the offender, that is, that the applicant has a propensity to commit acts of violence, which we do not think, on principle, can be ignored. In **Regina v Lloyd Badroe** (1988) 25 JLR 324, the head note reads in part that:

> "The paramount purpose of sentencing in criminal cases is for the general protection of the public. There must be some reasonable relationship between the sentence imposed and society's abhorrence of the crime…"

[57] In **Regina v Alfred Mitchell** (1995) 32 JLR 48, this court, in handing down its judgment, adopted the words of Lawton LJ in **R v Sergeant** (1975) 60 Cr App Rep 74 at page 77 where he said:

> "…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 courts can show this is by the sentences they pass…"

[58] In **Daniel Roulston v R**, this court considered whether the sentencing judge acted properly in taking into account previous convictions for rape committed outside of

this jurisdiction, for which the appellant was sentenced in 2001. He reoffended in this jurisdiction in 2013 and was convicted in 2015. This court held that those previous convictions could not be ignored as they related to relevant offences and was an aggravating factor, which ought properly to be taken into account. McDonald-Bishop JA who gave the judgment of the court, in referring to the effect of the appellant's previous convictions, said this at paragraph [25]:

> "...The fact that the appellant was sentenced to terms of imprisonment was a material one in considering his likelihood to re-offend and the threat he is likely to pose to society, particularly to women…"

[59] The Criminal Records (Rehabilitation of Offenders) Act deals with rehabilitation of offenders and prescribes the process by which convictions may be considered spent and applications made for them to be expunged for certain offences. It excludes offences listed in the third schedule to the statute, but includes sentences of less than five years, or where there was no term of imprisonment imposed at all. By virtue of section 20A(2) of the said Act, the applicant would not be eligible to be treated as a rehabilitated person, since based on his previous convictions, he would have committed three indictable offences (unlawful wounding, malicious destruction of property and simple larceny), and therefore, his convictions would not be capable of being treated as spent.

[60] The duty to protect the interest of the public and to punish and deter criminals, is never spent. The sentence imposed should be commensurate with the seriousness of the offence committed, and the need for protection against a violent offender from the

danger he poses to the public. We, therefore, agree with Counsel for the Crown that the applicant's previous convictions constitute an aggravating feature which should be taken into account in determining the appropriate sentence.

[61] Counsel for the applicant pointed out that, at the time of his arrest, the applicant was gainfully employed and had been described as a hard worker and quiet by the community in which he lived. Counsel suggested that this, along with the fact that he was a father to small children who were dependent on him, should be taken into account as mitigating factors. Counsel for the Crown disagreed. We are inclined to agree with her. In general, the previous good character of the offender carries little weight in sentencing, in very serious cases (see Blackstone's Criminal Practice 2002, paragraph B2.42, at page 181). In this case, the applicant had previous convictions, and though he had the opportunity to reform, he eventually reoffended. We do not believe that the points raised by counsel for the applicant count as mitigating factors, in all the circumstances of this case.

[62] Although there was no justification for the applicant attacking and injuring the unarmed complainant in the manner he did, it is our considered view, as suggested by counsel for the applicant, to which Crown Counsel agreed, that consideration ought to be given to the fact that, based on the evidence, the complainant was the initial aggressor having grabbed onto the applicant and pulled him outside.

[63] The value that is to be placed on a particular aggravating or mitigating factor is usually for the determination of the sentencing judge, taking into account all the

circumstances of the particular case. In the circumstances of this case, the appropriate sentence, after the exercise of adding and subtracting the aggravating and mitigating factors, is 20 years' imprisonment.

[64] The incident took place 4 July 2010. The record shows (the bail bonds) that the applicant took up bail 23 August 2010. On the assumption that he was apprehended on the same day (there being no evidence indicating otherwise) he would have been in custody for approximately one month and three weeks. Based on the current authorities, full credit will be given for that time spent in custody awaiting trial and conviction.

[65] We conclude therefore, that the sentence of 25 years' imprisonment imposed on the applicant was manifestly excessive. The sentence of the court should therefore be 19 years and 10 months imprisonment at hard labour.

Disposition

[66] The order of the court is that the application for leave to appeal sentence is granted. The hearing of the application is treated as the hearing of the appeal. The appeal against sentence is allowed. The sentence of 25 years imprisonment imposed by the trial judge is set aside. A sentence of 19 years and 10 months imprisonment is substituted therefor. The sentence is reckoned as having commenced on 6 March 2014.