[2015] JMCA Crim 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 88/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (Ag)

KEVIN YOUNG v R

Lord Gifford QC for the applicant

Miss Paula Llewellyn, QC, Director of Public Prosecutions and Joel Brown for the Crown

14 and 15 May 2015

ORAL JUDGMENT

MORRISON JA

[1] On 29 June 2012, after a trial before Edwards J and a jury, the applicant was convicted of murdering Christopher Fuller ('the deceased') on 23 March 2009. Consequently, on 6 July 2012, the applicant was sentenced to imprisonment for life and the learned trial judge stipulated that he should serve a minimum of 30 years before being eligible for parole.

[2] On 26 July 2012, the applicant applied for permission to appeal against his conviction and sentence, on a number of grounds which it is not now relevant to state. This application was in due course considered on paper by a single judge of this court and refused. On the question of sentence, the single judge stated, referring specifically to the decision of this court in **Ian Gordon v R** [2012] JMCA Crim 11, that the sentence imposed by the trial judge was "consistent with the decided cases". The single judge also ordered that the applicant's sentence should be reckoned as having commenced on 6 July 2012.

[3] This is therefore the applicant's renewed application for permission to appeal. At the outset of the hearing, Lord Gifford QC advised the court that his instructions were to abandon the application for permission to appeal against conviction, but to pursue the application in relation to sentence. In this regard, the court's leave was therefore sought and granted to argue a number of supplementary grounds of appeal filed on 8 May 2015. In summary, the applicant contends for a reduction of the period before which he will become eligible for parole, on the ground that the period of 30 years stipulated by the trial judge is manifestly excessive in all the circumstances of this case.

[4] The facts of the case can be briefly stated. At about 3:00 pm on 23 March 2009, District Constable Joan Daley and Corporal Keith Patterson were on duty at the corner of Olympic Way and Bay Farm Road in the parish of St Andrew. While there, explosions were heard coming from the direction of Olympic Way and immediately after that two men were seen. One of the men fell to the ground and the other man, who was armed with a gun, stood over the man lying on the ground and fired several shots into his

body. The fallen man, who was later identified as the deceased, died on the spot, having received a total of six gunshot wounds. Corporal Patterson, who had gone over to the other side of Bay Farm Road upon hearing the shots, challenged the shooter, shouting, "Police". The shooter then turned in Corporal Patterson's direction and fired several more shots. Corporal Patterson returned the fire and the shooter made good his escape.

[5] The applicant was identified as the shooter by both District Constable Daley and Corporal Patterson at a video identification parade and he was subsequently arrested and charged with murder. The applicant pleaded not guilty at his trial (at which he was represented by Queen's Counsel) and his defence was one of alibi. In a brief unsworn statement from the dock, he told the court that at the time of the killing he had been in Falmouth, Trelawny, where he was engaged in selling shoes. He denied knowing the deceased or killing anyone and asserted that, "I am not a gunman, I am a working man and I don't know the police in this case".

[6] No complaint has been, or indeed can be, made about the learned trial judge's full and accurate directions on the question of identification, which was the single issue in the case. After retiring at the end of the summing up, the jury returned a majority verdict of guilty of murder. In our view, despite the fact that the jury were not unanimous, that conclusion was fully justified by the evidence.

[7] At the sentencing hearing which followed, a social enquiry report pertaining to the applicant was read into evidence by Mr David Thomas, a probation officer. The

report revealed that the applicant, who was then 36 years old, had been gainfully employed for most of his adult life, was the father of one child and was well regarded by his family and members of the community in which he lived. The report also suggested that, in that same community, the deceased was "known by everyone for his acts in [sic] criminality". And then, in a wholly startling development, the report stated the following:

> "Mr. Young…recalled that he never had any problems with the deceased prior to the incident. He said his appliances were stolen and residents alerted him to the deceased…he then verbally confronted the deceased and a quarrel ensued, during which his life was threatened by the deceased. Mr. Young claimed that he was fearful for his life because he knew the deceased to be a violent person. Subsequently he left the scene and picked up a hidden firearm and later on the same day confronted the deceased and shot him several times…he is aware of the consequences of his actions and he is asking for leniency."

[8] This account, which amounted to a full confession of guilt, was not contradicted by the applicant and, indeed, it was adopted by his counsel as a mitigating factor in his submissions on sentence. Having stated that she would not take into account the applicant's two previous convictions (only one of which was admitted by him), for possession and smoking of ganja, respectively, the learned judge next considered the impact of the applicant's belated confession. She commended the applicant for his frankness, stating that she was "happy", "proud" and "heart warmed" by the stance he had taken. So much so, the learned judge went on to say, that she proposed to "shave

ten years" off the sentence which she had intended to impose on him. In the result, the applicant was sentenced in the manner already indicated.

[9] Lord Gifford QC, who did not appear at the trial, told us that his recent instructions from the applicant confirmed the confession of guilt which the probation officer's report had revealed. Lord Gifford urged on us the applicant's account of the circumstances in which the deceased came to be killed, the fact that the deceased was a known and violent criminal, the applicant's age, his generally favourable antecedents and the obvious impression which his late confession had made on the judge. Taking all these factors into consideration, it was submitted, the judge's apparent starting point of 40 years before eligibility for parole was far too high and had resulted in a sentence that was therefore manifestly excessive.

[10] Lord Gifford referred us to the relevant provisions of the Offences Against the Person Act and to the recent decision of this court in **Maurice Lawrence v R** [2014] JMCA 16. As regards the Act, we agree that, as was submitted, this is a murder covered by section 3(1)(b), with the result that the applicant, as a person convicted of murder, is liable to be sentenced "to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years". Section 3(1C)(b) goes on to provide that where, pursuant to section 3(1)(b), the 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".

[11] The upshot of these provisions is that, in this case, the learned judge had the option to impose a sentence of (a) life imprisonment (with a minimum period before parole of 15 years); or (b) such other period of imprisonment, not being less than 15 years (with a minimum period before parole of 10 years). While Lord Gifford did not contend for option (b), he nevertheless submitted strongly that, if the learned judge had approached the matter in the manner suggested by this court in **Maurice Lawrence v R**, she would have arrived at a period to be served before parole closer to the 15 year minimum set out in option (a). In **Maurice Lawrence v R**, the court reiterated that what is required is a balancing of the mitigating and aggravating factors, taking into account the circumstances of the particular offender. The learned sentencing judge in that case, in which the defendant pleaded guilty on a charge of murder, was therefore held to have erred in prescribing a minimum period before parole of 20 years. That period was accordingly reduced on appeal to the statutory minimum of 15 years. And this, Lord Gifford submitted, is also where the judge in the instant case ought to have landed, bearing in mind all the relevant factors, not least of which was the applicant's genuine, albeit late, manifestation of remorse.

[12] Mr Joel Brown, who appeared with the learned Director for the Crown, very helpfully told us that the result of enquiries made in the community in which the applicant and the deceased lived had tended to confirm the impression given to the probation officer that the deceased was a person associated with criminality in the area. There was also some indication that, at the time of the incident which led to his death, the deceased had only recently completed a 15 year sentence for murder and also had

a substance abuse problem. The Director herself felt moved to add that, in the peculiar circumstances of this case, she did not dissent from the general thrust of Lord Gifford's submissions.

[13] We should say at once that we are grateful to counsel on both sides for their careful and entirely realistic advocacy in what we have found to be an unusual and difficult matter. On the one hand, we consider that Lord Gifford was entirely correct to accept that this was not a case for a determinate sentence. For, whatever the extenuating circumstances and however unworthy the character and conduct of the deceased might have made him, the manner in which he was killed clearly demonstrated a premeditated and efficiently executed "snuffing out of somebody else's life", as the learned judge so aptly put it. But, on the other hand, the unusual features of the case – the applicant's expression of remorse, his age and his good character – were plainly factors which militated in the applicant's favour.

[14] It is clear that the learned judge was fully aware of these competing considerations, asking rhetorically, "…where do we place the balance, punishment on the one hand for what you have done and the possibility of reformation and forgiveness and rehabilitation on the other hand for the person who is standing before me". So the only question which remains is whether the judge, by fixing 30 years as the period to be served before the applicant will become eligible for parole, struck the right balance in all the circumstances of the case.

[15] In this regard, we have found it helpful to compare this case with **Ian Gordon v R**, the decision of this court to which, as we have indicated, the learned single judge made reference in refusing permission to appeal on the sentence issue. The appellant in that case was one of three men who entered premises in the parish of St Andrew at approximately 4:00 a.m., fired several shots through the front and both sides of a small wooden house located at those premises, and then left. As a consequence, two men who were inside the house at the time were shot and eventually died from their injuries. Speaking for the court, Brooks JA said this (at para. [40]):

> "The significant factor of this killing, in our view, is that these men had retired to their quarters and were shot therein. Some 23 cartridge casings were found outside the house, demonstrating the sustained nature of the attack as described by Mr Miller. Two lives were snuffed out. Such an attack should attract a severe penalty. We find that the appellant should serve a minimum period of 30 years before becoming eligible for parole."

[16] The instant case, as can immediately be seen, is a qualitatively different case from **Ian Gordon v R**. In this case, unlike in **Ian Gordon v R**, where two men were murdered in the safety of their home in the dead of night, the deceased lost his life as a result of what, as it has now turned out, was a wholly uncharacteristic loss of control by the applicant. And although, as was also the case in **Ian Gordon v R**, the applicant did not plead guilty, he did at the end of the day demonstrate remorse in a manner that the learned trial judge clearly assessed to be sincere. So for these reasons we think, with the greatest of respect to the single judge, that **Ian Gordon v R** does not provide a ready point of departure in arriving at the appropriate sentence in this case.

[17] But while this leads us to think that the 30 year minimum period before parole prescribed by the judge in this case was in fact too high, we do not find it possible to conclude, as this court did in **Maurice Lawrence v R**, that this is a case which should attract no more than the statutory minimum of 15 years. For, that was a case, unlike the instant case, in which the defendant pleaded guilty at the earliest opportunity which reasonably presented itself and thereby obviated the necessity of a trial. So while we accept that the applicant in this case is entitled to credit for the contrite stance which he ultimately adopted, we nevertheless consider that his position cannot be regarded as entirely analogous to that of the defendant in **Maurice Lawrence v R**.

[18] For these reasons and in all the circumstances, we therefore consider that the appropriate sentence in this case is to order that the applicant should be imprisoned for life, with a stipulation that he should serve a minimum period of 20 years before being eligible for parole. The order of the court is accordingly as follows:

1. The application for permission to appeal against conviction is refused.

2. The application for permission to appeal against sentence is allowed and the hearing of the application is treated as the hearing of the appeal.

3. The appeal against sentence is allowed and the sentence imposed by the trial judge is set aside. In its stead, the court imposes a sentence of imprisonment for life and orders that the appellant is to serve a period of 20 years before becoming eligible for parole.

4. The appellant's sentence is to be reckoned as having commenced on 6 July 2012.