[2018] JMCA Crim 37

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA IN THE PARISH OF HANOVER

SUPREME COURT CRIMINAL APPEAL NO 84/2014

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

NARIO ALLEN v R

Trevor Ho-Lyn for the appellant

Jeremy Taylor and Janek Forbes for the Crown

18, 19 June and 28 September 2018

MORRISON P

[1] On 15 May 2014, after a trial before Cole-Smith J ('the judge') and a jury in the Home Circuit Court held in Kingston, the appellant was convicted for the murders of Talman Cupidon and Tevin Pusey, otherwise called Easton ('the deceased'). On 25 July 2014, the judge sentenced the appellant to imprisonment for life on each count, with the stipulation that, in respect of each, he should not be eligible for parole before the expiration of 20 years in prison. The judge also ordered that these sentences should run concurrently.

[2] The appellant's application for leave to appeal against his convictions and sentences was considered on paper by a single judge of this court on 1 May 2017. The single judge refused to grant leave to appeal against the convictions, but granted leave to appeal against the sentences. This is therefore the appellant's renewed application for leave to appeal against the convictions and his appeal against sentence.

[3] When the matter came on for hearing before us on 19 June 2018, Mr Trevor Ho-Lyn for the appellant abandoned the application for leave to appeal against the convictions. He told us that, in his view, in the light of the evidence and the directions which the judge gave to the jury, the convictions were "unassailable". We agree entirely with this assessment.

[4] However, Mr Ho-Lyn indicated that the appeal against the sentences would be pursued. To this end, he accordingly sought and was granted leave to argue the following supplemental ground of appeal:

> "The Learned Trial Judge (LTJ) failed in her determination of the appropriate time to be served by the Appellant before becoming eligible for parole to properly consider the legislation applicable to the facts of the case and thereby imposed the incorrect legislative requirement and further the LTJ failed to address and take into account in specific terms the time the Appellant had spent in custody prior to being sentenced. In all the circumstances the recommendation of the LTJ as to the time to be spent before becoming eligible for parole was incorrect and manifestly excessive."

[5] The issues which arise on this appeal are therefore whether the judge erred in failing to (i) take the correct principles and the relevant provisions of the Offences Against the Person Act ('the OAPA') into account when fixing the period to be served by

the appellant before becoming eligible for parole; and (ii) address, and take into account in specific terms, the time spent by the appellant in custody prior to being sentenced.

[6] The brief facts of the case are as follows. The appellant was charged with murdering the deceased on premises on Glasspole Avenue in the East Kingston area in the parish of Kingston, at some point between 5 and 6 November 2008. At approximately 6:00 am on 6 November 2008, police officers went to the premises where they found the dead bodies of two men who were subsequently identified as the deceased. The bodies of the deceased men were found in separate houses some 75 feet apart on the premises. Each of the bodies showed signs of gunshot injuries and the evidence at the trial confirmed that that was the cause of death in both cases. Four spent shell casings were found on the scene.

[7] Later that same day at about 5:45 pm, Mr Gavin Liscombe, a security guard, who had previously spent 12 years in the Jamaica Defence Force, took a mini bus plying the Harbour View to downtown Kingston route. Mr Liscombe, with his licensed firearm in a knapsack on his back, was on his way to work. In the vicinity of the Ethanol Plant at Rockfort, he saw when two men boarded the bus. Initially, when asked by the bus conductor for the fare, one of the men, who was subsequently identified as the appellant, tendered a $50:00 bill. But, as the bus travelled further on along the road, the appellant asked for the money back, telling the conductor that "[i]s a drive me a beg". The conductor declined, saying, "why you never tell me from you come on to the bus seh you a beg a drive?", to which the appellant responded with his own question,

"what you a do, violate me?". In answer to a question from the judge, Mr Liscombe testified that he understood the appellant to mean by this question that the conductor was disrespecting his (the appellant's) authority.

[8] Shortly afterwards, as the bus approached the traffic lights at the intersection of Windward Road and Mountain View Avenue, the appellant asked to be let off the bus. The bus came to a stop and the conductor stepped off, but the appellant remained on board, calling out to him. Sensing something untoward, Mr Liscombe started to get close to the appellant. He saw the appellant "pull for his waist" and grab on to "[a] black looking thing like a [sic] ice pick". From his training, Mr Liscombe recognised the object to be a firearm and so he "help him take it out". A tussle for the firearm then ensued, during which the appellant bit Mr Liscombe on his hand. But Mr Liscombe got the better of the appellant, who then jumped out of the bus and ran away. But not before the conductor had taken a swing at the appellant with a machete and a magazine had fallen from his (the appellant's) pocket to the ground.

[9] Mr Liscombe was able to identify the firearm which he wrested from the appellant as a "Mini Carbon Pistol", which he described as "a version of the M16 Bush Master". When he pulled back on the charging handle of the firearm, he recognised the round of ammunition which flew from the breech as a 5.56mm round, that is, the same as that used in an M16 rifle.

[10] At Mr Liscombe's request, the driver of the mini bus took him to the Rockfort Police Station. There, he handed over the firearm and the cartridges and the conductor

handed over the other magazine to the police. Mr Liscombe and the conductor were then taken to the Elletson Road Police Station. In short order, a police vehicle arrived with the appellant in the back of it. Both Mr Liscombe and the conductor immediately identified the appellant to the police as the man on the mini bus less than a couple hours earlier. Mr Liscombe said that the appellant was the same person with whom he had tussled for the firearm and the conductor said that he was the man whom he had chopped on his hand with a machete.

[11] The appellant was then cautioned by the police and shown the firearm, the magazine and the cartridges. Asked where he got them from, his answer was –

> "I took it up from Talman's bed and used it to shoot Talman and Kevin [sic] and run left them Wednesday night."

[12] On 8 November 2008, the appellant was interviewed by Detective Superintendent Lloyd Wilson, who had been assigned as the investigating officer into the murder of the deceased. Upon being cautioned, the appellant stated, "Officer, mi waan tell you how it goh". The appellant then gave a statement in the presence of the attorney-at-law who had agreed to represent him for this purpose. The statement was admitted in evidence at the trial without objection from the defence. In it, so far as is now material, the appellant said this:

> "My name is Nario Allen. I wish to make a statement. I have been told that I need not say anything unless I wish to do so and that whatever I said [sic] may be given in evidence.

My name is Nario Allen. I am twenty eight years old. I was born December eighteen, nineteen eighty. I was born at Kingston Public Hospital. My mother name is Yvonne Harrison. I have one daughter name Tamesha Akeba Allen. She is suppose [sic] to be ten now still. She born June 2000. I have a sister but me two brother drop out. The situation that I am in I would like to express that it is self-defence because a just cook mi cook fi dem, Talman who me cook for, Easton weh me cook for and Macko and all, She She. A whole heap a years now mi a cook fi dem man yah.

MR. R. WILLIAMS: A whole heap a years what?

[THE ACCUSED]: Them try fi destroy me now. Them point gun nozzle at me several time and mi always try to side step them. The reason them a try fi kill mi is because them kill mi bigger brother and every move mi mek them trail mi."

Q: One second, Officer. You have to go slow, we have to record.

A: Them even try to block mi from mi female. Mi buy dozen and a half rizla them tek it weh, mi buy mi weed them tek it weh, everything mi buy them control it. Them even stop mi from visiting mi mother and mi daughter. Mi feel whole heap a heart burn; even mi sister can't come visit me because them have rapist mind. Mi family have the feeling that it was I and them kill mi brother but it is not true; and all when mi deh mongst them, I was always unemployed being mongst them, which righteousness was always my subject. Dem even try to distract me reading my bible. So mi get fed up. So Wednesday night about 8 - 9 in the night mi share out some food gi Easton and Talman was lying down but not sleeping. Mi now seh him tell Easton to keep a close eye on me cause he was guilty a something and I know it was the way he treat mi family. Me have a slight little fear for Talman because I know that he will kill me. I see the expression evil in a him eye. Is a bredda weh lye down and afterwards he get up and track mi down.

Easton put down the gun which Talman have a gun at the same time, him lift up the gun and point it; a death mi see mi nah lie, so mi defend miself, mi disarm him. Mi grab the gun from him and mi shoot both of them. Mi shoot dem because mi feel like this time them was gonna kill mi. Mi

> shot dem and mi run off and about eight a dem track mi down, so mi go right in front a mi mother house and sleep in front a mi mother house inna di bush and protect her and mi two nephew because mi feel them would a want kill dem. She She and Goose was among those weh run mi down. Dem even more dangerous than Talman because mi hungry and a go look some food a so the police dem get the gun. Dem think seh mi a go rob the bus and one of the passenger and the ductor jump pon mi a so dem come fi chop mi. First me have hundred dollar and true mi see seh it was not enough to carry mi to Stony Hill, so mi ask him fi a free ride and him tek it serious and attack me with the machete and chop me and tek weh the gun. A so mek mi end up here now."

[13] In two subsequent question and answer sessions, the appellant confirmed and amplified the statement which he had given under caution on 8 November 2008.

[14] That was, in essence, the case for the prosecution, though we should add for completeness that expert ballistics evidence was also called by the prosecution. This evidence established that, of the spent shells which were found in the vicinity of the deceased's bodies, two had been discharged from the firearm which Mr Liscombe had taken from the appellant, while one had been discharged from a .45 revolver.

[15] After an unsuccessful submission of no case to answer was made on his behalf, the appellant gave an unsworn statement from the dock. In it, he stated that, "I swear the whole thing was self-defence", adding that, "Two persons tried to kill mi an' mi help miself".

[16] The appellant's single witness was his mother, who spoke to his educational background and to his general good character. However, she testified, the appellant

had left her house in around September 2008, after getting upset over a domestic argument between his sister and her boyfriend, in which the latter had been violent towards his sister. The appellant's mother was also allowed to give evidence, based on what the appellant had told her, of the bad treatment which he had received at the hands of the deceased.

[17] After the judge had summed up the case to the jury, they returned a unanimous verdict of guilty on both counts of the indictment. At the request of the appellant's counsel, the judge ordered psychiatric and social enquiry reports before sentencing. The social enquiry report confirmed that the appellant was born on 18 February 1980 and was therefore 28 years of age at the time of the offences. In addition to a 1998 conviction for wounding, he had two convictions for illegal possession of firearm and ammunition respectively, the latter two convictions having arisen out of the incident on the mini bus which we have described above. The appellant's community report was generally favourable, with residents expressing considerable sympathy for him on account of the bad reputation which both deceased had had in the community.

[18] In his plea of mitigation on behalf of the appellant, the appellant's counsel at the trial (not Mr Ho-Lyn) asked the judge to bear in mind, among other things, the fact that the appellant had already been in custody since the date of the offence, that is, for a period of almost six years before the date of sentencing.

[19] In her brief sentencing remarks, the judge said this[1]:

> "Stand up, Mr. Allen. You are now 33 years old you have three previous convictions but one was from 1998, could say that is spent.
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> The jury having found you guilty on two counts of murder, these are serious offences but in the community report the community has said that more or less these two men they were bad men in the community and they have been gotten rid of but it is unfortunate that you are the person who did it.
>
> The community report was read into the record by the probation officer. And they are asking for some leniency and I have listened to the submissions by your learned counsel who has pointed out to the court that the court [sic] hands are tied but asking for leniency. And as I said this is two counts; there are two counts of murder. They are not saying you did not commit it but they are saying the circumstances under which you were forced to live and your sister has told the probation officer that after the death of your brother she noticed a change in you and then you went to Tallman and to Easton and then you were there.
>
> According to you and your evidence it is as if they had you in slavery. You could not go and come as you would want to but the sister said she saw you on the road but you did not look the same. But you encouraged her not to go to Tallman's house. But I ask myself why didn't you use it as an opportunity to go about your business. As the sister says you were not in your right mind. I don't know, it is very unfortunate that you have found yourself in this position but I have to recognise that it was two murders albeit that they were men, as the community said of questionable character.
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> I have taken everything into account I have balanced it and in all the circumstances I am trying to be as lenient as I can.

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[1] At pages 390-392.

> You have to bear in mind that it is two murders. On the first count life imprisonment, not eligible for parole until you have served twenty years.
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> On count two life imprisonment not eligible for parole until you have served 20 years. The sentence on count two to run concurrently with count one. The sentence on count one to run concurrently with the sentence he is now serving."

[20] As has been seen, Mr Ho-Lyn's complaints about the sentences imposed by the judge have to with, firstly, the judge's approach to the fixing of the minimum period to be served before parole in respect of each count; and, secondly, the judge's failure to address the impact of the time spent on remand pending trial by the appellant.

[21] In order to appreciate how these issues arise in this case, it is necessary to consider at the outset the relevant provisions of the OAPA to which Mr Ho-Lyn helpfully referred us.

[22] As foreshadowed by section 2(1) of the OAPA, section 3(1)(a) provides that every person who is convicted of murder falling within section 2(1)(a)-(f), or to whom section 3(IA) applies, "shall be sentenced to death or to imprisonment for life". Then, as foreshadowed by section 2(2), section 3(1)(b) provides that every person convicted of murder in circumstances other than those falling within section 2(1)(a)-(f), or to whom section 3(1A) applies, "shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years".

[23] Section 2(1)(a)-(f) applies to murders committed in certain specified circumstances, none of which arises in this case. However, section 3(1A), which applies

to a person who is convicted of murder after having been convicted "(a) … of another murder done on a different occasion"; or (b) "of another murder done on the same occasion", is directly relevant. The effect of section 3(1A)(b) is that the appellant, who was convicted of two murders committed on the same occasion, was liable to be sentenced to death or imprisonment for life.

[24] No question of the death sentence arose in this case, the prosecution not having instituted the steps now captured in paragraph 5.8 of the Sentencing Guidelines[2] as conditions precedent to the imposition of the death sentence.

[25] So the appellant was liable to imprisonment for life. This naturally brings into focus the issue of eligibility for parole, with regard to which section 3(1C) provides as follows:

> "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 –
>
> (a) where a court imposes a sentence of imprisonment for life pursuant to subsection (1)(a), the court shall specify a period, being not less than twenty years, which that person should serve before becoming eligible for parole; or
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> (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

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[2] Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017. See also **R v Reyes** [2003] 2 LRC 688, **White v The Queen** [2010] UKPC 22 and **Peter Dougal v R** [2011] JMCA Crim 13.

(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."

[26] The OAPA therefore makes, as Mr Ho-Lyn submitted, a clear distinction between double murders committed on different occasions and those committed on the same occasion: in the case of the former, a minimum period of 20 years must be stipulated before eligibility for parole, while in the case of the latter, the minimum period is 15 years. Mr Ho-Lyn therefore submitted that, in this case, the judge erred by failing to recognise this distinction and to indicate the considerations which led her to stipulate a minimum period of 20 years. In the absence of any reasoning from the judge, it was therefore logical to conclude that she had mistakenly considered herself bound to impose a minimum period of 20 years before parole.

[27] These errors were compounded, Mr Ho-Lyn submitted further, by the judge's failure to take into account the fact that the appellant had spent nearly six years in custody awaiting trial. In making this latter submission, Mr Ho-Lyn frankly acknowledged that he was to an extent constrained by the recent decision of this court in **Ewin Harriott v R**[3], in which it was held that, in seeking to give effect to the now accepted principle that full credit is generally to be given for time spent in custody before trial, the court has no power to, in effect, disapply a statutory minimum period

[3] [2018] JMCA Crim 22

of imprisonment. However, Mr Ho-Lyn urged us to be "flexible", bearing in mind the judge's apparent instinct towards leniency, and to find a way to incorporate the six years spent in custody by the appellant before trial within the statutory minimum period before parole.

[28] For the prosecution, Mr Jeremy Taylor contended that the sentence imposed by the judge in this case was entirely appropriate in the circumstances. In this regard, he referred us to **Garland Marriott v R**[4] and **Separue Lee v R**[5], both cases of double murders committed on the same occasion, in which sentences of life imprisonment with minimum periods before parole of 25 and 40 years[6] respectively were approved by this court.

[29] As regards the impact of time spent on remand before trial, Mr Taylor observed that neither **Richard Brown v R**[7] nor **Lincoln Hall v R**[8], in which this court applied the principle that full credit should be given for time so spent, addressed the particular problem caused by minimum sentences. However, as Mr Taylor also pointed out, there was no necessity to do so in either case, since it was possible in both of them to make an allowance for pre-trial remand without the total sentence so arrived at falling below the prescribed minimum sentence.

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[4] [2012] JMCA Crim 9
[5] [2014] JMCA Crim 12
[6] Although it should be noted that in **Separue Lee v R** the court got to this figure by the somewhat unusual means of a stipulation that consecutive periods of 20 years' imprisonment on each count should be served by the appellant before parole.
[7] [2016] JMCA Crim 29; see also the previous decision of the Privy Council in **Richard Brown v R** [2016] UKPC 6
[8] [2018] JMCA Crim 17

[30] More to the point, it was therefore submitted, is **Ewin Harriott v R**, in which this court declined to adjust the sentence imposed at trial downwards to allow for time spent in custody pending trial, on the basis that doing so would have resulted in a sentence falling below the mandatory minimum sentence prescribed by section 6(1)(b)(ii) of the Sexual Offences Act. Delivering the judgment of the court in that case, Pusey JA (Ag) observed[9] that:

> "The difficulty in the case of this appellant is that he has been sentenced as a result of a mandatory minimum sentence. It is our view that the terms of section 6(1)(b)(ii) of the Sexual Offences Act removes the jurisdiction to give credit."

[31] Accordingly, Mr Taylor invited us not to disturb the sentences imposed by the judge on either of the bases put forward by Mr Ho-Lyn.

[32] In applying the principles which these submissions have brought forward, we accept, firstly, that it does not appear from the judge's sentencing remarks that she gave any consideration to the distinction between cases of double murders committed on separate occasions and those committed on the same occasion. Secondly, having considered the matter ourselves, we also accept that, the appellant having been convicted of two murders committed on the same occasion, the applicable minimum period before parole in this case was 15 years, determined in accordance with section 3(1A)(b) and (1A)(b)(ii) of the OAPA, read together.

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[9] At para. [15]

[33] However, it does not in our view follow, as Mr Ho-Lyn submitted that it must, that the judge's choice of 20 years as the minimum period to be served before parole was arrived at purely on the basis of her having mistaken it for the minimum period applicable to this case. For, despite the judge's remark that, "I am trying to be as lenient as I can", it is clear from her sentencing remarks that she was trying, as best she could, to balance all the factors relevant to the case.

[34] We fully accept that, as Mr Ho-Lyn submitted, it would therefore have been helpful for the judge to indicate for the record the basis upon which she arrived at 20 years as a minimum period before parole in this case. Indeed, as the Sentencing Guidelines now indicate[10], "[t]he giving of reasons for sentence is an integral part of the sentencing process". But we think that the judge, a trial judge of great experience, must have had in mind, as we do, the fact that, despite the considerable sympathy which the circumstances described by the appellant in his caution statement must naturally have evoked, his contention that he acted in self-defence was rejected by the jury. For cases of murder, as the decisions cited by Mr Taylor indicate, a sentence of life imprisonment with a stipulation of 20 years as a minimum period to be served before parole is clearly not out of step for a double murder. In these circumstances, we have found it impossible to say that the judge's sentence in this case was so errant in principle as to attract this court's intervention.

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[10] At para. 15.1

[35] Which brings us then to the issue of the time spent by the appellant in custody before trial. There is no dispute that the appellant spent some six years in custody before being tried. Nor is there any dispute that, as Lord Toulson observed in giving the judgment of the Board in **Richard Brown v R**[11], "[i]t is hard to see why full allowance should not be given for the time spent by the appellant in custody, unless there is a particular reason for directing otherwise". Indeed, as the Sentencing Guidelines now indicate[12], "full credit should generally be given for time spent … in custody pending trial".

[36] The only question which has therefore arisen on this appeal is whether or to what extent it is possible to do so in a case in which a statutory minimum sentence applies. This court held in **Ewin Harriott v R** that, where applicable, the statutory minimum is in fact an obstacle in this regard. Pusey JA (Ag) described it[13] as "a lacuna in the law that needs to be addressed". The situation has in fact been addressed in relation to a defendant who enters a plea of guilty to an offence which carries a statutory mandatory minimum sentence[14]. But, as the decision in **Ewin Harriott v R** itself demonstrates, it remains potentially problematic in a case such as this.

[37] In this case, however, we have concluded that the applicable statutory minimum period before parole was in fact 15 and not 20 years. The only obstacle to giving the appellant full credit for the period of close to six years which he spent in custody before

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[11] [2016] UKPC 6, para. 49
[12] At para. 11.1
[13] **Ewin Harriott v R**, para. [9]
[14] See the Criminal Justice (Administration) (Amendment) Act, 2015, section 42D(3).

trial is that, by doing so, the aggregate time to be served by him would fall below the mandatory minimum period of 15 years. But there is, in our view, no bar to us allowing the appellant substantial, if not full, credit for the time spent in custody. On this basis, we accordingly consider that the judge's sentence of imprisonment for life, with a stipulation that the appellant should serve 20 years before becoming eligible for parole, should be varied by substituting 15 years for 20 years as the period to be served before parole.

[38] In the result, the application for leave to appeal against conviction is refused. The appeal against sentence is allowed and the sentences imposed by the judge are set aside. In their stead, the court imposes a sentence of imprisonment for life on each count, with a stipulation that the appellant must serve 15 years in prison before becoming eligible for parole. The sentences are to be reckoned as having commenced on 25 July 2014.