[2018] JMCA Crim 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 71/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE PUSEY JA (AG)

CLIVE BARRETT v R

Lloyd McFarlane for the appellant

Miss Patrice Hickson for the Crown

6, 12 June and 2 July 2018

SINCLAIR-HAYNES JA

[1] Twenty-two month old Eshauna Gardener succumbed to injuries which were inflicted upon her by Mr Clive Barrett, her grand-uncle (the appellant), in whose care she had been left. The fatal injuries were inflicted by the appellant because the infant had sustained injuries from a coal fire which had been lit by him and which he had left unattended while he tended his farm.

[2] The appellant was consequently indicted for the offence of manslaughter to which he pleaded guilty at the first opportunity. He was sentenced to 25 years imprisonment at hard labour with a reduction of two years and eight months for time

already spent in custody. He sought leave to appeal against his sentence. A single judge of this court granted him leave to appeal on the basis, inter alia, that his guilty plea was not sufficiently considered.

[3] We heard this matter on 6 June 2018 and on 12 June 2018 we made the following orders:

> "The appeal is allowed.
>
> Sentence of 25 years is set aside and a sentence of nine years and four months is substituted therefor.
>
> The sentence is reckoned as having commenced on 21 July 2016."

[4] These are our promised reasons.

Background

[5] On 30 October 2013, the appellant returned from his farm and observed that the infant had sustained burns from a coal fire which he had left on the veranda. He admitted using a piece of stick to administer the blows to the infant.

[6] Miss Sterling, a neighbour, testified that whilst she was walking past the appellant's house, she heard the following words: "Tek it off yah. Yuh too stubborn. Tek it off, you too stubborn, tek it off. Yuh think mi done wid yuh. Ah going beat yuh", followed by a "bad word". She recognized the voice to be that of the appellant's, who she called "Billy".

[7] In his statement, Corporal Fray-Lewis indicated that sometime on 30 October 2013, upon his arrival at the deceased's home in Dean Pen, in the parish of Saint Mary, he saw the appellant on the roadway holding the infant. The appellant told him that the infant had fallen into a fire and received burns, and as a result, he had beaten her with a piece of stick. He saw what appeared to have been burn marks on the infant's body.

[8] Corporal Fray took the infant to the infant's mother's house, and from there, the infant and her mother were driven to the Port Maria Hospital where he left the infant who appeared to have been unconscious.

[9] He later returned to the district in search of the appellant but did not see him. The infant's mother however told him that she did not know that the appellant would have hurt Eshauna because he had always shown love towards her. At the house he saw a stove with coal on a verandah and pieces of stick at the front of the yard.

[10] On 1 November 2013, Corporal Fray saw the appellant at the Annotto Bay Police Station. The appellant unhesitatingly accepted responsibility for what had happened to Eschuana. He told him that:

> "Mi left the baby at home and went on the farm. The baby go in the fire and get burn so mi did vex and use a piece of stick and beat her. Mi fool fool because mi should not lick har, and is the first mi a lick har. Worse, mi go put the baby in the water because she did shit up herself when mi beat har, and it look like she collapse. Mi want a lawyer yah man… Mi just ah go plea guilty an done cause dem obeah mi star."

The cause of death

[11] The post mortem revealed multiple criss-crossing linear imprint abrasions over the front of chest and upper abdomen over an area of the size 20 cm x 20 cm. The abrasions ranged in size from 7 cm - 11 cm x 0.5 cm-2 cm. The second injury, multiple criss-crossing imprint abrasions over back on an area of 50 cm x 30 cm. The abrasions were 9 cm - 11 cm x 1 cm – 2 cm in size. The third injury linear multiple criss-crossing bruises were found over scalp ranging from 5 cm – 6 cm x 1 cm – 2 cm.

[12] The cause of death was listed as shock and haemorrhage, traumatic cerebral haemorrhage and blunt force head injury. The infant, prior to this incident, had sustained an injury to the head for which she had been receiving treatment at the Bustamante Children's Hospital.

The ground of appeal

[13] The sole ground of appeal is that the sentence is "manifestly excessive".

The appellant's submissions

[14] Mr McFarlane, on behalf of the appellant, submitted that the learned trial judge was misguided in her approach to the sentencing of the appellant in several areas. Counsel submitted that although the appellant pleaded guilty to manslaughter, the learned judge treated with the sentence as if he had been convicted for murder.

[15] And although the learned judge acknowledged that the usual range for sentencing for the offence of manslaughter was three to 15 years, she nonetheless determined that the starting point of 25 years was appropriate. Twenty-five years, he

postulated, was far in excess of the usual range. Seven years, he submitted, is the usual starting point for sentences in respect of convictions for the offence of manslaughter.

[16] He indicated that on a conviction for murder, although the Offences Against the Persons Act states a minimum of 15 years, a murder offender who pleads guilty to the offence, may be paroled after 10 years. Counsel submitted that the learned judge knew the appropriate range but had considered the appellant's previous conviction, and treated the matter as a case of murder.

[17] The learned judge, he submitted, had misdirected herself. The appellant had had no intention to kill the infant.

[18] Mr McFarlane submitted that the learned trial judge acknowledged that the law permitted a discount of up to 50% where the offender pleaded guilty on the first relevant date, but the learned trial judge had refused to grant a discount in this case on the basis that the aggravating circumstances far outweighed those that were mitigating.

[19] Counsel submitted that pursuant to the Sentencing Guidelines For Use By Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 (the Sentencing Guidelines), the usual range for manslaughter is three to 15 years. Had the learned judge adopted a more balanced approach and an appropriate computation of sentence, she would have recognized the starting point of seven years (suggested in the Sentencing Guidelines) and, considering the mitigating factors, a discount of three years would have been appropriate. A reduction of two years and eight months for time

spent in custody pending trial would have further reduced the sentence. It was counsel's submission that an appropriate sentence would have been the time already served by the appellant.

[20] It was counsel's further submission that the learned judge's application of the law was wrong, in all the circumstances, given the appellant's clear remorse; the stated forgiveness of the child's mother; and the appellant's unhesitating acceptance of responsibility from the time he was taken into custody.

The Crown's response

[21] On behalf of the Crown, Miss Patrice Hickson submitted that, although it was the learned judge's discretion to impose the sentence she did, the learned trial judge had fell "mathematically" into error.

[22] Crown Counsel pointed out that the learned trial judge had adopted 25 years as a starting point. She regarded, in light of her recognition of mitigating factors arising from the plea in mitigation and the social enquiry report, a discount of five years would have been appropriate. Mathematically, a five year deduction would have amounted to 20% of 25 years. It was Crown Counsel's submission that the final computation of the sentence did not reflect that a discount of 20% had been given. Crown Counsel posited that the learned trial judge might have erred mathematically by not having given a discount. Had she discounted the sentence by 20% and considered the two years and eight months time spent in custody, the figure arrived at would have been reduced, she submitted, to 17 years.

[23] Crown Counsel however argued that the learned judge was not fettered by the Sentencing Guidelines which are just guidelines and ought not to be applied slavishly.

Analysis

[24] The appellant, having pleaded guilty to manslaughter, which plea the learned judge accepted, ought to have been sentenced accordingly. The Sentencing Guidelines have sought to set out the principles which have been espoused by this court and relevant laws. Section 6 deals with the sentencing process. The section 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."

[25] This court will not lightly interfere with a sentence imposed by a sentencing judge who adheres to the guidelines. Morrison P in **Meisha Clement v R** [2016] JMCA Crim 26 at paragraph [43] stated that:

> "...Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[26] At the sentencing hearing, the learned judge received the usual antecedent and a social enquiry reports which revealed that the appellant was a 51 years old, illiterate farmer, with a previous conviction for the offence of murder. He was sentenced in July 1992 in the Saint Mary Circuit Court for life imprisonment and was eligible for parole 15 years later.

[27] The reports also revealed that the appellant was hard-working, easy-going and of a quiet disposition. However, some persons were fearful of him because of his previous conviction for murder. The reports also revealed that the appellant was single and had no one depending on him for financial support.

[28] In considering the mitigating and aggravating factors, at pages 21 and 22, the learned judge said:

> "I must now consider the aggravating and mitigating circumstances in relation to the offender himself. One of the aggravating circumstances relative to the offender is that this offence was committed one year and three months after the offender was released on parole, having been sentenced to death, which was commuted to life and for which he served twenty (20) years.
>
> Another aggravating circumstance is that it is the second instance in which this offender would have been charged for Murder. In this offence, in fact, he was charged for Murder in this offence, and the Crown offered a plea in relation to Manslaughter.
>
> Another aggravating circumstance is that the offender had no psychiatric illness known, and he abused his position of trust to care for an helpless infant who was put in his custody.
>
> It is also an aggravating feature that his conduct has demonstrated a severely diminished capacity from the norm, because he committed this heinous crime while he was on parole."

The learned judge opined that:

> "But this is not a case in any sense which is average. The circumstances are nothing short of horrific, and I am of the considered view that the aggravating circumstances of this offence, taken outside the realm of what could be considered an average case of manslaughter involving provocation or diminished responsibility, perhaps.

The trial judge expressed the view that 25 years was the appropriate starting point which "could be adjusted upwards or downwards depending on the aggravating and mitigating circumstances relative to the offender himself".

[29] She noted that most persons in the community saw him as "a good and productive member of the community". She also noted that community members

"expressed that he did not give trouble" and that the child's mother and other members of the community asked for leniency.

[30] She opined that, although the law permitted up to a 50% discount for an offender who pleaded guilty, the court does not have to grant a discount of 50%. She however acknowledged that a plea of guilty to manslaughter at the first relevant date was a mitigating factor which had to be considered with all other mitigating factors, and balanced against the aggravating factors relative to the offender. So the discount is not automatic.

[31] The trial judge considered that the victim was a helpless baby who had been suffering from a head injury. She noted that the members of the community including the child's mother said that the appellant loved the child. However, the learned judge was unable to "fathom 'love for the baby' being comported with the villainous act that was meted out to her".

[32] In sentencing the appellant, the trial judge stated that a normal range for manslaughter was three to 15 years. However, as a result of what the learned judge described as "the savage, monstrous and unspeakable attack on a helpless child", she found that the aggravating circumstances of the case took it outside the realm of what could be considered an average case of manslaughter, involving provocation or diminished responsibility. She therefore considered a starting point of 25 years to have been appropriate. But was that starting point appropriate? Appendix A of the

Sentencing Guidelines refers to section 9 of the Offences Against the Persons Act, which states:

> "Whosoever shall be convicted of manslaughter shall be liable to be imprisoned for life with or without hard labour, or to pay such fine as the court shall award in addition to or without any such other discretionary punishment as aforesaid."

[33] Table 2 of appendix A states the normal range for manslaughter as three to 15 years to life imprisonment and the usual starting point as seven years. The learned judge therefore erred in regarding 25 years as an appropriate starting point. Indeed, that starting point is entirely out of sync with sentences imposed by this court for similar offences.

[34] Examination of sentences imposed for manslaughter in other cases is also helpful in determining the appropriateness of the sentence. In the case of **R v Kevin Grant** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 161/2004, judgment delivered 16 July 2006, the appellant was indicted for murder but convicted for manslaughter on November 2006. He was sentenced to nine years imprisonment which sentence was affirmed on appeal. It was alleged that he fatally stabbed his child's grandmother in the chest.

[35] In the case **R v Herron Spence** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 150/2004, judgment delivered 28 July 2006, Mr Spence was convicted for manslaughter and sentenced to 10 years imprisonment. The

appellant threatened to decapitate his mother's boyfriend after he had hit his mother with a bottle. The appellant left and returned 15 minutes later and he thereafter stabbed the deceased fatally in the neck. This court affirmed the sentence of 10 years.

[36] A reasonable starting point, in the instant case, in light of the serious nature of the offence, ought to have been 12 years. However, having regard to the aggravating features, that is the appellant's previous conviction for murder and the fact that this offence was committed whilst he was on parole for that offence, we consider 15 years an appropriate sentence.

[37] The trial judge had stated that she would have accorded the appellant a discount of 20% for the mitigating factors, but declined to do so. 20 % of 15 years is three years. In light of the absence of intention to cause the child's death, the existence of mitigating factors which the learned trial judge acknowledged, including the community report and the child's mother's evidence that he loved her; his favourable social enquiry report; together with his early acceptance of guilt, which she accepted was a mitigating factor, ought to have impacted the sentence. A deduction of three years, in the circumstances, ought to have been given. This would have brought the sentence to a period of 12 years imprisonment.

Time spent in custody

[38] The law is now settled, except in cases where it is by statute not allowed, convicts are entitled to have included in their sentence, time which was spent in

custody prior to sentence. In dealing with this issue, Morrison P in **Meisha Clement** said:

> "...However, in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial. As the Privy Council stated in **Callachand & Anor v The State** [[2008] UKPC 49, per Sir Paul Kennedy, at para. 9], an appeal from the Court of Appeal of Mauritius –
>
> > '... any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing'."

[39] The appellant was therefore entitled to a further deduction for the time he spent in custody pending his trial. With the deduction of two years and eight months for time already spent, and the three years deduction as aforesaid, a total of five years and eight months ought to have been deducted. The appellant should therefore have been sentenced to nine years and four months.

[40] It is worthy of note that on 3 July 1992, the appellant had been sentenced to death for murder which he committed on 27 April 1991, following a domestic dispute. The social enquiry report in respect of that murder, however, stated that before the commission of that offence, the appellant "lived as a law abiding citizen". That sentence was later commuted to life imprisonment on 3 May 1994. After serving 20 years imprisonment, he was paroled on 22 June 2012. Having been convicted of

manslaughter of the child, in the instant case, he would have violated his parole; forfeited any entitlement to further parole; and would therefore serve the life sentence.

[41] It was in those circumstances that we made the orders set out in paragraph [3] herein.