**[2017] JMCA Crim 29**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SITTING IN LUCEA IN THE PARISH OF HANOVER**

**SUPREME COURT CRIMINAL APPEAL NO 24/2015**

**BEFORE: THE HON MR JUSTICE MORRISON P**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA**
**THE HON MISS JUSTICE EDWARDS JA (AG)**

**JOSEPHAS BENNETT v R**

**Trevor Ho-Lyn for the appellant**

**Mrs Andrea Martin-Swaby and Stephen Smith for the Crown**

**28, 29 November 2016 and 10 July 2017**

**MORRISON P**

[1] On 19 March 2015, after a trial before Campbell J ('the judge') and a jury in the Circuit Court for the parish of Portland, the appellant was convicted of the offence of murder. On that same day, the judge sentenced the appellant to life imprisonment, with a stipulation that he should serve a period of 40 years before becoming eligible for parole.

[2] The appellant's application for leave to appeal against conviction and sentence was considered on paper by a single judge of this court on 24 June 2016. The application for leave to appeal against conviction was refused, but the application for leave to appeal against sentence was granted.

[3] The renewed application for leave to appeal against conviction and the appeal against sentence came on for hearing on 28 and 29 November 2016. On the latter date, the application for leave to appeal against conviction was refused, but the appeal against sentence was allowed. The court set aside the judge's stipulation that the appellant should serve 40 years before becoming eligible for parole, ordering instead that he should serve 25 years before becoming eligible for parole. The court also ordered that this sentence should commence on 29 March 2015. These are the reasons for this decision.

[4] The appellant was indicted for murdering his uncle, Errol Bennett ('the deceased'), on 17 December 2011, in the parish of Portland. The principal witness for the prosecution was Miss Kerry-Ann Thompson, who described herself as the deceased's lover. Her evidence was that, in the early morning of 17 December 2011, she and the deceased were in bed at his home in Compound District, Hector's River. Before retiring, they had checked all the doors and windows of the two storey house to ensure that they were closed.

[5] Sometime "before daylight", the deceased appeared to have been disturbed by a sound in the house. So he got out of bed and went, armed with a flashlight, to

investigate. Miss Thompson, who was behind him, saw him direct the flashlight, which was turned on, down the staircase. There, she saw the appellant, who was previously known to her as Clifton, coming up the stairs. The deceased immediately said to her, in a loud tone, that she should "call the police, because Clifton come to kill me". Miss Thompson went back into the bedroom, bolted the door and used the deceased's cellular phone to dial the number for the Manchioneal Police Station. Within seconds, she heard the deceased shouting, "murder, murder, murder ... Clifton a kill me." A few seconds later, the appellant "kick open the door" and came into the bedroom with a machete in his hand. Holding on to her right hand, the appellant dragged her from the bedroom and into the living room, while she held on to the blade of the machete with her other hand. As she pleaded with him not to kill her, the appellant bit off a piece of her right ear. The next thing she remembered was waking up and finding herself in a ward at the Kingston Public Hospital.

[6] At approximately 5:25 am on 17 December 2011, a neighbour of the deceased heard him crying out, "murder, Clifton, murder Clifton", and shortly after that he saw the appellant leaving from the back of the deceased's yard and walking towards the gate. The appellant then returned to the back of the house, got into the driver's seat of a CRV motor vehicle which was parked there and drove away at a fast speed.

[7] When the first police officer arrived at the deceased's house at around 9:00 am, he found the deceased's body inside the dining room on the top floor of the house, lying in a pool of blood, with a number of stab wounds at various parts of his body.

Miss Thompson, who was also seen at the house, was taken to the hospital. There was some evidence of forced entry to the house.

[8] During the course of the subsequent investigation, the appellant's name came to the attention of the police and he was in due course picked up and taken to the Port Antonio Police Station. While in custody, the appellant gave a statement to the police (which was subsequently admitted in evidence at the trial after a *voir dire*), in which he said that, on the morning in question, he had been forced by his brother, Neil, and a masked gunman to join with them and give assistance in an attack on the deceased and his girlfriend. While in the deceased's house, he was forced at gunpoint to "bite off the girl's ears" and he saw his brother take up a knife and stab the deceased. At the end of the attack, after various other things were done, he jumped out of a window of the house with Neil and the gunman and they forced him to drive them away in the deceased's CRV. At the end of the statement, the appellant was recorded as saying, "Me do it because a me children them".

[9] After an unsuccessful no case submission, the appellant made an unsworn statement from the dock. In it, he was mainly concerned to indicate that he had signed the caution statement to ensure that his baby mother and his children stayed safe and sound. He therefore signed it, he said, "out of fear of family and family members". He made no denial of any of the evidence which Miss Thompson had given.

[10] After the judge had summed up the case, in terms in respect of which no complaint has been made in this appeal by Mr Ho-Lyn, the jury returned a unanimous

verdict of guilty after retiring for just over half an hour. The judge proceeded immediately to sentencing. The antecedent report revealed that the appellant was born in Kingston on 21 February 1981; he is the eleventh of 12 children for his father and the second of eight children for his mother; he left school in grade 10 at age 16; after leaving school he worked as a construction worker and was so employed at the time of his arrest; he attended church and was a religious person; and he was in a common-law relationship and the father of three children who were dependent on him for support. He had no previous convictions. In mitigation, it was pointed out to the court that he had been in custody since August 2012, that is, a few months short of three years before the date of trial.

[11] In his brief sentencing remarks, the judge observed that nothing had been disclosed to the court to explain "the total violence that was visited on the persons who were in that house that morning". Contrary to what appellant's counsel submitted, the judge considered him to be a threat to society and, as we have already indicated, sentenced him to imprisonment at hard labour for life, with the recommendation that he not be eligible for parole until after 40 years had passed.

[12] On 18 October 2016, Mr Ho-Lyn advised the Registrar that he did not propose to advance any argument on the application for leave to appeal against conviction. However, in order to facilitate early completion of the appeal against sentence, Mr Ho-Lyn requested the court's assistance in obtaining social enquiry and forensic psychiatrist reports on the appellant. In response to the Registrar's request, the court was

accordingly provided with: (i) a Psychiatric Report dated 4 November 2016, prepared by Dr Clayton A Sewell[1], the Consultant Forensic Psychiatrist attached to the Department of Correctional Services ('the psychiatric report'); and (ii) a Social Enquiry Report dated 15 November 2016, prepared by Mr Dwight Kellier, Principal Probation Aftercare Officer in the Department of Correctional Services ('the social enquiry report'). The court is indebted to Mr Ho-Lyn for his initiative and to the Department of Correctional Services for their ready cooperation in this regard.

[13] At the outset of the hearing on 28 November 2016, Mr Ho-Lyn sought and was given permission to argue a single ground of appeal, which was that "...the sentence imposed by the learned trial judge was contrary to law and therefore must be set aside...". In addition, the appellant also complained that the judge did not conduct "...a proper sentencing hearing to clearly demonstrate the basis of the sentence imposed".

[14] Before considering Mr Ho-Lyn's submissions, it may be helpful to set out the relevant parts of the two reports. First, the psychiatric report summarised briefly the appellant's account of the circumstances which led to the death of the deceased. The appellant said that he was involved in a "family dispute" with his uncle over land arising out of which his uncle owed him $1,000,000.00 which he did not want to pay to him. That was the reason why he went to the deceased's house on 17 December 2011 and, while he was there, an argument ensued, in which the deceased's girlfriend also became involved. On this account, although the appellant spoke to the involvement of a

---

[1] B.Sc. (Hons), M.B., B.S., D.M. (Psych.), M.Sc.

knife in the incident, it was not clear how the deceased was injured. In fact the appellant said that it was the deceased who told him to take his car and drive to Kingston.

[15] Next, the psychiatric report summarised the outcome of the appellant's mental status examination as follows:

> "[The appellant] is a young man of average build. He was appropriately dressed for the setting and was cooperative during the interview. He spoke clearly and coherently. He had an appropriate affect and described his mood as 'a bit different'. He had no thought or perceptual abnormalities. He denied any suicidal or homicidal ideas. He was oriented in time, place and person and concentrated well during the interview. He had fair insight and his judgment was normal. He stated that he would like the court to cut his sentence and give him 'a manslaughter plea'. He wanted to be able to attend to his son and provide for his family."

[16] In Dr Sewell's opinion, the appellant showed signs of the presence of adult antisocial behaviour; and the possible presence of deceitfulness, lacking sympathy, and a failure to accept responsibility. However, he considered that the results suggested that, among other things, the appellant was unlikely to have an antisocial personality disorder; that, based on the available information, he did not appear to have been under the influence of an abnormality of the mind at the time of the offence; that he had neither major mental illness nor any personality disorder that would increase an individual's risk of violence; and that his current state did not suggest that he was an imminent danger to others.

[17] The social enquiry report rehearsed much of the ground that had already been covered by the antecedent report which had been presented to the judge as part of the brief sentencing exercise at the trial. In his interview with the probation officer, the appellant gave the same information that he had given to the psychiatrist about the dispute with the deceased over money and the argument which developed at the deceased's house on 17 December 2011, involving the deceased's girlfriend. However, he maintained that when he left the house that morning the deceased was "very much alive" and he was later surprised to hear that he had died.

[18] According to the report, the appellant was known in the community as a quiet individual who was not known to display aggressive tendencies. He got along well with community members and was regarded as a good father. The overwhelming view of informants was that the appellant was never a threat to their community. While the appellant's claim that he was owed money by the deceased could not be verified by community members, the probation officer reported having been told by others that the deceased was "well known to be what they described as 'hard pay', in that he was very unwilling to compensate persons for work done or services rendered".

[19] Mr Ho-Lyn described the psychiatric report as "unhelpful", and we agree. It certainly did not suggest that when he was interviewed by the psychiatrist in 2016 for the purposes of preparing the report he was suffering from any mental deficit. And, more importantly, it strongly implied that the position was no different at the time when the offence was committed.

[20] But Mr Ho-Lyn went on to make the point that it was sometimes better when the sentencing aspect of the case was put back for a few weeks, in order for the judge to allow himself time for "a more orderly reflection" on the appropriate sentencing decision to be taken in the particular case. Mr Ho-Lyn pointed out that the judge's sentencing remarks did not reveal what starting point he had used in arriving at the determination that the appellant should serve 40 years before being eligible for parole, nor indeed was any reason given by the judge for choosing to order imprisonment for life rather than a fixed sentence. While the case did warrant a long sentence, Mr Ho-Lyn submitted, 40 years before parole may have been too long, given the appellant's age, the absence of any previous convictions and his relatively favourable social enquiry report.

[21] To support these submissions, Mr Ho-Lyn invited us to compare the decision of this court in **Roderick Fisher v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 49/2006, judgment delivered 21 November 2008. In that case, the appellant was convicted of three counts of murder and the sentencing judge's sentence of life imprisonment without the possibility of parole before 40 years was upheld by this court. After considering a number of previous sentencing decisions, the court took the view that the order that the appellant should spend at least 40 years in prison before parole "would not be discrepant with the overall trend of pre-parole periods imposed in recent times" (per Smith JA (Ag), at paragraph 18). In arriving at this assessment, the court considered the number of victims involved in that case to be a relevant factor, "since this would directly relate to the retributive aspects of the period to be imposed" (paragraph 16).

[22] Accordingly, Mr Ho-Lyn submitted that in this case, in which there was some indication - albeit belated - that the attack on the deceased had its genesis in a perceived injustice, a sentence in the range of 20 to 30 years before parole would have been more appropriate.

[23] For the prosecution, Mrs Martin-Swaby observed that she could not resist Mr Ho-Lyn's comments on the sentencing process in this case. In this regard, she too referred us to **Roderick Fisher v R**, in which the court invited attention (at paragraph 8) by sentencing judges to the need to state in open court what factors have been taken into account in arriving at the sentence, including aggravating and mitigating factors, and any other relevant matters.

[24] Naturally with the greatest of respect to the experienced judge, we agree with counsel that the brief, almost perfunctory, sentencing exercise carried out in this case fell far short of what might have been expected in a case such as this. First, although much will always depend on the circumstances of the particular case, including the length of the trial, it will usually be a counsel of prudence for the sentencing judge at the end of a trial to stand down the actual sentencing for a short period, in order to enable him or her to gather thoughts and to prepare appropriate sentencing remarks. Second, as this court has recognised more than once in the recent past, while the absence of any mandatory requirement for a social enquiry report (or a forensic psychiatric report) in every case means that it will generally be a matter for the discretion of the sentencing judge to decide whether to order one in a particular case,

the obtaining of such a report before sentencing an offender is now generally accepted as good sentencing practice (see **Michael Evans v R** [2015] JMCA Crim 33, paragraph [9]; and **Sylburn Lewis v R** [2016] JMCA Crim 30, paragraph [16]). It seems to us that this case, involving as it did an apparently unprovoked attack by a nephew, without any previous criminal history, on his uncle, would on the face of it have been a fit case in which to order a social enquiry and, perhaps, a forensic psychiatric report. Third, a structured approach to the sentencing exercise in each case will generally require (i) the identification of an appropriate starting point, (ii) consideration of any relevant aggravating features, (iii) consideration of relevant mitigating features, (iv) consideration, where appropriate, of any reduction for a guilty plea; and (v) a decision on the appropriate sentence, with brief reasons being given, principally for the benefit of the offender, but also this court in the event of an appeal (see **Meisha Clement v R** [2016] JMCA Crim 26, paragraph [41]).

[25] But, putting on one side for the moment the obvious shortcomings of the sentencing exercise conducted by the judge in this case, it is still necessary to determine whether the sentence which he imposed was appropriate in all the circumstances of the case. We approach this question, as we must, bearing in mind the court's traditional disinclination to differ from the exercise of a sentencing judge's discretion merely on the ground that, had we had to do, we might have imposed a lesser sentence. The court must therefore consider not only whether the sentence imposed by the judge was arrived at by applying the usual, known and accepted principles of sentencing, but also whether it falls within the range of sentences "which

(a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances" (**Meisha Clement v R**, paragraph [43], applying **Alpha Green v R** (1969) 11 JLR 283, 284).

[26] In this regard, Mr Ho-Lyn's first query was whether the judge gave any consideration to the question of a fixed term custodial sentence as distinct from life imprisonment in this case. He was, of course, making the point that, under section 3 (1)(b) of the Offences Against the Person Act ('OAPA'), a person convicted of murder in the circumstances of this case may be sentenced to imprisonment for life "or such other term as the court considers appropriate, not being less than fifteen years". But it is fair to say that Mr Ho-Lyn did not press this point with any force, no doubt because there is nothing to suggest that the judge exercised his discretion wrongly in opting for a sentence of life imprisonment in this case.

[27] So the only remaining question is whether the period of 40 years fixed by the judge to be served before the appellant will become eligible for parole was appropriate in all the circumstances of this case. If, as the decision in **Roderick Fisher v R** indicates, 40 years before parole was considered appropriate in a case in which the offender committed three murders, then it seems to us that, in this case, a sentence of equal severity in circumstances hinting at some kind of family dispute does give an appearance of anomaly.

[28] In our view, a starting point significantly above the minimum period of 20 years before parole set out in section 3(1C)(a) of the OAPA would have been fully justified in

the circumstances of this case. But while the extreme violence of the appellant's attack plainly counted as an aggravating factor, it seemed to us that the appellant's previously clean record, the good report in which he was held by his community and the almost three years spent by him in custody pending trial were all significantly mitigating factors. It is taking all these factors into account that we came to the conclusion that the period of 40 years before parole stipulated by the judge should be set aside, on the ground that it was manifestly excessive, and a period of 25 years, commencing 19 March 2015, substituted in its place.