[2018] JMCA Crim 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 30/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

LINCOLN HALL v R

Miss Gillian Burgess for the appellant

Adley Duncan for the Crown

5 and 16 March 2018

MORRISON P

Introduction

[1] On 15 June 2016, the appellant pleaded guilty to the offence of murder before Straw J ('the sentencing judge') in the Home Circuit Court. The offence was committed on 18 February 2004. The appellant was arrested in August 2004 and had remained in custody since that time.

[2] On 24 June 2016, the sentencing judge sentenced the appellant to a term of imprisonment for life, with the stipulation that he should serve a period of 30 years before becoming eligible for parole.

[3] By leave of a single judge of this court, the appellant has appealed against this sentence on the ground that it is manifestly excessive. More specifically, the appellant complains that the sentencing judge failed to take into account, at all, or sufficiently, his entitlement to a discount in his sentence to reflect: (i) his plea of guilty; and (ii) the inordinate delay of over 10 years in bringing the matter to trial.

The relevant background

[4] The case for the prosecution, as outlined to the sentencing judge, was that the appellant had gained entry to the home of the deceased at night while the deceased and his girlfriend were asleep. After the deceased and his girlfriend were awakened, there was a struggle between the deceased and the appellant which resulted in the former being shot and fatally injured. The appellant, after repeatedly asking, "weh di money deh", made good his escape, but was subsequently taken into custody in August 2004. In due course, after he was positively identified by the deceased's girlfriend as his killer at an identification parade, the appellant was charged with the murder of the deceased.

[5] The record indicates that, in July 2005, while he was awaiting trial on the charge of murdering the deceased, the appellant was convicted and sentenced to 15 years' imprisonment for an unrelated offence of rape committed sometime before the murder of the deceased.

[6] It appears that, on the basis that the offence of murder in this case may have been committed in the course or furtherance of a burglary or robbery, the appellant

was originally indicted for a murder falling within section 2(1A) of the Offences Against the Person Act ('the OAPA'). Section 3(1)(a) of the OAPA provides that a person convicted of such a murder "shall be sentenced to death or to imprisonment for life".

[7] However, in May 2016 the prosecution served notice of withdrawal of its intention to seek the death penalty on the defence. On this basis, the appellant decided to offer a plea of guilty of murder on 15 June 2016, despite the advice of his counsel (Mr Lloyd McFarlane) that "he had defences in law". The appellant therefore fell to be sentenced for murder falling within section 2(2) of the OAPA. Section 3(1)(b) provides that such a murder attracts a sentence of "imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years".

The sentencing hearing

[8] At the time of the sentencing hearing the appellant, who was 49 years of age, admitted to a total of 19 previous convictions. His antecedent report revealed that, over the course of what appears to have been an otherwise unremarkable working life, he had worked in the baking, construction and farming sectors. At the time of his arrest for the murder of the deceased, he was a self-employed higgler.

[9] In passing sentence on the appellant, in a passage which we cannot avoid quoting at length, the sentencing judge said this:

> "Now, in [the] light of the previous convictions, I do know that two are for Possession of Ganja and Dealing with Ganja and this is 1999, so, I really won't have much regard to those two although they are serious, the dealing.

What I accept is that since 1989 you have been having some serious challenges with the law. Robbery with Aggravation, Robbery, Housebreaking, Simple Larceny, Larceny[,] Theft of Motor Car. So, there is a series of dishonest offences and then we have, Escaping Custody, two counts of Escaping Custody. We have some violence, Unlawful Wounding and Rape. Now, I see three counts of Rape on your record from 1993, the first for six years and then St. Ann Circuit Court in 2005 and then in the Saint Ann Circuit 2006, and of course, the Illegal Possession of Firearm, two counts of that.

So, it does show a man with a very destructive path and does show that you have been in and out of prison. I do know that the first offence committed in 1998, you were fined, it does appear the Court was at that time attempting to work with you, because you were fined and that was Robbery with Aggravation; but, you escaped custody, you were given three months and then apparently you committed robbery with violence and you were then sent to prison for 12 months and so your imprisonment started.

So, it does seem you have a very serious problem, serious.

Now, in passing sentence on you, the four goals of sentencing I must consider are, protection of the society, the deterrence, rehabilitation and retribution or punishment. Based on your record before me, the protection of the society is a very important goal, because you have been in and out of prison and there is no indication of you really moving toward rehabilitation. Certainly not at the time.

I am pointing out to you the goals I am applying, you have been in and out of prison and this last offence you have committed, your attorney did say you have some options, and I do bear that in mind that you did plea guilty, but this last offence now is Murder and Murder committed in circumstances where you broke into the man's house. So, you broke into the man's house and he was shot and killed, so it is a grievous offence, it is the taking of a human life and that by itself demands a certain level of punishment. It is done with a firearm, which itself is a serious problem in the society. People are safe nowhere, they have been shot on the road, in their houses, anywhere, so that is another

serious offences [sic], how it was committed. So, what I am saying, sir, protection of society is a major goal that I have to consider.

Also the deterrence, what message am I sending to the society in relation to this type of offence? Rehabilitation, can you be rehabilitated? Well, Mr McFarlane has asked me to bear in mind, on your part, that you have pleaded guilty, it does show a level of remorse. That may be so, I am not saying no, my view, as long as you are alive rehabilitation is possible, but you have to show that you take rehabilitation seriously and up to 2000 before you were sent away for 15 years in 2005, you have been in Court and got small fines, 12 months, 3 months, 4 months, but you keep coming back. You keep coming back.

So, in passing sentence on you, your antecedents, the person who stands before me, that is very important. And I cannot get away from the fact that you stand before me, let us say this count is not ganja, an assaulted criminal offences including three counts of Rape, very serious [sic]. I consider as I said also, the circumstances of the offence, murder committed when you broke into the man's house, that's serious.

Also, is there anything positive on your side? Yes, sir, it is, because you did plead guilty. The law does say, that if it is appropriate, the Court may, based on when you pleaded guilty, may reduce the sentence to the 25%, because that is, if it is appropriate, bearing in mind the factors, the proportionality and the appropriateness, the circumstances surrounding the plea, previous convictions and any other factors. As I said, really and truly, the only positive the Court have before me is that you pleaded guilty."

[10] The sentencing judge then went on to indicate that, given the appellant's long history of offending and the seriousness of the offence to which he had now pleaded guilty, the court was constrained to impose a sentence of life imprisonment, with a minimum of 30 years to be served before parole. However, the sentencing judge also

directed that this sentence should be served concurrently with the other sentence being served by the appellant. In answer to the appellant's counsel's request for clarification on this aspect of the sentence, the sentencing judge explained that –

> "It begins when I apply it, it is not to start after his 15 year [sic] ends, it is to start now. It is to be joined along with the 15 years. So, if he only have [sic] four years left then this 30 years would take in part of that four years, this is what I mean by concurrent."

The guilty plea discount issue

[11] The transcript of the proceedings at the sentencing hearing indicates that there was considerable discussion between counsel and the court as to the applicability of the provisions of the Criminal Justice (Administration) (Amendment) Act, 2015 ('the CJAA'), particularly as regards the effect of the appellant's plea of guilty. Indeed, as will be seen, the sentencing judge's observation in the remarks set out above that, "the Court may, based on when you pleaded guilty... reduce the sentence to the 25%", is a clear reflection of the relevant provision of the CJAA. However, at the end of the day, it was not entirely clear from the sentencing judge's remarks, if, and to what extent, she applied those provisions. It is therefore on this basis that, despite the sentencing judge's otherwise unexceptionable approach to the issue of sentence, the single judge considered it appropriate for the matter to be explored on appeal.

[12] The CJAA, as is now well known, effected significant amendments to the Criminal Justice (Administration) Act ('the CJA'), for the purpose of making special provision for the reduction of sentence upon a guilty plea. The principle of giving a discount for a

plea of guilty is, of course, hardly novel. It has long been a principle of the common law that, as P Harrison JA (as he then was) said in **R v Collin Gordon** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 211/1999, judgment delivered 3 November 2005, at page 4, such a plea must "attract a specific consideration by a court". However, as this court pointed out in **Meisha Clement v R** [2016] JMCA Crim 26, paragraph [38]), "the extent of the allowable discount for a guilty plea has never been fixed". So, the great virtue of the CJAA was that it introduced for the first time a fixed range of allowable discounts for the guidance of trial judges.

[13] We have been greatly assisted by the admirable submissions of Miss Burgess for the appellant and Mr Duncan for the Crown. On the basis of those submissions, we are happily able to go directly to the relevant provisions of the CJA, as amended by the CJAA.

[14] The first thing to note is that section 42C of the CJA expressly excludes from its ambit, guilty pleas for murder: (i) falling within section 2(1) of the OAPA; or (ii) in circumstances to which section 3(1A) of the OAPA applies. In other words, offences of murder, which potentially attract sentences of death, are not covered under the new sentencing regime.

[15] However, offences of murder falling under section 2(2) of the OAPA are dealt with in section 42E of the CJA, which provides that where a defendant pleads guilty to such a murder, "the Court may, in accordance with subsection (2), reduce the sentence

that it would otherwise have imposed … had the defendant been tried and convicted of the offence". Sections 42E(2), (3) and (4) go on to provide as follows:

> "(2) Pursuant to subsection (1), the Court may reduce the sentence in the following manner –
>
> (a) where the defendant indicates to the Court, on the first relevant date, that he wishes to plead guilty to the offence, the sentence may be reduced by up to thirty-three and one third *per cent*;
>
> (b) where the defendant indicates to the Court, after the first relevant date but before the trial commences, that he wishes to plead guilty to the offence, the sentence may be reduced by up to twenty-five *per cent*;
>
> (c) where the defendant pleads guilty to the offence after the trial has commenced, but before the verdict is given, the sentence may be reduced by up to fifteen *per cent*;
>
> (3) Notwithstanding subsection (2), the Court shall not impose on the defendant a sentence that is less than the prescribed minimum penalty for the offence as provided for pursuant to section 3(1)(b) of the *Offences Against the Person Act*.
>
> (4) In determining the percentage by which the sentence for an offence is to be reduced pursuant to subsection (2), the Court shall have regard to the factors outlined under section 42H, as my be relevant."

[16] "The "first relevant date" is defined in section 42A of the CJA as –

> "… the first date on which a defendant –
>
> (a) who is represented by an attorney-at-law; or
>
> (b) who elects not to be represented by an attorney-at-law,

> is brought before the Court after the Judge or [Parish Court Judge] is satisfied that the prosecution has made adequate disclosure to the defendant of the case against him in respect of the charge for which the defendant is before the Court."

[17] In this case, although the information as to precisely what transpired over the almost 11 year period that the appellant's case was before the court is scanty, it is common ground between counsel that the applicable range of sentencing discount for the guilty plea is that set out in section 42E(2)(b). In other words, upon his plea of guilty, the appellant was potentially entitled to a discount of 25% in the sentence which the sentencing judge would have imposed after a trial.

[18] In the case of a sentence of life imprisonment, this naturally begs the question of how to approach the calculation of the actual level of discount for the guilty plea. This is the very question which section 42F seeks to address:

> "Where the offence to which the defendant pleads guilty is one for which the Court may impose a sentence of life imprisonment, and the Court would have imposed that sentence had the defendant been tried and convicted for the offence, then, for the purpose of calculating a reduction of sentence in accordance with the provisions of this Part, **a term of life imprisonment shall be deemed to be a term of thirty years**." (Emphasis supplied)

[19] So the problem of calculation of a percentage of a sentence of indeterminate duration is resolved by resort to a deeming provision, essentially a statutory fiction by which something is decreed to be other than it is for some particular purpose (see **R v**

Verrette [1978] 2 SCR 838, per Beetz J at page 845). It follows from this that, for this purpose at any rate, no issues can arise with respect to the identification of a starting point and the assessment of the impact of aggravating and mitigating factors with a view to arriving at the appropriate sentence.

[20] In this case, there can in our view be no doubt that, had the appellant been tried and convicted for the murder for which he was charged, the court would have imposed a sentence of life imprisonment. The circumstances of the murder committed during the course of a home invasion in the dead of night were such as to have attracted no less. Accordingly, as it seems to us, the required approach to the calculation of the reduction in the appellant's sentence on account of his guilty plea would have been to treat the term of life imprisonment which the sentencing judge had in mind as though it were a sentence of 30 years' imprisonment.

[21] That having been done, the next step is to determine the actual percentage by which the sentence should be reduced within the range indicated in section 42E(2)(b). In this regard, section 42H requires the court to have regard to the following factors:

> "(a) whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;
>
> (b) the circumstances of the offence, including its impact on the victims;
>
> (c) any factors that are relevant to the defendant;
>
> (d) the circumstances surrounding the plea;

(e) where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;

(f) whether the defendant has any previous convictions;

(g) any other factors or principles the Court considers relevant."

[22] Section 42H therefore gives the court a discretion, based on a wide, though not limitless range of factors, to determine the exact extent of the discount to be applied in the case of a defendant who enters a guilty plea.

[23] While in this case the sentencing judge's analysis did not proceed explicitly along the lines set out above, it seems to us that her mind was plainly alert to the essential principles. So, firstly, in accordance with section 42E(2)(b), she recognised that "based on when you pleaded guilty, [the court] may reduce the sentence to the 25%". Secondly, roughly mirroring the factors set out in section 42H, she observed that such reduction would depend on whether "it is appropriate, bearing in mind the factors, the proportionality and the appropriateness, the circumstances surrounding the plea, previous convictions and any other factors". And thirdly, with section 42F obviously in view, she stated, having been alerted to the appellant's criminal record, that "I was thinking in terms of 25 years … [b]ut now that I have this record, I don't think I can go below **the 30** at all, cannot go below **the 30** …" (Emphasis supplied).

[24] In these circumstances, it is in our view impossible to say that the sentencing judge erred in principle, in any way, in arriving at her determination that there should

be no discount at all on account of the appellant's guilty plea in this case. Given the range of factors set out in section 42H, this was entirely a matter for the court's discretion, to be exercised in accordance with the law and in the light of all the facts of the case. As the sentencing judge pertinently observed, in considering the appellant's appalling criminal record, "really and truly, the only positive … before me is that you pleaded guilty". As the breadth of the discretion given to a sentencing judge to determine the level of discount to be applied, even in such a case, clearly suggests this may not be enough in every case.

[25] It follows from this that the appeal on this point falls squarely within the principle of appellate restraint adopted by this court in **Alpha Green v R** (1969) 11 JLR 283, 284, and many other cases, which is that "[i]t is only when a sentence appears to err in principle that this Court will alter it".

The delay in bringing the matter to trial

[26] Two questions arise under this head. The first is whether the appellant ought to have been given credit against his sentence for the time spent in custody between 2004, when he was arrested for the murder of the deceased, and 2016, when the matter was finally disposed of by his plea of guilty. And the second is, more generally, whether the undoubtedly inordinate period between the appellant's arrest and trial should entitle him to some form of *solatium* for breach of his constitutional right to a fair trial within a reasonable time.

[27] As regards the first question, there is now no question that an offender should generally receive full credit for time spent in custody pending trial (as to which, see **Meisha Clement v R**, paragraphs [34]-[35). Accordingly, the sentencing judge was, with respect, not entirely accurate in thinking, as she indicated in exchanges with counsel during the sentencing hearing, that, "[y]ou ought to credit them, but you ought not to credit them the exact time they have spent in custody pending trial".

[28] However, as the Caribbean Court of Justice confirmed in **Romeo Da Costa Hall v R** [2011] CCJ 6 (AJ), paragraph 18, there remains "a residual discretion in the sentencing judge not to apply the primary rule". Among the examples given were where the defendant is or has been on remand for some other offence unconnected with the one for which he is being sentenced, and where the defendant was serving a sentence of imprisonment during the whole or part of the period spent on remand (see also the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, paragraph 11.4).

[29] In this case, as has been seen, the appellant was in custody continuously from August 2004 and June 2006. However, since July 2005, his incarceration has been directly attributable to the 15 year sentence for rape which he received at that time. No doubt in recognition of this fact, Mr McFarlane adjusted his submission on the issue of time spent in custody at the sentencing hearing, by telling the court that "he was arrested for this offence in August of 2004, but was sentenced only in July of 2005, so

that the Court, of course, could safely give consideration to the period of incarceration between August 2004 and July 2005".

[30] We consider this to have been an entirely realistic position for Mr McFarlane to take in the circumstances of the case. In the light of the fact that there is no indication on the record that the sentencing judge credited the appellant with this period of just under a year, we think that the appeal must be allowed to this limited extent.

[31] As regards the wider question of the delay in bringing the matter to trial, Miss Burgess expanded her written submissions, in her submissions before us, to urge us to take the approach taken by this court, and sanctioned by the Privy Council, in **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26. That was a case in which, in order to compensate the appellant for the inordinate delay of four years in sending the papers from the trial court to this court, the court ordered a reduction of the appellant's suspended sentence from 18 to 12 months. This was done on the basis that the post-conviction delay was inordinate, and that, as Smith JA put in his judgment in this court, "such delay without more, constitutes a breach of the appellants' constitutional right to a hearing within reasonable time" (see the judgment of the Board at paragraph 6).

[32] However, in this case, although it can readily be said that the period of over 11 years between the appellant's detention and his trial date was indeed inordinate, there is, in our view, absolutely nothing in the record before us to indicate what were the reasons for the delay. Unlike in **Melanie Tapper v DPP**, therefore, where the cause of

the delay was known and inescapably attributable to the State, we have no basis for such an assessment in this case.

Conclusion

[33] In the result, we would: (i) allow the appeal to the limited extent indicated at paragraph [30] above; and (ii) affirm the sentence imposed on the appellant by the sentencing judge in all other respects. The practical effect of this is that the appellant must serve a period of imprisonment for life, with a minimum period to be served before being eligible for parole of 29 years. The sentence, which is to be calculated with effect from 26 June 2016, is to run concurrently with the sentence of 15 years' imprisonment currently being served by the appellant.