[2018] JMCA Crim 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 28/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE PUSEY JA (AG)

COURTNEY McLEOD v R

Ian Wilkinson QC and Mrs Dionne Jackson-Miller for the appellant

Joel Brown for the Crown

8 and 25 May 2018

MORRISON P

[1] On 11 February 2015, after a trial in the Home Circuit Court before Graham-Allen J (the judge) and a jury, the appellant was convicted of wounding with intent to cause grievous bodily harm. On 20 March 2015, the appellant was sentenced to seven years' imprisonment at hard labour. In addition, the judge recommended that, while serving the sentence, the appellant should receive anger management treatment; and pursue courses "equivalent to CXC".

[2] The appellant applied for leave to appeal against his conviction and sentence. On 8 September 2017, Sinclair-Haynes JA sitting as a single judge of appeal, granted leave to appeal against both conviction and sentence. When the appeal came on for hearing before us on 8 May 2018, Mr Wilkinson QC for the appellant advised us that his instructions were to abandon the appeal against conviction, but to pursue that against sentence. After hearing arguments from Mr Wilkinson and Mrs Jackson-Miller for the appellant and Mr Brown for the prosecution, we announced that, for reasons to be given at a later date, the appeal against sentence would be allowed. In the result, we set aside the sentence of seven years' imprisonment at hard labour imposed by the judge and substituted in its place a sentence of three years' imprisonment at hard labour, to be reckoned as having commenced on 20 March 2015.

[3] These are the reasons for this decision. It is first necessary to give a brief outline of the factual background to the matter. We base this outline on the case for the prosecution, which the jury, by their verdict which is not now challenged on appeal, must be taken to have accepted.

[4] The complainant, Romando Whyte, was a fourth form student at the Calabar High School at the material time. At about 1 o'clock in the afternoon of 3 July 2012, having completed his examinations at the school, the complainant, was walking through the yard of the Boulevard Baptist Church along the Washington Boulevard. He was dressed in school uniform and was on his way to the nearby Michi Super Centre to get something to eat. As he walked, he heard a noise from behind him. When he turned

around to look, he saw a group of Calabar boys, at a distance of about 55 feet behind him, chasing a boy dressed in khaki pants and a white shirt. The complainant slowed his pace and the boy in the white shirt ran past him, with the Calabar boys still in pursuit. The entire group then stopped ahead of the complainant, facing him.

[5] The complainant tried to continue on his way. But, as he walked through the crowd, the boy in the white shirt stabbed at him with a knife. The complainant retaliated by hitting him with a stick which he picked up from the ground in the churchyard. The boy in the white shirt then ran off. The appellant, who was also dressed in white shirt and khaki pants, then ran past and hit the complainant in the left side of his stomach, saying, "you a idiot, how you fi lick mi friend". The complainant felt a burning in his stomach, looked and saw blood on his shirt. However, he nevertheless joined the Calabar boys in chasing after the appellant, whom they subsequently caught up with and on whom they – including the complainant - inflicted some blows of their own. Returning to Calabar, the complainant was seen by a nurse at the school and later taken to hospital, where he was admitted and remained for four days, undergoing surgery and receiving treatment.

[6] In his defence, the appellant offered an unsworn statement from the dock, in which he admitted stabbing the complainant. However, he stated that he did so to prevent the complainant from hitting him with the piece of board which he had in his hand, raised above his head, as though he were about to attack him.

[7] After retiring for just short of 40 minutes, the jury returned a unanimous verdict of guilty of wounding with intent. And, at the request of counsel who then appeared for the appellant, the judge ordered a social enquiry report on the appellant.

[8] At the time of this incident, the appellant was 18 years of age. He had attended Jamaica College for five years, up to grade 10, then Quality Academics for about five months. At the time of the incident, he was working as a labourer on various construction sites. He had a single previous conviction in 2012 for possession of ganja, for which he had been sentenced to probation for one year. His social enquiry report was generally positive, with members of his community describing him as "an intelligent young man who needs to put his priorities straight and return to school". He was interviewed by a Probation Aftercare Officer and, while he maintained that he had stabbed the complainant out of fear for his own life, the appellant expressed remorse for his actions and asked the court to show leniency in sentencing him. The Probation Aftercare Officer endorsed this request.

[9] In her brief sentencing remarks, which we reproduce in full below, the judge said this:

> "In considering the best possible sentence to impose on you, in relation to this offence, the court has to take certain principles into consideration. The court also has to remind itself of the fundamental purposes of sentencing which is to promote respect for law and to maintain a just, peaceful society and the court must impose just sanctions that have one or more of the following objectives. And in your particular case, there are four objectives I wish to highlight.

A. To protect the community. This offence the jury accepted. One has to bear in mind where it took place and how it started. And even you know, that you entered the school compound with students and you had in your possession a knife.

B. To reinforce community held values that denounces [sic] unlawful conduct. To deter you and other persons from committing offences of this kind which is [sic] wounding with intent.

Your counsel urged on me, that wounding with intent, this is wounding with intent with a knife. It is not so prevalent. I really don't know which society counsel is living in. I don't know if it is the same one I am living in called Jamaica, but he urged me to take that into consideration.

The court also has to assist rehabilitating offenders. And those are the four principles in relation to you, that I wish to highlight.

The court also has to bear in mind that the sentence, a sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender. Well, the jury rejected your defence of self-defence and found that you did not act in self-defence when you stabbed the complainant Mr. Romando White [sic].

The court must also take into consideration Mr. McLeod, the nature and seriousness of the offence. I have to look also, if there are any aggravating circumstances in this particular case, as well as, are there any mitigating circumstances where you are concerned relating to the offence or you the offender.

The court also has to take into consideration how ... the court should go about determining what sentence to impose whether this is the kind of offence that would warrant a noncustodial sentence as your counsel has urged on the court, or a custodial sentence.

If the court is of the view that this particular offence for which you have been found guilty by the jury warrants a custodial sentence. Then the court has to embark on a number of things. The court has to look at the initial starting

point. I have to take that into consideration. Let me say at the outset that a noncustodial sentence based on the circumstances of this case is not appropriate. It is not the best possible sentence that the court find [sic] that it will impose in these circumstances.

The court intends to impose a custodial sentence, taken [sic] into account all the evidence that the jury has accepted. And having determined that this sentence has to be one of custodial - has to be a custodial one. The question therefore is, what is the court [sic] starting point. I must remind you that the maximum sentence for this offence is life imprisonment, that is the maximum sentence.

The court does not intend to impose the maximum sentence on you. **What therefore is the initial starting point for you, in relation to this particular offence, that you were found guilty of, using a knife, the starting point is ten years**. Having set the starting point at ten years, are there any mitigating circumstances that causes [sic] the court to come downwards from ten years and if the answer to that is yes what are they? The court has before it mitigating circumstances where you concerned. **The court has to take into consideration your age. You are twenty one years old and counsel has asked, has urged upon the court or reminded the court that at that time when the offence was committed you were eighteen. And I think the appropriate age to take into consideration is twenty one years.** You have not had any relevant, previous conviction for the purposes of this case, you have no previous conviction. Those two are mitigating factors.

I also have to take into account, the time that you may have spent in custody awaiting the trial of this case. That is on the one hand. So remember we started at ten years and we are coming down. Are there any aggravating features? I have to take into account any aggravating features present in this case.

If the court finds that there are aggravating features and the answer is yes, what are they? I will now highlight them. The complainant at the time of the incident, the third of July, 2012 was sixteen. He was a child attending Calabar High School. He was sixteen years of age. He received a

> stab injury to his left side that caused him to be hospitalized for four days. Not only was he hospitalized, he had to do surgery for the injury you inflicted on him. Those are serious aggravating features. So I now have to weigh those mitigating circumstances where you are concerned as the offender and the aggravating features where the complainant is concerned and come up with the best possible sentence to impose on you.
>
> Therefore, in the circumstances, the sentence that this court will impose on you is seven years imprisonment, time spent into custody is to be taken into consideration. And counsel, has he been in custody, time spent in custody to be taken into consideration." (Emphasis supplied)

[10] As we have indicated, the appellant did not pursue his appeal against conviction. However, as regards sentence, Mr Wilkinson sought and was granted leave, without objection from Mr Brown, to argue the following four supplementary grounds of appeal:

> "1. The learned Judge erred by ruling, in the totality of the circumstances, that '***...the starting point***' for the sentence imposed on the Appellant should be ten years. ...
>
> 2. The learned Judge erred in arriving at the sentence imposed on the Appellant by ruling that '***...the appropriate age to take into consideration is twenty-one years***'. ...
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> 3. The learned Judge erred in failing to consider other mitigating factors in the Appellant's favour including the fact that the Appellant expressed remorse for his action.
>
> 4. The learned Judge erred by imposing a sentence that was manifestly excessive in the circumstances."

[11] On this basis, the appellant urged the court to set aside the sentence of seven years' imprisonment imposed by the judge, and substitute a sentence of "no more than three (3) years imprisonment or, alternatively, such sentence as it deems just".

[12] Mr Wilkinson made submissions on grounds one and two. On ground one, he called our attention to the judge's adoption of starting point of 10 years in considering the appropriate sentence to impose on the appellant. He pointed out that, in the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts (the Sentencing Guidelines), which were formally launched on 19 January 2018, the usual starting point for the offence of wounding with intent is stated to be seven years' imprisonment (see Appendix A, page A-3). Mr Wilkinson submitted that although the "offending implement" in this case was a knife, there was no evidence that it was used in such an extraordinarily vicious or violent manner so as to justify a starting point beyond the usual. On ground two, Mr Wilkinson submitted that the judge also fell into error when she took the appellant's age at the time of trial, which was 21 years, to be the appropriate age for the purposes of sentencing him. In so doing, so the submission went, the judge "essentially treated the Appellant as a twenty-one year old individual when he committed the offence instead of as an eighteen year-old, a much younger person" (appellant's skeleton arguments, paragraph 15).

[13] Mr Wilkinson was followed by Mrs Jackson-Miller on grounds three and four. It was submitted that although the judge took into account a number of mitigating factors, such as the appellant's age, the time spent in custody pending trial and the fact

that he had no relevant previous convictions, she failed to consider his expression of remorse for his actions. In this regard, Mrs Jackson-Miller submitted that an expression of remorse is a crucial factor to be taken into account in mitigating any sentence. Mrs Jackson-Miller also submitted that the judge failed to consider other mitigating factors, such as the circumstances in which the offence was committed, which were clearly chaotic and revealed a situation in which there was obviously no room for premeditation on the appellant's part. In addition, it was argued, the judge ignored several other mitigating factors, such as the fact that the appellant was not of violent character, and had a history of school attendance and gainful employment. All of these factors, it was submitted, indicated the appellant's capacity for rehabilitation and should have been taken into account. In the result, it was submitted, the judge had arrived at a sentence which was manifestly excessive in the circumstances and should therefore to be disturbed by this court.

[14] Responding for the Crown on ground one, Mr Brown submitted that the judge's choice of a starting point of 10 years was not unreasonable, bearing in mind various factors relating to the commission of the offence, such as, among others, the nature of the injuries he received and the fact that he had to be hospitalised and had to undergo surgery while in hospital. However, on ground two, Mr Brown accepted that it was "unusual" for the judge to have treated the appellant's age at the time of trial as the relevant age for sentencing purposes, while at the same time treating the age of the complainant at the time of the offence as an aggravating factor. But Mr Brown also pointed out that the judge did in fact consider the appellant's age to be a relevant

mitigating factor. On ground three, Mr Brown observed that the appellant's expression of remorse would have availed him more in the context of a plea of guilty, though he also acknowledged that, as Mrs Jackson-Miller had submitted, an expression of remorse is the usual starting point towards rehabilitation. Finally, on ground four, Mr Brown referred us to the decisions of this court in **Ernie Williams v R** [2011] JMCA Crim 37 and **Raymond Whyte v R** [2010] JMCA Crim 10, to make the point that each case must be judged on its own facts and that in this case, it could not be said that a sentence of seven years' imprisonment was manifestly excessive.

[15] Three issues arise from these submissions. First, whether the judge was correct in her use of a starting point of 10 years; second, whether the judge was correct in treating the relevant age for sentencing purposes as the appellant's age at the time of sentencing; and third, whether the sentence imposed by the judge was manifestly excessive in all the circumstances.

[16] As regards the first point, we were referred by Mr Wilkinson and Mrs Jackson-Miller to **Meisha Clement v R** [2016] JMCA Crim 26, in which this court provided the following guidance (at paragraph [41]) to sentencing judges on the sequence of decisions to be taken in arriving at the appropriate sentence in each case:

> "(i) identify the appropriate starting point;
>
> (ii) consider any relevant aggravating features;
>
> (iii) consider any relevant mitigating features (including personal mitigation);

(iv) consider, where appropriate, any reduction for a guilty plea; and

(v) decide on the appropriate sentence (giving reasons)."

[17] The Sentencing Guidelines indicate (at paragraph 7.2) that –

> "In arriving at the appropriate starting point in each case, the sentencing judge must make an assessment of the intrinsic seriousness of the offence, taking into account the offender's culpability in committing it, and the harm, physical or psychological, caused or intended to be caused, or that might foreseeably have been caused, by the offence."

[18] Although the sentencing exercise in this case predated both the decision in **Meisha Clement v R** and the subsequent publication of the Sentencing Guidelines, the structure of the judge's sentencing remarks strongly suggests that she would have had in mind the general approach distilled by them. However, as Mr Wilkinson correctly pointed out, the usual starting point for wounding with intent indicated in the Sentencing Guidelines is in fact seven years and not the 10 years chosen by the judge. While the judge would not have had access to the final version of the Sentencing Guidelines, it seems clear that, as the guidelines themselves indicate (at paragraph 7.5), "[t]he suggested usual starting points reflect experience gathered over time as well as previous sentencing decisions of the Court of Appeal". So, although the judge may not have had access to the guidelines (which were still in draft form when the judge sentenced the appellant in this case), there is some indication from them that the starting point chosen by her may have been on the high side. Had a starting point of

seven years been adopted, as Mr Wilkinson suggested, then it is highly likely that the sentence ultimately arrived at by the judge may well have been somewhat lower than 10 years.

[19] As to the judge's use of the appellant's age at the time of sentencing, there is a curious dearth of authority on the point, other than in relation to a sentence of death. In that regard, section 78(1) of the Child Care and Protection Act provides that a sentence of death "shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time the offence was committed he was under the age of eighteen years". Section 78(1) replaced section 29(1) of the now repealed Juveniles Act, which was amended in 1975 to make plain, reversing the effect of **Eaton Baker and Another v The Queen** [1975] AC 774, that the statutory prohibition on pronouncement of the death sentence against a juvenile applied to those appearing to be aged under 18 at the time when they had committed the offence, not at the time of sentence (see per Lord Bingham in **Director of Public Prosecutions of Jamaica v Mollison** [2003] 2 AC 411, page 419).

[20] There is no similar provision in relation to the basis of sentencing for offences other than those attracting the sentence of death. Nevertheless, bearing in mind the wider principle that the sentence imposed on an offender is required "to fit the offender and at the same time to fit the crime" (per Rowe JA, as he then was, in **R v Sydney Beckford and David Lewis** (1980) 17 JLR 202, 203), we think that the appropriate age for the purpose of sentencing generally ought to be the age at the time of the

offence. For that is the age, as it seems to us, which is relevant to the consideration which the sentencing judge must inevitably give to the level of maturity or otherwise of a young offender, such as the appellant, as a matter affecting sentence.

[21] This having been said though, it appears to us that Mr Brown also made a fair point when he observed that, despite having settled on 21 rather than 18 as the relevant age for the purposes of sentencing, it is clear that the judge treated the appellant's youth in a more general sense as a mitigating factor. So, to this extent, it may still be possible to say that the judge's error in this regard may not have had a significant impact on the sentence that was finally imposed.

[22] But then there is also Mrs Jackson-Miller's submission that the judge failed to take into account all the relevant mitigating factors in the case in favour of the appellant. As has been seen, the judge considered the appellant's age, the fact that he had no "relevant" previous convictions and the time spent by him in custody pending trial as the factors falling within this category. However, it appears to us that other factors of personal mitigation on which the appellant was entitled to rely included his remorse (albeit not, as Mr Brown correctly observed, perhaps carrying the same weight as in the case of a guilty plea), his educational and employment status, the absence of premeditation and what Mrs Jackson-Miller described as the "clearly chaotic" circumstances in which the offence was committed. Again, it is difficult to say whether, had these additional mitigating factors been put into the balance, the judge would inevitably have ended up with a sentence of seven years' imprisonment in this case.

[23] We also found it possible to test the appropriateness of the sentence of seven years' imprisonment in this case by analogy to the decisions of this court in **Raymond Whyte v R** and **Ernie Williams v R** to which Mr Brown referred us. **Raymond Whyte v R** was a case of a brutal attack by the applicant on a woman with whom he had once had a romantic connection. In a fit of rage, he used a cutlass to chop her severely on her left hand, after which he also used the cutlass to beat the complainant. As a result of the chop wound, the complainant had to undergo two rounds of surgery over seven months, at the end of which her left hand was of virtually no use. The applicant applied unsuccessfully for leave to appeal against the sentence of 12 years' imprisonment imposed on him by the trial judge. During the course of the argument, this court indicated to the applicant's counsel (see per Panton P at paragraph [7]), in response to his contention that the sentence of 12 years was manifestly excessive, that "offences of this nature do regularly attract sentences of between 8 and 12 years imprisonment".

[24] In **Ernie Williams v R**, a dispute arose between two brothers in relation to damage to a motor vehicle. This resulted in one of them (the complainant) becoming infuriated and damaging items of agricultural produce belonging to the other (the applicant) with a cutlass. As a result, the applicant took out his cutlass and went in the direction of the complainant, but turned back after being called out to by their father. The complainant then put down his cutlass and started to walk away when he was stabbed in the back by the applicant. The complainant fell to the ground and the applicant continued to stab him, using one of their mother's kitchen knives. The

evidence from the doctor presented at the trial indicated that there had been four stab wounds to the back of the complainant.

[25] The applicant was convicted of wounding with intent and sentenced to seven years' imprisonment. He contended on appeal that, among other things, this sentence was manifestly excessive and, speaking for the court in rejecting this argument, Panton P commented as follows (at paragraph [13]):

> "In respect of the sentence in a case of wounding with intent, the maximum sentence is one of imprisonment for life and so there cannot be any serious complaint that a sentence of seven years imprisonment for such an offence is manifestly excessive, given the level of violence in the society and the antecedent of the applicant. In the circumstances of the case the sentence is quite appropriate."

[26] In our view, both of these cases are, as Mrs Jackson-Miller submitted, plainly distinguishable in favour of the appellant in this case. **Raymond Whyte v R** was a case of a wounding of the utmost severity, far more so than this case. The court's observation that offences of that nature would "regularly attract sentences of between 8 and 12 years imprisonment" suggests to us that, in a far less serious case of wounding such as the one committed by the appellant in this case, a sentence somewhat below the bottom end of that range might be more appropriate. And, perhaps even more to the point, **Ernie Williams v R** seems to us to be a clear demonstration that the sentence of seven years' imprisonment in the circumstances of this case, against the backdrop of less severe injuries and the several mitigating factors which we have identified, was significantly outside of the usual range of sentences.

[27] These are the considerations which led us to the view that the appellant had made good his contention that this was a proper case in which we should disturb the sentence passed by the judge below, notwithstanding this court's traditional reluctance to do so (see **Alpha Green v R** (1969) 11 JLR 283, 284).