**[2023] JMCA Crim 64**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MISS JUSTICE STRAW JA**
**THE HON MR JUSTICE D FRASER JA**
**THE HON MISS JUSTICE SIMMONS JA**

**SUPREME COURT CRIMINAL APPEAL NO COA2020CR00011**

**CURTIS CARTER v R**

**Miss Delphine Golding Jenkins for the appellant**

**Miss Natallie Malcolm for the Crown**

**12 July 2023**

**Criminal Law – Murder – Sentencing – The Offences Against the Persons Act, Sections 2(2), 3(1)(b) and 3(1C) – Life imprisonment as the maximum sentence for cases falling under section 3(1)(b) should be reserved for the worst cases – Sentence imposed affects the minimum period that may be imposed before eligibility for parole**

**ORAL JUDGMENT**

**D FRASER JA**

**Background**

[1] On 4 December 2019, in the Saint Mary Circuit Court, the appellant, Curtis Carter, pleaded guilty to the offence of the murder of Melvin McKoy, before Y Brown J, the learned sentencing judge ('LSJ'). On 24 January 2020, he was sentenced to life imprisonment with the stipulation that he should serve 15 years before becoming eligible for parole. On 22 September 2021, a single judge of this court refused his application for leave to appeal against conviction but granted him leave to appeal against his sentence. At the hearing of his appeal, he was granted leave to abandon the initial grounds filed and to rely on supplemental grounds filed. His ultimate prayer was that the sentence be

adjusted, so that a determinate sentence of 15 years with a pre-parole period of 10 years be imposed.

**The prosecution's case**

[2] Unfortunately, the circumstances of this case are not revealed on the available transcript. However, from the social enquiry report, the brief facts are that on 10 August 2015, at about 1:40 pm in the town of Port Maria, in the parish of Saint Mary, the appellant used a knife to stab Melvin McKoy in his left shoulder. Thereafter, Mr McKoy was pronounced dead at the hospital.

**The defence case**

[3] Though defended by counsel, unusually, the appellant was allowed to address the court. He expressed remorse for his actions and maintained that the killing was unintentional. He outlined that the killing was the result of an argument and fight. He indicated that he had been pursued and provoked by Mr McKoy who used harsh words to him. In the plea in mitigation, made on the appellant's behalf by his then attorney-at-law, reference was made to the emotional trauma caused to the appellant by his mother's untimely passing, the appellant's claim that the killing was unintentional and his remorse.

**Grounds of appeal**

[4] The supplemental grounds of appeal are:

> "1) The learned [sentencing] judge erroneously arrived at the sentence imposed, by failing to appreciate the full extent of her legislative sentencing powers. She was of the erroneous notion that she was constrained by the ambit of her legislative sentencing powers in the contemplation of an appropriate sentence. Consequently, the sentence imposed was manifestly excessive.
>
> 2) The learned [sentencing] judge fell into error when she failed to employ the correct approach and methodology that ought to be applied in her approach to sentencing the appellant. Consequently, this resulted in a failure to demonstrate, a clear balancing of certain critical considerations, and how arithmetically, she ultimately arrived at the sentence imposed.

3) The factual circumstances of the offending does [sic] not justify the sentence imposed."

**Ground 1: The learned [sentencing] judge erroneously arrived at the sentence imposed, by failing to appreciate the full extent of her legislative sentencing powers. She was of the erroneous notion that she was constrained by the ambit of her legislative sentencing powers in the contemplation of an appropriate sentence. Consequently, the sentence imposed was manifestly excessive.**

**Summary of submissions**

Counsel for the appellant

[5] Counsel for the appellant submitted that, based on the facts of the case, the offence falls within section 2(2) of the Offences Against the Person Act ('OAPA'), the sentence for which is governed by section 3(1)(b). Counsel further outlined that the minimum parole stipulation was governed by section 3(1C). Therefore, had the LSJ imposed a fixed sentence, she would have had the power to impose a lower pre-parole sentence, not below 10 years.

[6] Counsel complained that the LSJ erred by using the minimum pre-parole period for the life sentence interchangeably with the minimum sentence she understood could be given. This was an error which resulted in a fundamental flaw in appropriately identifying the sentence range the court was empowered to consider She cited the case of **Meisha Clement v R** [2016] JMCA Crim 26 in support. Counsel also relied on **R v Ball** (1951) 35 Cr App R 164 to advance that, as the LSJ had erred in principle, this court could interfere with the exercise of her discretion and adjust the sentence imposed.

Counsel for the Crown

[7] Counsel for the Crown conceded that it is unclear from the transcript whether the LSJ properly considered and appreciated the sentencing parameters that were available to her under the OAPA; that a fixed term of imprisonment could be imposed with or without eligibility period for parole, or a sentence of life imprisonment with the stipulation

that a minimum term of 15 years be served before eligibility for parole. Consequently, the sentence imposed was unsafe.

**Discussion and analysis**

[8] The relevant sections of the OAPA are set out below. Section 2(2) of the OAPA states in part:

> "…every person convicted of murder other than a person –
> (a) convicted of murder in the circumstances specified in subsection (1)(a) to (f); or
>
> (b) to whom section 3(1A) applies,
>
> shall be sentenced in accordance with section 3(1)(b)."

Section 3(1)(b) states that:

> 3.—(1) Every person who is convicted of murder falling within—
>
> …
>
> (b) section 2(2), shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years…"

Section 3(1C) states:

> "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—
>
> …
>
> (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
>
> (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."

[9] By virtue of section 2(2) of the OAPA the sentence in this case was governed by section 3(1)(b). That section provides two options: imprisonment for life or a determinate period of not less than 15 years. Section 3(1C) addresses the minimum parole period that must be stipulated based on the option chosen by the sentencing judge. If life imprisonment is imposed the minimum parole period is 15 years; if a term of years, that period is 10 years.

[10] At lines 10 to 23 on page 12 of the transcript, the LSJ is recorded as stating:

> "There is no doubt that the Murder is the most abominable and horrifying of crime. This why the legislation calls it an offence against the person [sic] act and stipulates a maximum sentence of life imprisonment. The said legislation also posits that where a sentence of life imprisonment is imposed, in certain instances the Court is allowed to impose a specified minimum of not less than fifteen years, which the convict should serve before becoming eligible for parole. **So that is the situation with which you are faced**." (Emphasis added)

[11] And then at line 25 and lines 1 – 3 on pages 15 and 16 respectively:

> "You may recall that earlier I indicated that **the minimum sentence, based on the Offences against the Person Act is fifteen years. Yes**." (Emphasis added)

[12] Further at lines 6 to 12 of page 18:

> "However, based on your demeanour today and your words of regret, you can benefit from rehabilitation and will enjoy a productive life after incarceration. **I cannot go below the statutory minimum.** I have said that, so that is what it is." (Emphasis added)

[13] Those extracts from the sentencing remarks do not disclose that the LSJ appreciated that she had a discretion to impose a determinate term of years rather than life imprisonment. Having not contemplated that option, there was no consideration of which type of sentence was more appropriate on the facts of this case.

[14] In **Meisha Clement v R**, at para. [43], Morrison P outlined the focus of the consideration of this court where a sentence is appealed. He stated:

> "On an appeal against sentence…this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) **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. 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." (Emphasis supplied)

[15] As the LSJ misconstrued her sentencing powers, in particular the range of sentences she was at liberty to consider, the oft cited dictum of Hilbery J in **R v Ball** at page 165, that "…when a sentence appears to err in principle…this Court will alter it", is applicable. This principle has been adopted and applied in our court in a range of cases including **Quacie Hart v R** and **Cornelieus Robinson v R**. Accordingly this court is required to embark on a resentencing exercise to determine whether the sentence imposed by the LSJ was appropriate in all the circumstances. This ground succeeds.

**Ground 2: The learned [sentencing] judge fell into error when she failed to employ the correct approach and methodology that ought to be applied in her approach to sentencing the appellant. Consequently, this resulted in a failure to demonstrate, a clear balancing of certain critical considerations, and how arithmetically, she ultimately arrived at the sentence imposed.**

**Summary of submissions**

Counsel for the appellant

[16] Counsel advanced on this ground that the LSJ did not follow the established methodology articulated in **Meisha Clement v R** [2016] JMCA Crim 26, as well as the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') and refined in **Daniel Roulston v R** [2018] JMCA Crim 20. Counsel complained that the LSJ failed to identify i) an

appropriate sentencing range, ii) a starting point, and iii) how the aggravating and mitigating factors affected the ultimate sentence imposed.

[17] Counsel also relied respectively on the cases of **Denver Bernard v R** [2019] JMCA 13 on the one hand and **Callachand & Anor v The State** and **Cornelius Robinson v R** [ 2022] JMCA 16 on the other hand, to maintain that the LSJ had erred by failing to identify the discount given for the guilty plea and to arithmetically deduct the time spent in custody.

[18] On those bases, based on the principles outlined in **R v Ball**, counsel invited the court to disturb the sentence imposed by the LSJ.

Counsel for the Crown

[19] Counsel for the Crown conceded that the LSJ did not adopt the established methodological approach to sentencing as outlined in **Meisha Clement v R** and **Daniel Roulston v R** [2018] JMCA Crim 20. She admitted that, despite consideration being given by the LSJ to matters such as the circumstances of the case, plea of guilty, and the time the appellant spent in custody, there was no express computation of the sentence. Hence the LSJ erred in her approach and the intervention of this court is warranted. She also cited section 14(3) of the Judicature (Appellate Jurisdiction) Act ('JAJA') which allows this court to revisit a sentence, **Alpha Green v R** (1969) 11 JLR 283 and **R v Ball**.

[20] Counsel also agreed that the cases cited by counsel for the appellant at the end of her submissions, provide a useful guide to this court in revisiting the sentence imposed.

**Discussion and analysis**

[21] It is now well settled that the methodology a court should adopt in arriving at a sentence involves the following steps — identification of the sentencing range and then the appropriate starting point within the range; consideration of the relevant aggravating and mitigating factors (including personal mitigation) and then, where appropriate, specifically any reduction for a guilty plea (including any statutory guidance); decision on the appropriate sentence (giving reasons); and deduction of time spent in pre-sentence

custody, awaiting disposal of the matter: **Meisha Clement v R**; **Daniel Roulston v R** and the Sentencing Guidelines.

[22] The effect of the failure of a sentencing judge to adhere to that methodology was highlighted in **Denver Bernard v R** where at para. [23], McDonald-Bishop JA (as she then was), writing for the court, observed that:

> "By remaining inscrutably silent on these critical matters in the sentencing process, the learned judge has not placed this court in a position to confidently say that he had properly applied some critical principles of law in his sentencing of Mr. Bernard and that the sentences are not manifestly excessive."

[23] Therefore, while as pointed out by counsel for the Crown, the LSJ considered matters such as the circumstances of the case, plea of guilty, and the time the appellant spent in custody, there was no express demonstration of a balancing and weighting of all relevant factors, that reflected a clear computation of the appropriate sentence.

[24] In accordance with the power granted to this court by section 14(3) of the JAJA and following the principles outlined in **R v Ball** and adopted by this court in **Alpha Green v R** and subsequent cases, this ground also succeeds. That requires the court to intervene and resentence the appellant.

## Ground 3: The factual circumstances of the offending does [sic] not justify the sentence imposed

### Summary of submissions

Counsel for the appellant

[25] Counsel pointed to the case of **R v Cecil Gibson** (1975) 13 JLR 207, where it was noted that due consideration ought to be given to both the circumstances of the offender and the offending, otherwise the rehabilitation purpose of punishment would be ignored. Counsel also advanced that there was nothing in the LSJ's summation to suggest that she took any exception to the facts forming the basis for the appellant's plea. It was submitted that the LSJ did in fact address her mind to the peculiar circumstances of the offending and should have sentenced the appellant on the facts most favourable to him

in the absence of there being a Newton hearing. Counsel cited the cases of **Quacie Hart v R** [2022] JMCA Crim 70, at para. [26], **R v Pearlina Wright** (1988) 25 JLR 221 and **Gaynair Hanson v R** [2014] JMCA Crim 1 at para. [24].

[26] Counsel argued that a single murder committed with a knife, in the course of a fight where there was provocation, is not the worst example of this type of offence. It was submitted, therefore, that this case should attract among the lowest sentences that could be given by virtue of section 3(1C) of the OAPA. Therefore, the appellant could have benefitted from a determinate sentence with a pre-parole period of 10 years, which would not have shocked the public conscience, as is proscribed by section 42H(a) of the Criminal Justice Administration Act.

[27] Counsel submitted that, in light of the above, critical errors were made by the LSJ, which resulted in the sentence being excessive and unjust.

[28] Counsel suggested for guidance the following murder cases decided by this court which have similar factual circumstances, where the appellant in those cases had received a determinate sentence and a pre-parole period of 10 years: **Ryan McLean, Richard Gordon & Christopher Counsel v R** [2021] JMCA Crim 21, **Kevin Balfour v R** [2012] JMCA Crim 23; and **Leslie McLeod v R** [2012] JMCA Crim 59.

Counsel for the Crown

[29] Counsel for the Crown conceded that the "factual circumstances" of the offending do not justify the sentence imposed. Counsel submitted that based on the limited facts available from the transcript, this type of murder appears to be one that would attract a sentence at the lower end of the sentencing range; especially in light of the accepted principle that a defendant should be sentenced on the facts that are most favourable to him. Thus, counsel advanced that, although this court is slow to disturb the sentence imposed by a sentencing judge, for the reasons submitted in supplemental ground 1, the intervention of the court was warranted.

**Discussion and analysis**

[30] By the effect of sections 2(2) and 3(1)(b) of the OAPA, the appellant was liable to be imprisoned either for life imprisonment or a determinate term of imprisonment not being less than 15 years. It was previously noted that the only available accounts of the circumstances of this case emanate from the social enquiry report and the statement made by the appellant during the sentencing hearing. As submitted by both counsel, the appellant should, in the circumstances, have been sentenced on the version of the facts most favourable to him.

[31] In the social enquiry report, the appellant indicated that the deceased was a stranger to him, and he had never committed an act of violence before that day, save for childhood squabbles. He said he tried his best to avoid the conflict that day as he had gone to the police station seeking assistance for a disagreement with his stepbrother. He had only argued with the victim to intimidate him, but he never intended to stab him and the injury to the deceased was caused when they were wrestling for the knife. In his statement made in open court at the sentencing hearing, the appellant indicated that he went to report a domestic matter between himself and his brother. While leaving (the station) he noticed the deceased started to chase him. He stopped at the supermarket where the incident took place and the deceased passed him and "used some harsh words to me" and "was trying to tell me we could finish there, and a fight take place". He said he did not intend to stab or cut the deceased, but it did happen. In the plea in mitigation, it was pointed out that the loss of the appellant's mother was traumatic to him, which caused him to behave more negatively.

[32] The aggravating features identified by the LSJ were that he was perceived as a dangerous person by the community, a knife had been used to commit the murder and in the words of the victim's father, the murder had "ripped his family apart". As mitigating factors, the LSJ identified the appellant's guilty plea, absence of any previous conviction, his industry and that he was remorseful about his actions. She also noted that he could benefit from rehabilitation and be able to enjoy a productive life after incarceration.

[33] The cases cited by counsel for the appellant as examples sharing the same offence and somewhat similar circumstances, are instructive, concerning firstly, whether life imprisonment or a determinate sentence should be imposed and secondly, if a determinate sentence is appropriate the range within which the sentence should fall.

[34] In **Ryan McLean, Richard Gordon & Christopher Counsel v R,** the deceased was in conversation with friends when they were accosted by Messrs McLean, Gordon and Counsel, who were armed with knives. The deceased fled and was chased by Mr McLean whom he eluded. Mr Gordon, Mr Counsel and subsequently Mr McLean, attacked the deceased, stabbing him multiple times. The medical evidence showed that the deceased succumbed to haemorrhage from multiple stab wounds to the chest, likely caused by a single blade knife. At trial, during the prosecution's case, Mr Counsel changed his plea to guilty. He was sentenced to 18 years' imprisonment with the stipulation that he should serve 10 years before becoming eligible for parole. This is in a context where Mr Counsel had three previous convictions for illegal possession of a firearm and ammunition (these two on the same day for which he was sentenced to seven and two years' imprisonment respectively) and for unlawful wounding for which he served nine months' imprisonment. Unsurprisingly, his sentence was not appealed.

[35] In **Kevin Balfour v R** the deceased and Mr Balfour got into an argument during which the deceased told Mr Balfour "about his mother in an angry way" according to one of the witnesses. They started to fight. After they were separated, Mr Balfour left the scene and then returned armed with a knife and "a half lass". He used the knife to stab the deceased in his chest, and he then chased him while brandishing the "lass". The deceased was unarmed at the time of the stabbing. The medical evidence showed that the deceased died from a stab wound to the chest.

[36] After a trial, he was found guilty and sentenced to 15 years' imprisonment at hard labour with a stipulation that he should serve 10 years before becoming eligible for parole. Before this court, a single judge having refused leave to appeal, the renewed application for leave to appeal against conviction was not pursued. Also unsurprisingly in this case, there does not appear to have been even a contemplation of an appeal against

sentence. No information was provided in the judgment on the antecedents of the applicant.

[37] In **Leslie McLeod v R**, a re-trial, the appellant was convicted of the murder of the deceased, a drug addict. The sole eye-witness testified that, in the early morning of 19 July 2004, at the appellant's gate, the appellant accused the deceased of lurking around his place. He then chopped the deceased on his hand and subsequently across his face, after the deceased had fallen on his knees. The medical evidence showed that the deceased's death was caused by chop wounds to the facial bones and the left upper limb with massive haemorrhage and hypovolemic shock. The appellant's defence was an alibi, that he was at home during the night and did not hear "any sound or anything". A character witness was called for the defence. The main issue was identification. The appellant was sentenced to 15 years' imprisonment with a stipulation that he should serve a minimum sentence of 10 years before becoming eligible for parole.

[38] In all the circumstances of the instant case, in particular, the fact that the appellant is entitled to acceptance of the version of facts most favourable to him, the balance between the aggravating and mitigating factors, his early guilty plea and sentences imposed in comparable cases, it is clear, as agreed by counsel on both sides, that the minimum determinate sentence of 15 years' imprisonment permitted by the OAPA is appropriate in this case.

**Order**

[39] In the premises it is, therefore, ordered as follows:

i) The appeal against sentence is allowed.

ii) The sentence of life imprisonment at hard labour with the stipulation that the appellant should serve 15 years before becoming eligible for parole is set aside. Substituted therefor, is a sentence of 15 years' imprisonment at hard labour (the court being unable to credit the appellant with any of the time he spent in pre-sentence custody),

with the stipulation that the appellant should serve a period of 10 years before becoming eligible for parole.

iii) The sentence is reckoned as having commenced on 18 December 2019, the date it was imposed.

iv) In light of the indication in the social enquiry report that the appellant continues to suffer from emotional trauma due to the tragic loss of his mother, it is recommended that the appellant be afforded psychological counselling.