JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO.15/2007

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE DUKHARAN, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

BYRON EDWARDS V. REGINA

Miss Nancy Anderson for the applicant.

Miss Paula Llewellyn, Q.C., Director of Public Prosecutions and Mrs. Tracey- Ann Johnson, Crown Counsel for the Crown.

5th and 9th October and 6th November 2009

PHILLIPS, J.A.

1. The applicant Byron Edwards was indicted and tried jointly with his father Ervin Edwards in the Saint Catherine Circuit Court for the murder of Lester Edwards. He was convicted on the 23rd of January 2007 and sentenced on the 29th January 2007, after a trial before Mangatal J. and a jury. The applicant was sentenced to twenty (20) years imprisonment at hard labour with a specification that he is to serve twelve (12) years before becoming eligible for parole. Ervin Edwards was sentenced to fifteen (15) years imprisonment at hard labour, and is to serve ten (10) years before becoming eligible for parole.

2. Both convicted persons appealed against the sentences imposed. However, on the morning of the 5th October, 2009, when the applications were to be heard, a Notice of Abandonment, pursuant to Rule 3.22 (1) of the Court of Appeal Rules was filed by Ervin Edwards who therefore abandoned all further proceedings in this matter, and rightly so, as he was given the minimum sentence as well as the minimum time before eligibility for parole, for the offence committed. As a result, an order that the sentence should commence from the date of conviction was made, on an application made by his counsel, on the basis that the court's time had been saved by him having taken this step. On the 9th day of October 2009, we dismissed the Bryon Edwards' application for leave to appeal against sentence and promised to put our reasons in writing. This we now do.

The Prosecution's Case

3. Anthony Irvin, a farmer of Cedar Valley, Redwood in the parish of St. Catherine, the main eyewitness for the prosecution, gave evidence that on the 4th February, 2004, he was at Mr. Jerky's yard in Cedar Valley catching some water from his pipe when he heard "Lindo cussing" (the deceased was called "Lindo"). The deceased passed him with a machete in his hand and went to his "old yard", which was about two hundred metres from him, and then returned still "cussing". Mr. Irvin also stated that he saw when Ervin Edwards went out on the road where the deceased was, and he saw when the deceased threw the machete in the bushes and heard when he said "mi nuh in a no war". Ervin

Edwards had a ratchet knife and a dagger in his hands. The deceased, he said took up a stone from the roadside and said, "Reds a nuh mi kill yuh father so if yuh want to kill mi, kill mi Reds" (Ervin Edwards was called "Reds"). In response, Ervin Edwards said, "yes a dead yuh fi dead long time yuh know bwoy". Subsequent to this exchange, the witness said, they "clash up" from there; they fell to the ground while throwing punches at each other. The knife was still in the hands of Ervin Edwards and eventually the witness said he saw blood on the merino of the deceased. At this time Ervin Edwards was standing, while the deceased was trying to get up by holding on to the wire fence but he appeared to be "weak out". Nevertheless, he moved off and tried to head on up to his yard. It was at this time that the applicant Byron Edwards came from his father's yard with a ratchet knife and held the knife at the deceased's neck and said, "Daddy sey a dead yuh fi dead yuh noh bwoy" then drew the knife at his neck cutting his throat. The witness said he saw blood running down from the deceased neck. Immediately after this, Ervin Edwards took up the machete, which the deceased had thrown away and chopped the deceased in his belly after which, they let him go and he fell to the ground.

4. Dr. Kadiyala Prasad, a Registered Medical Practitioner and Consultant Forensic Pathologist, who performed the post mortem examination on the body of Lester Edwards, gave evidence of the injuries that the deceased had received, that is, he saw one stab wound, two chop wounds and three incised wounds.

Dr. Prasad said that the cause of death was due to multiple sharp force injuries and that death was likely to have occurred between two to ten minutes after the injuries had been inflicted.

5. Detective Sergeant Paul Thomas of the Spanish Town Police Station in St. Catherine, the arresting officer, gave evidence that when he arrested the applicant and cautioned him, he stated, "But Mr. Paul, mi couldn't meck him dis mi old man sa". Det. Sergeant Thomas gave further evidence that when he asked the applicant what he had done with the machete, the applicant took him to an area and showed him where he had hidden the machete. However, when asked by the officer if he had used the machete to chop the deceased the applicant did not respond. Det. Sergeant Thomas also said in evidence that having charged the applicant with the offence of the murder of the deceased, when cautioned, he said, "Mr Paul, sorry sey it happen".

The Defence

6. In his unsworn statement, Ervin Edwards, stated that the deceased cursed him, kicked his two feet, "lick him with a cutlass" and "beat him in his neck". His son, the applicant had to come to his assistance and take the deceased off him.

7. The applicant in an unsworn statement said he was at his father's house when he heard the deceased coming down the road 'cussing' and saying to his

father "who tell you to drive away with the pickney?" He said he saw him kick away his father's feet, and hit him with a cutlass. He tried, he said, "to get the youth off" his father, but he was a "stucky" guy so he had to try until he finally got him off. He said he just was fighting him off and then there was a "rassling", until he got the cutlass away from him. Then they parted. The deceased went to his shop and the applicant went to his father's home, and he later learnt that "Lindo" was dead.

Grounds of Appeal

8. Miss Nancy Anderson on behalf of the applicant applied for and was granted leave to argue the following two supplemental grounds of appeal:

1. In sentencing the applicant the learned trial judge failed to take into account the circumstances that provoked the applicant.

2. In sentencing the applicant the learned trial judge failed to take into account his pre- trial incarceration of nearly 2 1/2 years.

Ground 1

9. Miss Anderson submitted that as the fight started with the applicant's father, and the applicant joined the fray to defend or assist his father, then he should be sentenced leniently. Counsel further submitted that it was the threat made to the applicant's father which provoked him into responding. She referred

to and relied on the work, "A Guide to Sentencing in Capital Cases" (Oxford 2007), which states at paragraph 47, as follows:

> "Defendants on the borderline of other recognized defences such as provocation, coercion or duress, or with an element of any of these factors in their case, can also deploy these considerations in mitigation even if they did not advance a specific defence, or did so unsuccessfully in the trial itself."

Counsel also referred to section 6 of the Offences Against the Person Act, which states as follows:

> "6. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self- control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

10. There was obviously no room for provocation on the Crown's case. Self-defence was raised on the Crown's case, in respect of Ervin Edwards and, in the unsworn statement of the applicant, in respect of his actions to protect his father. In those circumstances, one could say that there were provocative acts

on the evidence in relation to the applicant, particularly since self-defence was an issue in the case.

11. In these circumstances, the learned trial judge in her summation told the jury that the issue of provocation did not arise on the evidence and dealt with the issue of self defence. The jury clearly did not accept the story as given by the applicant and believed the evidence given by the eye witness Mr. Irvin as to the altercation and convicted the applicant and his father of murder.

12. The 2005 amendments to the Offences Against the Person Act provide for a sentencing hearing in section 3 (1E) and set out the minimum sentence for murder in section 3 (1) (b). As stated previously, Mr. Ervin Edwards received the minimum sentence. The applicant did not.

13. There are authorities that suggest that if the facts are borderline in respect of recognized defences such as provocation, the defendant can utilize such elements of the facts in the case in mitigation, whether the specific defence had been advanced or it had been done unsuccessfully at the trial itself. In the text on sentencing referred to earlier, the author referred to cases where the court has held, that although the jury had rejected the defence "in a general way", the court should not speculate on whether any specific aspects of the defence were accepted. Additionally, in other cases, the court has held that

although the jury had rejected provocation in the legal sense, the court for the purpose of sentence is not precluded from taking into account and acting on any provocative acts toward the accused.

14. Thus, although provocation as a legal defence did not arise in the case and counsel was not attempting to say that it did on the facts, or that the learned trial judge erred in saying that it did not, it was still open to the court to view such acts that were given in evidence as provocative acts, (such as the kicking of Ervin Edward's feet, hitting him with the cutlass, which the jury obviously did not believe) in mitigation when considering the sentence of the applicant.

15. The question is, would this consideration affect the sentence given as the learned trial judge was very succinct when imposing the sentence. She stated that the facts which the jury must have accepted suggest a violent offence. Those facts would have indicated that the applicant attacked the deceased when he was already injured and weak and holding on to a wire fence. However, the eyewitness for the Crown also stated that after the applicant had held the deceased at his neck with a knife and drawn it, Ervin Edwards then took the cutlass which the deceased had thrown on the ground before the fight and chopped him in his belly. The deceased succumbed to all these injuries.

16. In our view, the learned trial judge could therefore in sentencing the applicant have taken all these matters into consideration. The question really would be, is the sentence which was imposed, manifestly excessive in all the circumstances? We do not believe so.

17. An issue also arises as to whether the court ought to have imposed similar sentences on both the accused. It is our view, that judges should endeavour to impose similar sentences on co-accused when being tried jointly for the same offence. The principle of uniformity must apply and as stated by Wright, J.A in the case of ***R v Earl Mowatt***; ***R v Christopher Brown*** (1990) 27 JLR 32 (CA), the person who receives the higher sentence might be excused if he harbours a sense of grievance engendered by the lack of uniformity and proportionality in the system of sentencing. However, those cases were tried at different times and the appellants were convicted in separate trials. The court therefore stated that it should endeavour to do its best to harmonise the sentences in the two cases and allowed the appeals in part. The court found that the sentences were manifestly excessive. The appellants then received reduced sentences of five years imprisonment at hard labour.

18. In the case of ***R v Seville Gordon*** (1966) 9 JLR 320, the appellant and his co-accused were convicted of the larceny of cows. Both were implicated in the offence; however, the appellant was sentenced to a term of four months

imprisonment while his co-accused was sentenced to pay a fine of £15. The appellant appealed on the basis that the learned Resident Magistrate had discriminated against him and that he should have been given the opportunity to pay a fine. Although it was stated in the judgment to have caused the court some concern (Duffus, P. Waddington, J.A., Shelley J.A. (Ag.)) it was nonetheless held that the sentence of four months imprisonment imposed on the appellant was not manifestly excessive in the circumstances of the case and the court would not therefore interfere notwithstanding that the co-accused was fortunate in being allowed to pay a fine. It was submitted, on behalf of the appellant, that the court should reduce his sentence to be in line with the sentence of the co-accused. The court however was not concerned with that sentence but in fact stated that it may have been too lenient. However, the real question before the court was whether the sentence imposed on the appellant of four months imprisonment was manifestly excessive, for if not, then it cannot be said that the judge was wrong in principle in ordering that sentence, and that justice has not been done.

19. As said in that case, and which would seem to be the case here, bearing in mind the evidence given and the circumstances of the acts done by the applicant, there may very well have been good reasons for the learned trial judge differentiating between the two parties. In the circumstances, we will not, on that basis, interfere with the sentence given.

Ground 2

20. With regard to ground two, notwithstanding the fact that there was no reference to the period of pre- trial incarceration at the time that the sentence was being imposed, we must look at the overall facts of the case, and having taken into consideration the period of incarceration prior to trial, we cannot say that the sentence imposed was manifestly excessive. In the circumstances, we will also not make any adjustment to the sentence imposed on that basis.

21. It was for the above reasons we refused the application for leave to appeal against sentence. The sentence is affirmed and is to commence from the 29th April 2007.