[2014] JMCA Crim 16

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 9/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MRS JUSTICE LAWRENCE-BESWICK JA (Ag)

MAURICE LAWRENCE v R

Delano Harrison QC for the appellant

Alwayne Smith for the Crown

28 November 2013 and 28 March 2014

MCINTOSH JA

[1] The appellant, on his own admission, shot and killed Dalton Graham on 13 October 2008, in the parish of Clarendon. When faced with the resulting charge of murder in the Clarendon Circuit Court on 24 October 2011, he readily pleaded guilty and was subsequently sentenced to life imprisonment with no possibility of parole until he served 20 years.

[2] He applied to this court for leave to appeal his sentence, the essence of his complaint being that it was harsh, excessive and unjustified in law. After the grant of leave by a single judge of the court, his appeal came before us for hearing on 28 November 2013 and, at the conclusion of submissions from his attorney-at-law, Mr Delano Harrison QC, we made the following order with a promise, now being fulfilled, to give brief reasons for our decision:

> "Appeal allowed. Sentence imposed by the learned trial judge is set aside and substituted therefor is a sentence of life imprisonment with eligibility for parole after he has served 15 years. Sentence to commence from 20 December 2011."

The facts as outlined by the prosecution

[3] After the appellant's plea was entered, prosecuting attorney gave the court a summary of the facts in the following terms. On 13 October 2008, at about 6:15pm the deceased was driving his taxi between May Pen and Sevens Heights in the parish of Clarendon, with the appellant as one of his passengers. On reaching the Sevens Heights area the appellant asked the deceased to stop the taxi and when he complied, the appellant then alighted, pulled a firearm from his person and pointed it at the deceased. This was witnessed by the common law wife of the deceased who then heard a number of explosions and saw the deceased, who was sitting in the driver's seat, fall forward with his head down and blood coming from his nose and mouth. The appellant then threatened her with death if she spoke about what had occurred and proceeded to search the pockets of the deceased, removing a sum of money

therefrom. The subsequent postmortem examination on the body of the deceased revealed that death was caused by laceration to the brain.

[4] According to the prosecution, this was a case of recognition as the witness had known the appellant some seven months prior to the incident. She would see him four to five times per week taking his animals to pasture as they lived in the same neighbourhood.

[5] On his apprehension by the police, the appellant, when informed of the allegations, said "a force dem force mi fi do it" and that he did not want to do it. He later gave a statement under caution in which he told the police that one Jeffrey had hired him to kill the deceased for a sum of $50,000.00. Jeffrey had provided him with the gun to do the job and, after it was done, he had returned the weapon to Jeffrey but did not receive any part of the contract price.

[6] The prosecution further outlined that on 5 April 2011, the eyewitness pointed out the appellant on an identification parade and, on 9 April 2011 in a question and answer session with the police, the appellant denied that he was hired to do the killing. This denial is of significance in terms of the sentencing options available to the judge on accepting the appellant's guilty plea.

The ground of appeal

[7] Learned Queen's Counsel was granted leave to argue one supplementary ground of appeal which, he submitted, encompassed the two original grounds filed by the appellant with his notice of appeal. It read as follows:

> "The learned trial judge was wrong in principle in his approach to sentencing the appellant, in that he failed to properly/adequately assess all the factors relevant in sentencing the particular offender (the appellant) before him. In the result, the sentence of imprisonment for life with the stipulation of a minimum period of 20 years before eligibility for parole is manifestly harsh and excessive."

Submissions

[8] Mr Harrison QC referred to the learned judge's sentencing remarks in which he sought to outline the principles governing the sentencing exercise, then apply them to the instant case. However, in so doing, learned Queen's Counsel submitted, he fell into error as he failed to carefully assess the factors involved in relation to the particular offender before him.

[9] He further contended that the learned judge's sentencing remarks showed a confusion between the provisions of section 3(1C)(a) and 3(1C)(b)(i) of the Offences Against the Person Act (the Act) and, ultimately, it was unclear which section informed his thinking when he arrived at the sentence he imposed. The applicable section, Mr Harrison QC submitted, was section 3(1C)(b)(i) which provided a sentence of life imprisonment for murder with eligibility for parole after 15 years had been served.

[10] A "contract" killing, as first related to the police by the appellant, would attract the sentence set out in sections 2(1)(e) and 3(1)(a), learned Queen's Counsel submitted, namely, death or alternatively, life imprisonment with a pre-parole period of not less than 20 years (in accordance with section 3(1C)(a). However, in light of the retraction of the 'murder for hire' account, which, in effect, took away the aggravating feature of the first account, Mr Harrison QC contended, the learned judge ought to have considered a sentence in accordance with that second account as being most favourable to the appellant. To support this contention, he cited the case of ***R v Pearlina Wright*** (1988) 25 JLR 221 where it was held that "it is a settled principle of law that when a person pleads guilty, the learned trial judge, as the tribunal of fact, should sentence on the set of facts which was most favourable to the accused".

[11] Mr Harrison QC submitted that the social enquiry report made it clear that the appellant was not irredeemable and therefore the learned judge ought to have conducted a careful assessment of his circumstances in the context of the sentencing guidelines to which he referred. That consideration would have led to a sentence as provided in section 3(1C)(b)(i) and his failure to do so rendered the sentence manifestly excessive. Additionally, Queen's Counsel argued, in light of the age of the appellant (15 years old at the time of the commission of the offence), the sentence was harsh. In the circumstances, Mr Harrison QC urged this court to set aside the sentence imposed by the learned judge as being manifestly excessive.

The learned judge's approach to the sentencing options

[12] Sentencing is at best a difficult task and the provisions of the amended Act, covering as they do a multitude of possible scenarios, intended to make the task of the sentencer easier in murder cases, do not readily achieve their aim. In this case the learned judge seemed to have been grappling with them and in the course of his address to the appellant he expressed about three different sentencing possibilities.

[13] He accepted that the appellant had retracted the first version given to the police concerning the murder which therefore obliged him to look at the provisions of the Act that were relevant to the appellant's altered position. In that regard he said at page 12 of the transcript:

> "... you spoke to someone about your deed then you gave a statement to an officer which you had seem [sic] to suggest that someone else caused you to do it, you retract [sic] it then, you accepted your responsibility for the fact that you had robbed an entire household of its bread winner..."

Then at page 14 he continued:

> "... but I am mindful of the fact that the amendment [sic] to the offence against the person's [sic] act [sic] describes [sic] a minimum period of 15 years for non capitol [sic] murder, that is to say that you must serve 15 years before you can be legible [sic] for parole. So the sentence is 15 years ..."

[14] This was consistent with the provisions of sections 2(2), 3(1)(b) and 3(1C)(b)(i) which were the sections applicable to the instant case as this killing did not fall within

the scenarios described in section 2 subsections (1)(a) to (f) and section 3(1A). The learned judge ought therefore to have been guided by the provisions set out below:

> "2. (2) Subject to subsection (3), 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).
>
> 3. -- (1) Every person who is convicted of murder falling within –
>
> (a) ...
> (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.
>
> (1C) 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 ---
>
> (a) ...
>
> (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;
> (ii) ...
>
> which that person should serve before becoming eligible for parole."

[15] Fifteen years being the minimum or starting point for the computation of the pre-parole period, however, the learned judge sought to examine the circumstances of the appellant in the context of the principles of sentencing to determine whether there were mitigating factors which would impact that minimum period or indeed to determine whether there should be an upward movement away from that minimum

period. He considered that the appellant was a victim of circumstances and said at page 13:

> "...having looked at the social enquiry report, I have no doubt in my mind you are a victim of circumstances of your early training, which was minimal at most and certainly nonexistence [sic] at times you seem not to have had the benefit of a stable family and as such, the probationer has describe [sic] your living conditions as deviant and nomadic."

He continued:

> "... some of the factors I have to consider when mitigating the offence, the type and gravity of the offence, the mental factors, other factors, publications [sic] lack of premeditations, character, remorse, capacity for reform..."

The learned judge said this was not an exhaustive list and at page 14 he went on to say:

> "... I take into account the fact that you pleaded guilty, didn't waist [sic] the Court's time. I take into account that you are one to be treated as [sic] clean slate, no previous convictions ..."

[16] However he was also mindful that there were other considerations. The learned judge described the murder at page 13 as "the most sinister, grievous act of savagery, one human being against another a defenceless man, [sic] can be no doubt of the seriousness of this offence.". He found nothing before him, he said, which could suggest that the appellant was suffering from any delusions of the mind. He considered whether there was any degree of premeditation involved and said at page 14:

> "... I am not saying there was not, because by virtue of the fact that you were armed with a firearm and that you found a ready made victim so to speak, and that you had executed your purpose, tells me that there [was] some degree of planning."

In the final analysis the learned judge had this to say:

> "...when all is said and done, having regard to the objectives of sentencing, that the society needed [sic] from people who can readily take up a gun, rob a taxi driver and then put him to his eternal rest, a heinous crime. So there is no doubt that you must go somewhere and spend some time and be reformed. It makes no difference in my view in the facts which are before me, that any sentence at all should be discounted to the fact that you pleaded, in view of the fact of your age and in view of the fact that you had no previous conviction, having regard to the minimum sentence that I impose before parol, [sic] life in prison, I should not say minimum, the time you can serve before you can be legible [sic] for parol, [sic] 14 years."

[17] Having moved from 15 to 14 years during which time the learned judge hoped the appellant would be taught a skill before being re-admitted into society, his Lordship then pronounced the sentence of the court as follows:

> "So the sentence of the court, a minimum period of 20 years before you can be eligible for parol [sic]."

Expressed in those terms the learned judge had then strayed into the provisions of section 3(1C)(a) which related to the imposition of a sentence of life imprisonment pursuant to section 3(1)(a) and that latter section related to the scenarios as described in section 3(1)(a) to (f) which were not applicable to the instant case.

Conclusion

[18] It was clear that the learned judge had in his contemplation the principles which

were to guide him in the sentencing exercise. However, it seemed to us that there was some basis for learned Queen's Counsel's disquiet concerning the manner in which he applied those principles to the appellant's circumstances. While it may not have been entirely correct to say that he failed to assess and analyze the factors relating to this particular offender, his sentencing remarks showed an imbalance in his consideration of the mitigating features on the one hand and the sentencing principles such as the gravity of the offence and the need, in his view, for society to be protected from someone who unhesitatingly snuffed out the life of the breadwinner of a family, on the other hand. That was the approach which led him to the view that the minimum sentence of 15 years warranted an increase.

[19] However, he ought to have balanced his outrage at the heinous nature of the killing, for which he said he could find no excuse and nothing to suggest that the appellant was suffering from any delusions of the mind (referred to above), with the mitigating factors he identified such as the harsh conditions of the appellant's early life which deprived him of the benefit of a stable family life. He referred to the appellant as a victim of circumstances and someone with a conscience. The learned judge also mentioned the social enquiry report which was submitted to the court and in that report members of the community where the appellant resided remembered him as "a hardworking young man who was not afraid to undertake any work available". Further the report read:

> "He was mainly engaged in drain cleaning and as a labourer on construction sites. Residents relayed [sic] that he lived in a

> huge family yard and they have never heard him in contention with anyone.....
>
> They expressed surprise when they heard that he was arrested by the police as he is not known to be violent."

[20] The reporter ended by saying that in imposing sentence "[t]he court could take into consideration subject's age and guilty plea". At the end of the day, however, it did not appear that the learned judge placed any great store on these considerations and at page 15 of the transcript, he said this:

> "It makes no difference in my view in the facts which are before me, that any sentence at all should be discounted to the fact that you pleaded, in view of the fact of your age and in view of the fact that you had no previous conviction ..."

[21] On the contrary, those factors do make a difference and in seeming to disregard them, the learned judge fell into error. The appellant was entitled to a discount in any sentence above the 15 year mark and to consideration for his age at the time of the commission of the offence (not at the time of sentence – see ***R v Bowker*** [2008] 1 Cr App Rep (S) 412), as well as for his previous unblemished record. In our judgment, a proper consideration of those factors should not have resulted in an increase in his sentence so that there was merit in Queen's Counsel's contention that the sentence was excessive and harsh.

[22] Accordingly we allowed the appeal and made the order as set out in paragraph [2] above.