[2016] JMCA Crim 30

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 2/2014

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA

SYLBURN LEWIS v R

Trevor Ho-Lyn for the appellant

Miss Paula Llewellyn QC, Jason Alliman and Mrs Sharon-Milwood Moore for the Crown

7, 9 December 2015, 12 February 2016, 19 September and 28 October 2016

MORRISON P

[1] On 12 December 2013, the appellant was convicted of the offence of wounding with intent, contrary to section 20 of the Offences Against the Person Act (the Act), after a trial before Sykes J (the judge) and a jury in the Circuit Court for the parish of Saint Elizabeth. On 13 December 2013, the judge sentenced the appellant to 28 years' imprisonment at hard labour. In arriving at this sentence, it appears that the judge only took into account in mitigation the fact that the appellant had spent approximately two years in custody pending his trial.

[2] The appellant's application for leave to appeal against his conviction and sentence was considered on paper by a single judge of appeal on 11 August 2015. The application was refused in respect of the conviction, but granted in relation to the sentence imposed by the judge.

[3] At the conclusion of the hearing of the appeal on 19 September 2016, the court made the following orders:

1. The application for leave to appeal against conviction is dismissed.

2. The appeal against sentence is allowed and the sentence of 28 years' imprisonment imposed by the judge is set aside.

3. In its stead, the court imposes a sentence of 17 years' imprisonment at hard labour, such sentence to be reckoned as having commenced on 13 December 2013.

[4] This judgment is written in fulfilment of the promise made by the court at that time to give reasons for its decision. In this regard, it is first necessary to state in outline the brief facts of the case. The appellant was charged with wounding Oshane Wilson (the complainant), with intent to do him grievous bodily harm, on 7 December 2013. The case for the prosecution was that, on the morning of that day, the appellant, who was armed with a machete, launched an unprovoked attack on the complainant. When the complainant put up his right hand to ward off the attack, the appellant chopped him with the machete, injuring his hand and severing three of his fingers. The complainant started to run away, but he was chased by the appellant, who then chopped him again, causing him to fall to the ground. The appellant continued to swing the machete at the complainant, chopping him on his left foot, while the complainant

tried to block him with his left hand, receiving multiple chops to that hand in the process. The appellant then chopped the complainant just below his shoulder, with such severity that it broke the bone in his arm, causing it to fall across his head. At this point, the complainant said, the appellant remarked, "Yu dead now", and then went on his way. As a result of these injuries, the complainant was hospitalised for a period of three weeks, during which time, he told the court, he underwent three operations on his left arm, shoulder, "coming down to the wrist".

[5] The appellant's case was that he acted in self-defence. According to him, as he was going about his lawful business, he honestly apprehended an attack by the complainant and two other men. The appellant said that the complainant was armed with a fish gun and that, it was as the three men advanced towards him, with the complainant coming closest to him, that he swung his machete at them and heard a sound as though it had hit the fish gun. The appellant contended that any injuries sustained by the complainant were therefore the result of his effort to repel the complainant's attack.

[6] The judge gave the jury full and accurate directions, about which no complaint is now made, on the law relating to self-defence. Thus, the jury were told that if the complainant received his injuries in the manner described by the appellant, no offence had been committed. The jury were also directed that the appellant was not obliged to prove anything, but that it was for the prosecution to prove to their satisfaction that the

appellant had not acted in lawful self-defence. The jury also had the benefit of an unexceptionable standard good character direction from the judge.

[7] After retiring for just under an hour, the jury returned a unanimous verdict of guilty of the offence of wounding with intent. The antecedent report presented to the court by the police revealed that the appellant was a man of 38 years of age; that, although the appellant had attended school for some nine years, he was "not able to read and write well"; and that the appellant had one previous conviction (which he admitted) for possession of ganja some 15 years before, for which he had been fined $100.00 or 10 days' imprisonment. In a plea of mitigation made by counsel for the appellant, the court was told that he had spent two years and three months in custody pending his trial.

[8] In his sentencing remarks, the judge observed as follows:

> "Having regard to the evidence presented by the Prosecution, it is clear that this case, in the world of Wounding with Intent cases, has to be regarded as one of the more severe cases of Wounding with Intent. Why do I say this? This shows a premeditated, planned attack on the complainant ... Because clearly you had to track down the [complainant], find out where [he] was and then you were coming stealthily behind him, clearly it was behind and he turned around in time to see the machete virtually on its way down, put up his hand and with that first chop, he lost three of his fingers. Must have been a lot of blood. But even the sight of the blood and the even serious injury did not give you cause for thought. There was no sense of wait, the man was given a serious injury, what is this I have done? Nothing like that. He is on the ground there and you are chopping at him. He kicks you and is trying to get away, you still chopping at him. You chopped him on his foot.

> He gets up, runs away from you ... He runs down on the road and you were there in hot pursuit. You chopped him in his back. He falls to the ground again. And all the chops after he fell the second time are aimed at the upper part of his body. This explained why he had multiple chops on his left hand. He is on the ground using his hand to prevent you from chopping him in his head or neck. That still doesn't stop you. One chop was so severe, the force was so severe that it broke his arm, the bone of his arm and the arm fell listlessly across his head and not even that stopped you. What stopped you was that you formed the view that he was now dead because those were the words that the complainant heard. "Yu dead now." So, mission accomplished and you are on your way. So this is no product of a fight. This is not the product of a single chop. The attack ceased because you thought he was dead."

[9] The judge then pointed out that, for a fairly serious case of wounding with intent, the sentence of the court would usually be between 15 to 18 years. But this was, the judge said, a different kind of case:

> "... what you did to this gentleman was not just wicked, it was really bordering on evil. Because you set out to maim this young man and your sole plan was to kill him. Fortunately, you did a bad job. That's why he is alive here. So in this kind of case, the usual sentence of 15 to 18 years really is inadequate.
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> So the position is ... that for this kind of attack, the severity of the injuries, your expressed intent at the time, that the man is to die ... the sentence of the Court ought to reflect the seriousness of the attack in this case, the absence of any kind of compassion."

[10] In the result, after indicating that he would take into account the time spent by the appellant in custody, which he approximated at two years, the judge sentenced the appellant to 28 years' imprisonment.

[11] On 1 December 2015, the appellant filed a single supplemental ground of appeal, by which he contended that the sentence imposed by the judge was manifestly excessive. In particular, the appellant complained that the judge failed to take into account the usual sentences imposed for offences such as the one for which he was convicted and to balance the aggravating factors against the mitigating factors to arrive at the appropriate sentence.

[12] The matter first came before the court, sitting in Lucea in the parish of Hanover, on 7 December 2015. At that time, Mr Ho-Lyn for the appellant sought and was granted leave, without objection from the learned Director of Public Prosecutions, to argue the supplemental ground of appeal. Mr Ho-Lyn's principal complaint was that the judge had failed to approach the issue of sentence in a structured manner. Accordingly, because the judge did not apply the methodology of choosing a starting point, adjusted for aggravating and mitigating factors, it was impossible to tell how the judge had arrived at the undiscounted figure of 30 years' imprisonment. Instead, the judge appears to have focused on the viciousness of the attack without any proper analysis of the circumstances. The result was, Mr Ho-Lyn submitted, that the judge had "imposed a sentence that had no objective rationale and therefore was in the circumstances manifestly excessive".

[13] But Mr Ho-Lyn also complained that it was wrong in principle for the judge to have embarked on the sentencing exercise without having access to any proper information, apart from the usual antecedent report provided by the police after conviction, about the appellant's circumstances. Indeed, Mr Ho-Lyn submitted, it was questionable whether this court should, in the event that it agreed that the sentence imposed by the judge was manifestly excessive, itself embark upon a resentencing exercise without the proper information. What was required in almost every case was a social inquiry report and, in this case, given the egregiousness of the appellant's attack on the complainant, a forensic psychiatric report.

[14] On 9 December 2015, after hearing further submissions from counsel on the proper disposal of the appeal, the court reserved its judgment to 12 February 2016. On that date, the court directed that steps be taken to obtain the reports requested by Mr Ho-Lyn on or before 13 May 2016.

[15] We wish it to be clear that, by giving these directions, we intend no criticism of the fact that the very experienced trial judge did not make any order or give any directions with a view to obtaining similar reports, in particular a social enquiry report, as a prelude to passing sentence on the appellant. It does not appear from the record that any submission was made to the judge that any such reports should be obtained and, in any event, in the absence of any mandatory requirement that a social enquiry report and/or a forensic psychiatric report should be obtained as an aid to sentencing in all cases, it is very much a matter for the discretion of the sentencing judge whether

any, and if so what, reports should be ordered in a particular case. Given the fact that, usually, the sentencing judge would have heard the evidence and be fully seised of all the facts of a particular case, this is not a matter upon which we would wish to be too prescriptive. But, that having been said, we think that it may be well for judges entrusted with the difficult task of sentencing, to bear in mind what McDonald-Bishop JA described in **Michael Evans v R**[1], as "the utility of social enquiry reports":

> "We do recognize the utility of social enquiry reports in sentencing and cannot downplay their importance to the process. Indeed, obtaining a social enquiry report before sentencing an offender is accepted as being a good sentencing practice. John Sprack in A Practical Approach to Criminal Procedure, tenth edition, page 395, paragraph 20.33, in his discussion of the provisions of the Powers of Criminal Courts (Sentencing) Act 2000, as they relate to the use of pre-sentencing reports in the UK, noted:
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> > 'Even if there is no statutory requirement to have a [social enquiry] report, the court may well regard it as good sentencing practice to have one, particularly if it is firmly requested by the defence. Nevertheless, even where the obtaining of a pre-sentence report is 'mandatory', the court's failure to obtain one will not of itself invalidate the sentence. If the case is appealed, however, the appellate court must obtain and consider a pre-sentence report unless that is thought to be unnecessary.' "

[16] It is on this basis that we came to the view that, in this case, it would be helpful to obtain a social enquiry report in relation to the appellant. In addition, given the

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[1] [2015] JMCA Crim 33, para [9]

apparent senselessness of the attack on the complainant by the appellant, a mature man with no previous convictions for offences involving violence, we were persuaded that, as Mr Ho-Lyn had submitted, it might also be of value to obtain a forensic psychiatric report.

[17] In the result, the court and counsel were in due course provided with a social enquiry report dated 24 March 2016 and a psychiatric report dated 5 May 2016.

[18] The social inquiry report confirmed the appellant's date of birth as 23 July 1975. It revealed that he was one of at least eight siblings but he himself was as far as was known childless. He was said to be literate. He was in good health and at the time of his arrest he earned his living as a fisherman while selling cash crops to supplement his income. Since his incarceration, it appeared that he had maintained a good record of behaviour in prison; the correctional officers assigned to his section commended him for his positive attitude towards his fellow inmates; and considered him to be cooperative and respectful. The report also confirmed the appellant's one previous conviction for possession of ganja. Some members of his family described him as "a sociable individual who was not known to initiate trouble", while others described him as "an aggressive individual who is not minded to control his temper as he responds with violence when provoked". They attributed his aggression to his frequent use of ganja and some were of the opinion that a long period of incarceration would be of benefit to him. Some members of the community in which he lived prior to his arrest expressed similar views, saying that from time to time he displayed bouts of aggression and that

people were afraid of him. Yet others said that, "he can be lamb but a 'lion' when provoked". The report also suggested that the appellant was "a repeat offender [with] offences of a violent nature".

[19] The psychiatric report was prepared by Dr Clayton Sewell, a lecturer and consultant psychiatrist at the University of the West Indies, Mona, and a sessional psychiatrist in the Department of Correctional Services of the Ministry of National Security. Dr Sewell interviewed the appellant for the purposes of preparing his report on 4 March 2016 and reported that the appellant was cooperative throughout the interview. The report revealed nothing unusual about either the appellant's physical or mental health. As far as the latter was concerned, Dr Sewell's assessment was that the appellant had "fair insight and his judgment was normal". The appellant admitted to Dr Sewell that he had used ganja up to eight months prior to the date of the interview. He also told Dr Sewell that, before his incarceration, he drank alcohol occasionally, but denied any crack/cocaine use. The report confirmed much of the information contained in the social enquiry report, save that it stated that the appellant was illiterate. Dr Sewell's conclusion was that the appellant manifested no psychiatric disorder, but was a person of poor educational attainment with mild impairment. Dr Sewell stated further that the appellant was not under the influence of an abnormality of the mind at the time of the offence; he understood the nature of the offence; now admitted his guilt; had no suicidal or homicidal tendencies; and did not appear to be an imminent danger to others. Finally, Dr Sewell considered that the appellant "would benefit from being

engaged in rehabilitation and educational programmes, given his illiteracy and limited educational attainment".

[20] When the matter resumed before us on 19 September 2016, Mr Ho-Lyn made the brief further submissions on the question of sentence. Dealing firstly with the new material, Mr Ho-Lyn identified two issues of fact, the first being whether the appellant was literate, as the social enquiry report indicated, or illiterate, as Dr Sewell's report suggested. This was significant, Mr Ho-Lyn suggested, because illiteracy sometimes contributed to a reduced capacity to resolve problems otherwise than by way of violence. The second issue of fact was whether the appellant had ever been to prison (before his conviction in this case) for the offence of wounding. Mr Ho-Lyn next drew attention to the fact that there was no indication that the appellant suffered from an anti-social personality disorder, suggesting that he would therefore be more amenable to rehabilitation. (Though Mr Ho-Lyn did make the point that it might also have been helpful for there to have been some better evidence of the appellant's conduct in prison since his incarceration as this might also have an impact on his capacity for rehabilitation.) And finally, Mr Ho-Lyn emphasised the fact that the appellant now admitted his guilt.

[21] Turning next to what should be the appropriate sentence in this case, Mr Ho-Lyn referred us to the draft sentencing table which is expected to form part of the sentencing guidelines currently in an advanced stage of preparation for use in the Supreme Court. This table indicates that, for the offence of wounding with intent under

section 20 of the Act, which provides for a maximum sentence of imprisonment for life, the normal sentencing range should be 7 to 20 years, with a usual starting point of 7 years. But Mr Ho-Lyn suggested that in the instant case, which was a case of a "premeditated, savage and continuing attack", the usual starting point of 12 years for attempted murder, as indicated by the draft guidelines, might be more appropriate and that, taking all aggravating factors into account, a sentencing court could well arrive at a figure of 20 years, before accounting for mitigating factors. In this last regard, Mr Ho-Lyn urged us to give credit to the appellant for the time spent in custody pending trial, while at the same time, just as the judge had done, leaving his previous conviction for possession of ganja out of account. Finally, Mr Ho-Lyn asked us to take note of the fact that the appellant's conduct in prison since his conviction was reported to be good.

[22] For the Crown, Mrs Milwood-Moore was content to indicate that, in her view, the sentence of 28 years' imprisonment imposed by the judge appeared to be excessive.

[23] On the first of the two issues of fact raised by Mr Ho-Lyn, we do not attribute any particular significance in this case to the issue of whether the appellant was literate or not. Nothing has been put before us to suggest that illiterate persons are more prone, as Mr Ho-Lyn implied, to commit wanton acts of violence than others and, in the absence of any evidence to this effect, we would be loath to approach the matter on any such basis. And, as for the question of the appellant's previous convictions, we approach the matter on the basis of the information supplied to the court by the police, which was that he had a single conviction for possession of ganja some 15 years ago.

[24] The judge was obviously moved to consider, as we have been, that the senseless savagery of the appellant's attack on the complainant called for condign punishment. But we should say at once, that it is not at all clear to us how the judge, having identified 15 to 18 years' imprisonment as standard for a serious case of wounding, which this undoubtedly was, managed to get to 30 years' imprisonment, before any deduction for time spent in custody pending trial. In our view, this very lack of clarity as to the judge's thought processes in this regard must provide some justification for Mr Ho-Lyn's complaint that no objective rationale has been shown for his conclusion.

[25] We do not doubt that in this case the appellant's conduct fully warranted a sentence of imprisonment. Indeed, Mr Ho-Lyn conceded as much, observing that the nature of the offence committed by the appellant "does call for a long sentence". In the recent decision of this court in the case of **Meisha Clement v R**[2]**,** the court adopted the approach to sentencing previously articulated by Harrison JA, as he then was, in **R v Evrald Dunkley**[3]; which is that, having decided that a sentence of imprisonment is appropriate in a particular case, the sentencing judge's first task is to "make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise".

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[2] [2016] JMCA Crim 26, para [26]
[3] RMCA No 55/2001, judgment delivered 5 July 2002, page 4

[26] As regards the method of arriving at the starting point, the court went on to say this in **Meisha Clement v R**[4]:

> "... in arriving at the appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence. Although not a part of our law, the considerations mentioned in section 143(1) of the United Kingdom Criminal Justice Act 2003 are, in our view, an apt summary of the factors which will ordinarily inform the assessment of the seriousness of an offence. These are the offender's culpability in committing the offence and any harm which the offence has caused, was intended to cause, or might foreseeably have caused."

[27] In our view, a starting point at the top of the usual range identified by the judge in this case, that is, 18 years' imprisonment, would have appropriately reflected the intrinsic seriousness of the offence committed by the appellant. To this figure, we considered that something should be added to reflect the plainly aggravating factors of: (i) the clear premeditation of the attack on the complainant; and (ii) the appellant's obvious intention to commit more serious harm than actually resulted from the offence (as evidenced by the appellant's telling remark to the complainant at the end of the attack, "Yuh dead now"). But, on the side of mitigation, we would leave the appellant's single previous conviction out of account, thus entitling him to be treated as a person with no previous convictions. We also considered that, as the judge did, it was right to give the appellant credit for the approximately two years which he spent in custody pending trial. It is by this means that, taking all factors into account, we came to the

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[4] At para [29]

conclusion that a sentence of 17 years' imprisonment would be appropriate in all the circumstances of this case.

[28] Finally, we must express our gratitude and appreciation to Mr Ho-Lyn for his ever thoughtful and wholly realistic advocacy in this matter.