

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE LAING JA (AG)**

SUPREME COURT CRIMINAL APPEAL NO 40/2015

KEVIN MALABRE v R

Michael Jordan for the appellant

Miss Kathy-Ann Pyke and Ms Debra Bryan for the Crown

22 May 2024

Endorsement read by P Williams JA

[1] On 4 May 2015-, the appellant was convicted by a judge, sitting with a jury for the offence of murder. On 19 June 2015, he was sentenced to life imprisonment at hard labour, with the stipulation that he becomes eligible for parole after 35 years. He applied for leave to appeal his conviction and sentence. On 21 May 2021, a single judge of this court refused the application for leave to appeal the conviction but granted leave to appeal his sentence.

[2] The facts, as presented by the prosecution, were that an eyewitness saw when the appellant shot, Iran Morris, the deceased, who was walking with his son who was two years old at the time, in the community of Cockburn Gardens in the parish of Saint Andrew.

[3] Following discussions with the bench, Mr Jordan accepted that two of the 17 grounds originally filed that he sought to pursue, were without merit. The leave to appeal conviction was, therefore, refused. Mr Jordan pursued the appeal against sentence primarily on the basis that the learned trial judge gave no apparent consideration to the time spent in pre-trial custody.

[4] In arriving at the sentence the learned trial judge demonstrated clearly an appreciation of the principles of sentencing and the factors he took into account. In particular, he identified the mitigating and aggravating factors and recognised the time spent in pre-trial custody. He specifically took into account the pre-**Meisha Clement v R** [2016] JMCA Crim 26 authority of **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered 5 July 2002 from our court. He mentioned the case of **Director of Public Prosecutions v Shaunlee Fahie** BVI HCRAP 2008/003, judgment delivered 11 January 2010, and **Benjamin v R** (1964) 7 WIR 459. He also recognised **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ) in relation to the time spent in custody.

[5] When we apply the current practice, which requires a demonstration of a more transparent mathematical approach to the sentencing exercise, we find that a period of between 28 – 30 years' imprisonment pre-parole for a gun murder of this nature would be appropriate. Using the aggravating features identified by the learned trial judge and taking into account the mitigating factors also identified by the learned trial judge we would arrive at a sentence of between 40 – 43 years. Finally taking into account the five years spent in pre-trial custody, the sentence of 35 years pre-parole is not manifestly excessive and was appropriate in the circumstances of this case. Therefore, we find no basis to interfere with the sentence imposed.

[6] In light of the foregoing, the court orders as follows:

1. The application for leave to appeal conviction is refused.
2. The appeal against sentence is dismissed.
3. The sentence of life imprisonment with the stipulation that the appellant serve 35 years before becoming eligible for parole is affirmed.

4. The sentence is reckoned as having commenced on 19 June 2015, the date on which it was imposed.