[2022] JMCA Crim 48

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CRIMINAL APPEAL NO 64/2014

CHARLES MCDONALD V R

Mrs Emily Shields and Miss Maria Brady instructed by Gifford, Thompson & Shields for the applicant

Miss Tamara Merchant and Mrs Christina Porter for the Crown.

8 June and 10 October 2022

SIMMONS JA

[1] On 8 June 2022, this court heard submissions from counsel for both parties and at the conclusion of the hearing we made the following orders:

> "1. The application for leave to appeal conviction and sentence is refused.
>
> 2. The sentence is to be reckoned as having commenced on 13 June 2014; the date when it was imposed."

[2] On that date, we promised to put our reasons in writing. This judgment is a fulfilment of that promise.

Background

[3] This was an application brought by Mr Charles McDonald ('the applicant') seeking leave to appeal his conviction and sentence, following a trial, before D Fraser J, (as he then was) (the learned trial judge), in the Circuit Court for the parish of Westmoreland.

[4] The applicant was tried on 10 and 11 June 2014 on an indictment charging him with the offence of arson. The particulars of the offence are that the applicant, on 25 February 2013, in the parish of Westmoreland, unlawfully and maliciously set fire to a dwelling house with the intent to injure or defraud.

[5] On 13 June 2014, the applicant was sentenced to 12 years' imprisonment at hard labour.

The applications for extension of time in which to file a notice of appeal and for leave to appeal

[5] The applicant filed applications (both dated 8 July 2014) in this court for an extension of time in which to file a notice of appeal and for leave to appeal conviction and sentence.

[6] The applications were considered by a single judge of appeal on 23 August 2018, who granted the application for the extension of time. The application for leave to appeal was refused and the applicant renewed his application before this court, as is his right.

The prosecution's case

[7] It was the prosecution's case, that on 25 February 2013 in the parish of Westmoreland, at around 1:00 am, Desmond Morris ('the complainant') was inside his home with his wife when he heard a door being kicked down. He described the house as being comprised of seven apartments. Several persons lived at the premises which was "a tenement yard". The complainant gave evidence that he saw the applicant coming from the room where the door had been kicked in. The applicant was accompanied by two other men who were armed with homemade firearms. The complainant stated that the applicant who had gone to the roadside, returned, lit a match and threw it through a window into the same room where the door had been kicked in. After the fire started blazing the men left the premises. Most of the belongings of the complainant and his wife

were destroyed by the fire. The complainant had known the applicant for about 25 years prior to the incident.

The case for the applicant

[8] In his unsworn statement the applicant denied any wrongdoing and asserted that the allegation against him was made out of malice.

The grounds of appeal

[9] At the hearing of the appeal, the applicant through his counsel, Mrs Shields, abandoned the application for leave to appeal his conviction. Counsel also sought and obtained leave to abandon the original grounds of appeal filed and to rely on the amended ground of appeal filed on 31 May 2022. The amended ground which relates to sentence solely states as follows:

> "1. The sentence of twelve (12) years for arson is manifestly excessive having regard to the fact that [sic] normal range for sentences imposed in cases of arson where dwelling houses are concerned is a high of fifteen (15) and a low of three (3) years, depending on the circumstances-in that:
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> (a) The learned trial judge failed to demonstrate that in conducting the sentencing process, he'd [sic] commenced with a starting point for determining the range of sentence which would be appropriate;
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> (b) The learned trial judge failed to demonstrate that he'd [sic] given the applicant the full credit for the time spent in custody before sentencing;
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> (c) The learned trial judge failed to demonstrate at all or failed to demonstrate with any degree of mathematical precision the years added to any starting point based on [the] aggravating circumstances of the case;
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> (d) The learned trial judge failed to demonstrate at all or with any degree of mathematical precision the years subtracted from the sentence based on the mitigating circumstances of the case;

(e) The learned trial judge failed to order a social inquiry which may have assisted the court in better understanding the circumstances of the convict- [sic] such circumstances as may have impacted the sentencing process and which social inquiry report would of [sic] necessity capture the peculiarities of the offender-such peculiarities being important to the sentencing process."

Applicant's submissions

[10] Mrs Shields having referred to the principles that guide this court in appeals against sentence, as set out in **R v Alpha Green** (1969) 11 JLR 283 at page 284 ('**Alpha Green**') and **Meisha Clement v R** [2016] JMCA Crim 26, ('**Meisha Clement**') at para. [43]), submitted that the sentence imposed was manifestly excessive. Counsel stated that section 4 of the Malicious Injuries to Property Act, prescribes a maximum penalty of life imprisonment for the offence of arson.

[11] It was also submitted that the learned trial judge failed to apply the known principles of sentencing; those being retribution, deterrence, prevention and rehabilitation. Counsel further stated, that the learned trial judge failed to identify a starting point and demonstrate that any arithmetical calculations were used to determine the length of the sentence. In this regard, reliance was placed on **Meisha Clement**. It was submitted, that the starting point based on **Lindell Howell** [2017] JMCA Crim 9, ('**Lindell Howell**') was between 12 and 15 years.

[12] Where the time spent in custody was concerned, counsel submitted that there was no evidence that the applicant was given full credit for the year which he spent in custody, notwithstanding the learned trial judge's indication that he would have taken that period into account. In this regard, counsel relied on **Lindell Howell**.

[13] Where the length of the sentence was concerned counsel examined **Lindell Howell** (sentence of 18 years' imprisonment reduced to 10 years' imprisonment), **R v Regan** [2007] EWCA Crim 2343 (sentence of 12 months' imprisonment reduced to six months' imprisonment) and **Anthony Atkinson and another v R** [2016] JMCA Crim 4 ('**Anthony Atkinson**') (sentences of four and five years' imprisonment imposed on each

appellant). Mrs Shields submitted that the facts in **Anthony Atkinson** were comparable to that of the applicant and as such, a similar sentence was appropriate.

[14] Counsel further submitted that a social enquiry report ought to have been relied upon by the learned trial judge, in assessing the peculiar circumstances of the applicant's case, before handing down a sentence. This was especially so where as in this case: (i) the trial was of short duration, (ii) the applicant gave an unsworn statement and (iii) no character witnesses were called.

[15] It was counsel's submission that 10 years would have been an appropriate starting point, and having regard to the aggravating and mitigating factors, a sentence of eight years would have been appropriate.

Respondent's submissions

[16] Miss Merchant submitted that the learned trial judge's failure to identify all the principles of sentencing did not make the sentence excessive. She pointed out that he had made reference to retribution and rehabilitation in his sentencing remarks.

[17] Where his failure to identify a starting point or engage in an arithmetical calculation of the sentence was concerned, it was submitted that those omissions were not fatal to the sentencing process. Counsel asked the court to consider that the sentencing of the applicant pre-dated the decision of this court in **Meisha Clement** and the Sentencing Guidelines for Use by Judges of the Supreme Court and the Parish Courts that were promulgated in December 2017 ('the Sentencing Guidelines '). It was submitted further, that in any event, the relevant principles were applied in substance and the sentence was not excessive. (See **Ryan McLean and others v R** [2021] JMCA Crim 21).

[18] In respect of the time the applicant spent in custody, counsel accepted that based on **Meisha Clement** and **Mohamed Iqbal Callachand and Anor v State of Mauritius** [2008] UKPC 49 ('**Callachand**') full credit was to be given to the applicant. Counsel submitted that the learned trial judge addressed his mind to that issue even though there was no arithmetical deduction.

[19] The absence of a social enquiry report, it was submitted, caused no prejudice to the applicant as it would not have provided any real benefit to him. Counsel argued that the court had the information gleaned from the applicant's antecedents, coupled with submissions advanced on his behalf, which painted a favourable picture of him. Reference was made to **Sylburn Lewis v R** [2016] JMCA Crim 30 ('**Sylburn Lewis**'), in support of the submission that the provision of a social enquiry report as an aid to sentencing was a discretionary matter. Reliance was also placed on **Michael Evans v R** [2015] JMCA Crim 33 ('**Michael Evans**').

[20] In addressing the issue of whether the sentence imposed was excessive, counsel referred to the principle in **Alpha Green**, which guides this court in its review of sentence, that there will be no interference with a sentence unless there was an error in principle that resulted in the imposition of an excessive sentence. She made the point that the sentence must relate to the circumstances of the case, the antecedents of the offender and the usual range of sentences for a similar offence (**R v Gary Hoyes**, (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No. 33/88, judgment delivered 26 September 1988). It was submitted that in all the circumstances, the sentence of 12 years' imprisonment was not excessive (see **Lindell Howell**). She argued that if a starting point of 5 years' imprisonment was used, the aggravating factors would increase the sentence to 15 years. When the mitigating factors were considered it would result in a sentence of 13 years from which the one year spent in custody would be deducted, resulting in a sentence of 12 years' imprisonment. The sentence imposed was therefore lenient.

Analysis

[21] The jurisdiction of this court to disturb the discretion of a sentencing judge is well settled. Section 14(3) of the Judicature (Appellate Jurisdiction) Act provides:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe)

> in substitution therefor as they think ought to have been passed, and in any other case, shall dismiss the appeal."

[22] The principles which guide the exercise of that discretion were addressed in **Alpha Green**, in which the court at page 284, adopted the following statement of Hilbery J in **R v Ball** (1951) 35 Cr App Rep 164 at page 165:

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. **It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then the Court will intervene**." (Emphasis supplied)

[23] The approach to be taken by the court in considering an appeal against sentence was set out in **Meisha Clement** at para. [43]:

> "[43] On an appeal against sentence, therefore, 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."

[24] The decisions of **Meisha Clement** and **Daniel Roulston v R** [2018] JMCA Crim 20 ('**Daniel Roulston**') and the Sentencing Guidelines, provide a template for the methodology that is to be applied by a sentencing judge in the sentencing exercise. However, the applicant in this matter was sentenced prior to those decisions and the Sentencing Guidelines. Notwithstanding, the learned trial judge would have had the benefit of guidance from **Regina v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July

2002. At pages two to three of the judgment, P Harrison JA (as he then was), writing for the court, stated:

> "Sentencing is the process by which the ultimate decision of punishment is reached, and then the sentencer declares the nature of the punishment, after conviction for an offence. The principles which govern the method by which that ultimate goal is achieved, have been well formulated and generally accepted. The aim of the sentence is to satisfy, the goals of:
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> (a) Retribution;
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> (b) Deterrence;
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> (c) reformation and
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> (d) protection of the society
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> or any one or a combination of such goals, depending on the circumstances of the particular case.
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> The sentencer commences this process after conviction by determining, at the initial stage, the type of sentence suitable for the offence being dealt with. He or she first considers whether a non-custodial sentence is appropriate, including a community service order. If so, it is imposed. If not, consideration is given to the other options, ranging from the suspended sentence to a short term of imprisonment…
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> If therefore the sentencer considers that the 'best possible sentence' is a term of imprisonment, he should again 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. The factors to be considered in mitigation of a sentence of imprisonment are, whether or not the offender has:
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> (a) pleaded guilty;
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> (b) made restitution; or
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> (c) has any previous conviction.
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> These factors must be considered by the sentencer in every case before a sentence of imprisonment is imposed."

[25] The learned trial judge would also be required to consider the time that the applicant spent in custody on pre-trial remand. In **Callachand** Sir Paul Kennedy who delivered the decision of the Board stated at para. 9:

> "In principle it seems to be clear that where a person is suspected of having committed an offence, is taken into custody and is subsequently convicted, the sentence imposed should be the sentence which is appropriate for the offence. **It seems to be clear too that any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing**." (Emphasis added)

[26] This principle has been applied by this court in several cases, including **Meisha Clement, Sylvan Green and ors v R** [2021] JMCA Crim 23 ('**Sylvan Green**') and **Lindell Howell**. The sentencing of the applicant in this matter pre-dated those decisions. In **Sylvan Green**, McDonald-Bishop JA stated:

> "[53] It was recognised that this case was before the guidance given on this question in **Meisha Clement**, which, seemingly, introduced within our jurisdiction for the first time, the rule of law established by the Privy Council in **Mohamed Iqbal Callachand & Anor v The State** [2008] UKPC 49 ('**Callachand**'), and followed by the Caribbean Court of Justice ('CCJ') in **Romeo DaCosta Hall v The Queen** [2011] CCJ 6. According to these highly persuasive authorities, the court must take fully into account time spent in custody before sentencing.
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> [54] The Privy Council in **Callachand** had further instructed that taking the time spent in custody into account should not simply be by means of a form of words but by an arithmetical deduction when assessing the length of the sentence to be served from the date of sentencing. It is now settled beyond question, on the strong authority of **Meisha Clement**, that the principles regarding the treatment of pre-trial/pre-sentence remand in the sentencing process, laid down by the Privy Council in **Callachand**, should apply in this jurisdiction to courts at all levels."

[27] The learned trial judge in considering the sentence addressed two of the principles of sentencing; punishment and rehabilitation. He also identified the aggravating and mitigating factors. They were stated to be as follows:

i. Aggravating factors: seriousness of the offence, offence committed at night when persons were home sleeping, risk to property and lives, applicant was accompanied by two other men who were armed with homemade firearms, premeditation, previous convictions and negative impact on the victim who lost property;

ii. Mitigating factors: arson is not a prevalent offence, antecedent report showed the applicant to be a trying man and the applicant expressed a desire to change for the better.

[28] However, the learned trial judge did not identify a starting point and there was no mathematical computation of the sentence to take account of the aggravating and mitigating factors. He also failed to demonstrate that he had given the applicant full credit for the time spent in pre-trial custody. He simply stated:

> "…I am going to also take into account the fact that you spent almost one year in custody. In fact, it would be a little more than a prison year in custody before you got bail."

[29] The learned trial judge's treatment of this issue was in keeping with the practice before **Meisha Clement** and **Callachand**. However, in **Sylvan Green**, McDonald-Bishop JA stated that notwithstanding that fact, it must be evident on the face of the record that full credit was given for the time spent in pre-trial remand. She stated:

> "[55] In keeping with the state of the law and practice as it was before **Meisha Clement**, the trial judge stated that he had taken into account the fact that the applicants were in custody before sentencing but did not indicate or demonstrate, by any arithmetical formula, the deduction he had made for time spent in pre-sentence remand. Therefore, this court was unable to definitively say whether he had applied any arithmetical formula and, if so, what was the

> extent of the deduction he made. As a result, it was not established to the court's satisfaction that the applicants were fully credited for the time spent on pre-sentence remand. We considered that, in keeping with the current law and practice in this court, and more so, in the interests of justice, allowance should be made for the full time spent in custody awaiting trial and sentencing in this case.

[30] Similarly, in this case, we were unable to conclude with any certainty that full credit was given to the applicant for the time he spent on pre-trial remand, as the learned trial judge did not indicate what the sentence would have been, before that period was deducted. As stated by Brooks JA (as he then was), in **Lindell Howell** at para. [46] "[j]udges should demonstrate that that [sic] credit has been applied". In light of the failure of the learned trial judge to identify a starting point and the lack of clarity in respect of his treatment of the time the applicant spent in custody, in accordance with the established practice of the court, we concluded that the learned trial judge erred in principle. As such, we were entitled to consider the matter afresh.

[31] Counsel for the applicant also took issue with the fact that the applicant was sentenced without the benefit of a social enquiry report. Mrs Shields submitted that its absence deprived the applicant of the opportunity to have the court assess other factors not mentioned in the antecedent report. This issue was addressed in **Michael Evans** and **Sylburn Lewis**. In **Michael Evans**, McDonald-Bishop JA recognised the utility of social enquiry reports and stated at para. [9] that it was a "good sentencing practice" for one to be obtained. The learned judge of appeal continued:

> "[9]… 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'."

[32] McDonald-Bishop JA, at para. [12], concluded that the learned judge did not err in principle by failing to procure a social enquiry report, as there was "nothing from which [the court] could conclude that the applicant would have been prejudiced, in any way, by the absence of a social enquiry report".

[33] In **Sylburn Lewis**, the learned judge in arriving at the sentence imposed, did not have a social enquiry report but had the benefit of the antecedent report. It was argued on Mr Lewis' behalf, that it was wrong in principle, for the learned judge to have embarked on the sentencing exercise without information pertaining to his personal circumstances as would have been provided by a social enquiry report. In the final analysis it appeared that the only fact taken into account was the approximately two years that the appellant spent in custody pending his trial. A social enquiry report was requested by this court. However, Morrison P at para. [15] stated:

> "[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**, as 'the utility of social enquiry reports'." (Emphasis supplied)

[34] As stated by McDonald-Bishop JA in **Michael Evans**, it is "good sentencing practice" to obtain a social enquiry report. In the present case, there is no indication from the transcript that a social enquiry report was requested. The court did, however, have the benefit of the antecedent report and counsel in his plea in mitigation highlighted certain aspects of the applicant's life and his personality. In particular, counsel highlighted that since the applicant's conviction for possession of ganja some eight years prior to his conviction in the present case, he had had no other "brush with the law". The applicant was described as hardworking and the court was informed that he had expressed remorse for his actions. In addition, it was highlighted that the applicant had a difficult upbringing and did not have the benefit of being guided by a father or any other male figure. Before us, there was no submission made in respect of how the applicant may have been prejudiced by the absence of a social enquiry report. In the circumstances, we found that the learned trial judge did not err in principle by failing to procure such a report.

Was the sentence excessive?

[35] In **Meisha Clement**, Morrison P set out the methodology that should guide the court in its quest to arrive at an appropriate sentence. This issue was also addressed by McDonald-Bishop JA in **Daniel Roulston**, who stated at para. [17]:

> "[17] Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:
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> a. identify the sentence range;
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> b. identify the appropriate starting point within the range;
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> c. consider any relevant aggravating factors;
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> d. consider any relevant mitigating features (including personal mitigation);

> e. consider, where appropriate, any reduction for a guilty plea;
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> f. decide on the appropriate sentence (giving reasons); and
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> g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."

[36] Section 4 of the Malicious Injuries to Property Act which speaks to the offence of arson provides for a maximum sentence of life imprisonment. The Sentencing Guidelines do not address this offence. We therefore sought guidance from previously decided cases.

[37] Arson is a serious offence. In **R v Regan**, Simon J stated:

> "[30] As has been said frequently in this court, the seriousness of the crime of arson is the risk of danger to others. An act of arson done out of spite or resentment against a particular person can endanger the life and property of, not just that person but the lives and property of many others: neighbours, the fire services and all that have a duty to respond to a fire. It is for this reason that deterrent sentences must be passed for this crime."

[38] The cases of **Anthony Atkinson** and **Lindell Howell** are relevant in respect of this issue. In **Anthony Atkinson**, the appellants were convicted of arson having been found guilty of setting fire to a shop and a bird coop. They were sentenced to four years' imprisonment and five years' imprisonment respectively on each count. Their appeal against conviction was dismissed. The issue of sentence was not considered by this court.

[39] In **Lindell Howell**, the appellant pleaded guilty to the offence of arson, having set fire to a home in the night whilst persons were inside. He was sentenced to 18 years' imprisonment at hard labour. Brooks JA, in his quest to determine whether the sentence imposed was excessive considered a number of cases. He referred to **R v Marcellous Robinson**, (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No. 47/1997, judgment delivered 7 July 1998, in which the conviction of the appellant who had been sentenced to 12 years' imprisonment was set aside. It was noted that in that

case, there had been no consideration of the sentence by this court. Reference was also made to **Anthony Atkinson**, **R v George Frankham** [2007] EWCA Crim 1320, **R v Regan** and **R v Wellington** (2013) (1) CILR 364. Brooks JA concluded that if a custodial sentence is considered to be appropriate for arson in respect of a dwelling house, the range of sentences is from three to 15 years' imprisonment "for the ordinary cases of arson". He also stated that an appropriate starting point was between 12 and 15 years.

[40] In **Lindell Howell**, a starting point of 15 years was used as the appellant had barred the door to the house in order to prevent the persons inside from exiting. The sentence was reduced to ten years having regard to his guilty plea and the time spent in custody.

[41] In the present case, we agreed with the learned trial judge that a custodial sentence is appropriate. The offence is quite serious, bearing in mind the extent of the risk to life, having regard to the number of persons who could have been injured or killed as a result of the applicant's actions. As such, we used a starting point of twelve years' imprisonment. The aggravating factors were as follows:

i) The offence was committed at 1:00 am;

ii) There was forcible entry into the house;

iii) The applicant was accompanied by two other persons who were armed;

iv) The risk of loss to property other than the building; and

v) Premeditation.

[42] The mitigating factors were:

i) The evidence that the applicant was an industrious person;

ii) The applicant's indication that he wanted to make a positive change to his life; and

iii) The fact that the applicant had a clean record for seven years before the commission of the offence.

[43] When the aggravating circumstances are considered, the sentence would be increased to at least 18 years' imprisonment. Three years would be deducted on account of the mitigating factors, which would reduce the sentence to at least 15 years' imprisonment. When the approximately 12 months spent in custody is taken into account, an appropriate sentence would have been at least, 14 years' imprisonment.

[44] In the circumstances, we were not persuaded that the sentence of 12 years' imprisonment was manifestly excessive, on the bases advanced by counsel for the applicant. We, therefore, concluded that the application for leave to appeal sentence should be refused and made the orders set out at para. [1] of this judgment.