[2020] JMCA Crim 28

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 225/2004

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS CAROL EDWARDS JA (AG)

JERMAINE McINTOSH v R

Robert Fletcher for the applicant

Miss Annette Austin for the Crown

22, 23 November 2016 and 10 July 2020

MORRISON P

Background

[1] The applicant was convicted of the offence of murder on 3 December 2004, after a trial before Straw J (as she then was) ('the judge') and a jury in the Home Circuit Court. After a sentencing hearing held that same day, the judge sentenced the applicant to imprisonment at hard labour for life, with a stipulation that he should serve a minimum of 30 years before becoming eligible for parole.

[2] The applicant's application for leave to appeal against his conviction and sentence was considered on paper, and refused, by a single judge of this court on 16 January 2007. This was, therefore, the applicant's renewed application for leave to appeal against his conviction and sentence.

[3] The application was heard on 22 and 23 November 2016. On the latter date, the court refused it and ordered that the applicant's sentence should run from 3 December 2004. With profuse apologies for the delay in providing them, these are the promised reasons for the court's decision.

[4] At the outset of the hearing of the application on 22 November 2016, Mr Robert Fletcher for the applicant sought leave to argue two supplementary grounds of appeal in substitution for the grounds which were originally filed by the applicant[1]. This application was granted without objection from Miss Annette Austin, who appeared for the Crown in this court.

[5] The two grounds of appeal were as follows:

> "1. The sentence was manifestly excessive.
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> 2. The failure of the police authority to provide the court with the station diary subpoenaed, significantly compromises the applicant's ability to bring, by way of fresh evidence, information which may challenge the veracity of critical evidence given at the trial."

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[1] Mr Fletcher initially indicated the applicant's intention to rely on a third supplementary ground, in which complaint was made as to the judge's summing-up. However, he did not pursue this ground at the hearing of the application.

[6] We will subsume these grounds of appeal under the headings, 'The sentence issue' and 'The station diary issue'. However, for the purposes of discussion, it will in due course be convenient to reverse the order in which they were presented. But, first, we must give a brief account of what transpired at the trial.

The trial

[7] The prosecution alleged that the applicant murdered Mr Leon Richards ('the deceased') on 17 September 2003. At the trial, the prosecution relied on the evidence of a single eyewitness, Mr Dean Perry, a friend of the deceased. Mr Perry testified that at about 9:00 – 10:00 pm on the evening in question, he and the deceased were sitting together on a pedestrian bridge in the Greater Portmore area of Saint Catherine. While they were there, a man known to him as 'Sugar' rode up to them on a bicycle. Shortly after that he saw another man, who was known to him as 'Jomo', coming up the road. After asking the deceased about the whereabouts of someone called 'Muta', 'Sugar' pulled a gun and shot the deceased in the head. Mr Perry said that the time which elapsed from when Sugar rode up and when he fired the first shot was about five to six minutes, and that during all of this time he had a clear view of the applicant.

[8] After the deceased was shot, Mr Perry ran off to a friend's house. While running, he heard explosions behind him, felt like something had hit him in the right side and, when he looked, he noticed that it was bleeding. But he returned to the scene a few minutes later, where he saw the deceased's body hanging over the bridge on which they had both been sitting. By this time a policeman was also on the scene.

[9] The policeman was Detective Corporal Everald Bennett, who was attached to the Saint Catherine South Homicide Unit, with offices at the Portmore Police Station. His evidence was that at about 9:15 that evening, whilst at the station, he received a report and immediately proceeded to the scene. About 10 minutes after he arrived at the scene, Detective Corporal Bennett was approached by Mr Perry, who made a report to him. The area was well lit by several street lights and outside lights from nearby houses. After noting that Mr Perry had what appeared to be a gunshot wound to his left side, Detective Corporal Bennett immediately sent him off to the Spanish Town Hospital with another police officer. He also arranged for the deceased to be taken to the Spanish Town Hospital. The deceased was pronounced dead on arrival. The post-mortem examination would subsequently reveal that the deceased had received two gunshot wounds, one each to the head and the back, and that the cause of death was the wound to the head.

[10] Mr Perry testified that Sugar was known to him before the night in question. He had seen him twice before in the Greater Portmore area, the second time being at about 4:00 pm on the afternoon of 17 September 2003, the same day of the murder, in the vicinity of Muta's gate. At that time, there had been some kind of altercation involving Muta and Jomo, which resulted in Jomo going away briefly and returning with

Sugar about five minutes afterwards. A quarrel had then ensued between Muta and Sugar, which ended with Muta "running Sugar from his gate"[2].

[11] Detective Corporal Bennett obtained a warrant for the arrest of a man known only as Sugar. While on duty at the Portmore Police Station on 20 October 2003, he received certain information and went over to the CIB office at the station. He was shown a man, who gave his name as "Jermaine McIntosh otherwise called Sugar". He identified that man in court as the applicant.

[12] According to Detective Corporal Bennett, after he told the applicant what the allegations against him were and cautioned him, the applicant told him that, "Jomo really come call me and me go talk to the youth dem but me left and go a town after dat"[3].

[13] At an identification parade held on 30 October 2003, Mr Perry pointed out the applicant as Sugar, the man who shot and killed the deceased on 17 September 2003.

[14] The applicant gave sworn evidence in his defence. He completely denied knowing either Mr Perry or the deceased, speaking to any of them, or being involved in the killing of the deceased in any way. He said that at all times during the day and night of 17 September 2003 he was in Central Kingston at the home which he shared with his then girlfriend. He also denied seeing, making any statement to, or having any

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[2] Transcript, page 50
[3] Transcript, page 235

conversation with Detective Corporal Bennett at the Portmore Police Station CIB office on 20 October 2003. He also denied that he was known as Sugar.

[15] After the judge's summing-up, about which no complaint was ultimately made on the hearing of the application for leave to appeal[4], the jury returned a unanimous verdict of guilty of murder.

[16] In a brief antecedent report given at the sentencing hearing on 3 December 2004, the court was told that the applicant was a single man of 22 years of age, with no dependents. He had spent a total of six years attending high school, before having to leave because of an accident. After leaving school, he had been variously employed at a supermarket, with a security company as a security guard and in a business which pressed records and compact discs. At the time of his arrest, he was a self-employed "higgler". He had one previous conviction for possession of ganja, for which he was fined.

[17] In her sentencing remarks, the judge said this[5]:

> "Mr. McIntosh, you are a young man, twenty-two years old, you have been found guilty of a very, horrible crime, a crime of murder, we call it the ultimate crime, because it means that you have taken a human life without excuse or justification for the taking of that life. Our society and our constitution say that everybody has a right to live until natural reasons say otherwise, and in sentencing you, I have

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[4] See footnote 1 above.
[5] Transcript, pages 459-460

> to consider that the deceased [sic] life was taken away from him, his whole right to live has gone through the door.
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> Your attorney has asked me to look at the rehabilitative side of sentencing more than any other. Sentencing has various functions including rehabilitation, deterrence, but for the Court to exercise its function the Court has to look at the type of offence and all the circumstances surrounding the offence, and as I said to you sir, this was a very horrible crime that you have been found guilty of committing.
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> The sentence is a statutory one so that I would impose a sentence of life imprisonment upon you, but I am also to state how many years you should serve before parole is considered and this is something that I have been considering. I have to look at the fact of the type of offence, the fact that the victim's life has gone through the door, he has no chance of coming back, and the fact that these crimes are also prevalent in our society.
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> So, sir, the sentence is one of life imprisonment with no possibility of parole before thirty years."

The station diary issue

[18] This issue arose in the following way. As will be recalled[6], Detective Corporal Bennett gave evidence that, on 20 October 2003, after he had cautioned the applicant and told him what was being alleged against him, the applicant remarked that "Jomo really come call me and me go talk to the youth dem but me left and go a town after dat". But in his evidence at the trial, the applicant specifically denied making any such statement to Detective Corporal Bennett on that day or at any other time. The significance of the alleged statement was that, if true, it placed the applicant in Greater

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[6] See para. [12] above

Portmore on 17 September 2003 and, to this extent, contradicted the applicant's evidence that he was at home in Central Kingston at all times during that day.

[19] When the renewed application for leave to appeal came on for hearing on 19 May 2015, Mr Fletcher indicated to the court that he had received certain instructions which, if true, would have a significant impact on the appeal. On this basis, Mr Fletcher requested and was granted an order from the court that a subpoena be issued for the station diary for the Greater Portmore Police Station containing entries for 20 October 2003. The Registrar was directed to issue a subpoena duces tecum accordingly and this was done on 12 June 2015.

[20] In a return to the subpoena made on 12 July 2015, the Senior Superintendent in charge of the Saint Catherine South Police Division reported that, despite extensive searches, the station diary for the period including 20 October 2003 was not located, whether in the stores or elsewhere.

[21] Against this background, Mr Fletcher submitted that the failure of the police authorities to provide the information sought had deprived the applicant of an opportunity to impeach Detective Corporal Bennett's credibility. In the circumstances, the absence of the station diary gave rise to a fair trial issue which should enure to the applicant's benefit. No authority was cited in support of this submission.

[22] Miss Austin pointed out that, even if the station diary had been found, it would have been necessary for the applicant to make an application for leave to adduce fresh evidence. Had this been done, the applicant would have had great difficulty satisfying

the court that the station diary was not available to him at the time of the trial and thus qualified as fresh evidence. The real basis of the prosecution's case against the applicant was the evidence of Mr Perry, who was an eyewitness to the shooting, and there was therefore ample evidence upon which the jury could have found the applicant guilty.

[23] It is true that, had the station diary been available, it would have been necessary for the applicant to obtain an order from this court to admit it as fresh evidence, pursuant to the provisions of section 28 of the Judicature (Appellate Jurisdiction) Act. And, as Miss Austin submitted, one of the conditions which the applicant would have had to satisfy on that application would have been that the evidence which it was sought to call was not available at the trial[7]. But the decision of this court in **Sean Forbes and Tamoy Meggie v R**[8] is in fact an example of a case in which an application to adduce evidence of an entry in a station diary as fresh evidence on appeal succeeded on the basis that the station diary, not being public a document, may not have been readily available to defence counsel at the trial[9].

[24] In this case, of course, because of the unavailability of the station diary, the applicant did not get even as far as this. However, in the absence of any suggestion, far less information, that the failure of the police to locate the station diary more than 11 years after the completion of the trial was the result of any kind of impropriety, we

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[7] **R v Parks** [1961] 3 All ER 633, per Lord Parker CJ at page 634
[8] [2014] JMCA App 12
[9] See the judgment of Brooks JA at para. [38]

found ourselves completely unable to accept Mr Fletcher's suggestion that the applicant's fair trial rights had been, by this reason alone, in some way compromised.

[25] In addition to her careful directions to the jury on how they should treat with discrepancies and inconsistencies and other matters affecting credibility generally, the judge also gave full and entirely accurate directions on the proper approach to evidence of identification. And, with respect to the evidence given by Detective Corporal Bennett, the judge left it squarely to the jury in the following terms:[10]

> "Now, Madam Foreman and members, it is a matter for you to decide who you believe. And let me say this, the facts of the words whether or not [the applicant] use [sic] those words to the police about Jomo calling him and he went and talk to him but he left and go to town after, that you have to decide whether he said that to the police. And if you decide whether he said that to the police, you have to decide what you make of it. It is a matter for you."

[26] In these circumstances, as it seemed to us, the jury were well placed, having seen and heard the evidence of Mr Perry and Detective Corporal Bennett, on the one hand, and of the applicant on the other, to decide whether the prosecution had proved its case against the applicant beyond a reasonable doubt.

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[10] Transcript, page 446

The sentence issue

[27] Mr Fletcher submitted that judge's approach to sentencing in this case was not "best practice"[11]. In this regard, he emphasised the absence of a social enquiry report; the perfunctory nature of the antecedent report on the applicant, the judge's failure to refer to the aspects of the report relating to the applicant's employment history; the fact that the sentence appeared to be at variance with previous sentences for like offences; and the fact that, rather than taking into account the rehabilitative aspect of sentencing, the judge appeared to have focussed on "unmitigated punishment"[12]. He accordingly submitted that, in all the circumstances, the order that the applicant should serve 30 years in prison before becoming eligible for parole was manifestly excessive and ought not to be allowed to stand.

[28] Pointing out this court's current emphasis on transparency and consistency in sentencing, Miss Austin agreed that the judge's approach may not have been "best practice". But she submitted that the jurisprudence was still evolving and that this court should be cautious not to usurp the functions of a sentencing judge unless the sentence can in fact be shown to have been manifestly excessive. In this case, the judge's brief sentencing remarks demonstrated an awareness of the cardinal principles of sentencing and a minimum period of imprisonment of 30 years before parole was within the usual range for murder. Accordingly, the judge's exercise of her sentencing discretion should not be disturbed.

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[11] Applicant's skeleton arguments, para. 5
[12] Ibid

[29] Both Mr Fletcher and Miss Austin very helpfully referred us to a number of authorities. While we have not found it necessary to refer to all of them, we take from them the following well-established propositions:

(1) The four classical principles of sentencing are retribution, deterrence, prevention and rehabilitation[13].

(2) It is for the sentencing judge in each case to apply these principles, "or any one or combination of … [them], depending on the circumstances of the particular case"[14].

(3) The now generally accepted practice is for the sentencing judge to identify a notional starting point within a broad range of sentences usually imposed for a particular offence, and then decide whether to increase or decrease the starting point to allow for aggravating or mitigating features of the particular offence[15].

(4) Obtaining a social enquiry report as an aid to sentencing is generally regarded as good sentencing practice, though it will be

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[13] **R v James Henry Sargeant**, (-1974) 60 Cr App R 74, per Lawton LJ at page 77

[14] **R v Everald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002, per P Harrison JA (as he then was), at page 3; see also **R v Anneth Livingston and others**, (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77, 81 and 93/2003, judgment delivered 31 July 2005, page 50, in which P Harrison JA (as he then was) observed, speaking of the aims of punishment, that "[s]ometimes these aims overlap and one goal may assume an ascendancy over the other".

[15] **R v Everald Dunkley**, at page 4; **Meisha Clement v R** [2016] JMCA Crim 26, para. [26]

for the sentencing judge in each case to determine whether to obtain a report in light of the circumstances of each case[16].

(5) This court will not lightly interfere with a sentencing judge's exercise of his or her discretion to fix an appropriate sentence, and will only do so where it can be shown that the sentencing judge (i) departed from the accepted principles of sentencing; and (ii) imposed a sentence outside of the range of sentences which the court is empowered to give, or the usual range of sentences imposed in like cases[17].

[30] However, as well established as these principles are, it is important to bear in mind that they – and whatever others might be assembled in a particular case - do not constitute a checklist. In other words, it does not follow that a failure to comply with any one or more of them will necessarily result in an appeal against sentence being allowed. A good example of this is **Michael Evans v R**, in which this court clearly acknowledged what McDonald-Bishop JA described[18] as "the utility of social enquiry reports in sentencing". Despite the fact that the sentencing judge did not order a social enquiry report in respect of the applicant, the application for leave to appeal against sentence failed because he was unable to demonstrate any prejudice to him from the

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[16] **Michael Evans v R** [2015] JMCA Crim 33, para. [9]; **Sylburn Lewis v R** [2016] JMCA Crim 30, para. [15]
[17] **Alpha Green v R** (1969) 11 JLR 283, 284; **Meisha Clement v R**, paras [42]-[44]
[18] At para. [9]

absence of a social enquiry report. In every case, it will, therefore, be a matter for the court to determine whether the sentence imposed was manifestly excessive in all the circumstances.

[31] In this case, the judge did not order a social enquiry report, as she might have done, in light of current practice and given the age of the applicant and his relatively clean criminal record. Nor did the judge appear to lay too much emphasis, despite mentioning it, on the applicant's potential for rehabilitation: again, particularly in light of the applicant's age and educational background, it seemed to us that this might obviously have been a useful area of enquiry.

[32] Miss Austin submitted that despite these or any other shortcomings in the sentencing process, the judge's order that the applicant should serve a minimum period before parole of 30 years in prison was not so outside of the usual range of sentences for murder approved by this court as to be manifestly excessive. In order to make this point good, she referred us, among others, to **Carlington Tate v R**[19], also a gun murder, in which there was no challenge on appeal to the trial judge's stipulation of 30 years as a minimum period of imprisonment before parole; **Omar Brown v R**[20], another gun murder, in which the court declined to disturb the trial judge's stipulation that the 21 year old applicant, who had no previous convictions and was gainfully employed at the time of the offence, should serve 28 years in prison before parole; and

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[19] [2013] JMCA Crim 16
[20] [2016] JMCA Crim 18

R v Anneth Livingston and others, where the deceased's throat was cut, in which this court reduced the judge's stipulation of a minimum period of imprisonment before parole from 60 to 35 years.

[33] In light of these authorities, we concluded that the judge's stipulation that the applicant should serve 30 years before becoming eligible for parole could not possibly be said to be so out of range as to be manifestly excessive. The applicant was found guilty of a brutal and quite senseless gun murder which, in our view, obviously warranted condign punishment.

Conclusion

[34] The applicant, therefore, failed to persuade us that (i) he had been unfairly prejudiced by the failure of the police authorities to produce the station diary; and (ii) the sentence of imprisonment for life, with a stipulation that he should serve a minimum of 30 years in prison before becoming eligible for parole, was manifestly excessive in all the circumstances of the case.

[35] It is for these reasons that we made the orders set out at paragraph [3] above.