[2023] JMCA Crim 59

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 71/2017

KEVON SHAW V R

Ian Wilkinson QC and Lenroy Stewart for the applicant

Mrs Christine Johnson Spence and Mrs Nickeisha Young Shand for the Crown

27 June 2022 and 8 December 2023

Criminal Law- Murder- Sentence- Whether the learned trial judge recognized the discretion to impose a sentence of life imprisonment or a determinate sentence- Whether the stipulation of a period of 20 years before eligibility for parole for murder was manifestly excessive- Whether the learned trial judge erred in failing to credit the applicant with the time spent in custody- Offences against the Person Act, Sections 2(1)(a) to (f), 2(2) and 3(1)(b).

F Williams JA

Background

[1] By this application, the applicant seeks leave to appeal his sentence for the offence of murder. He stood trial for this offence in the Hanover Circuit Court holden in Lucea on divers days between 14 June and 4 July 2017 before a judge of the Supreme Court (hereafter referred to as 'the learned trial judge') sitting with a jury. He was found guilty and on 6 July 2017, sentenced to life imprisonment. He was, however, ordered to serve a period of 20 years before becoming eligible for parole.

Summary of the case at trial

[2] The brief facts are that on 22 June 2011, the body of Darnel Patrina Campbell ('the deceased'), was found inside her home in Green Island in the parish of Hanover with injuries to her neck inflicted with a pair of scissors. Kerry-Ann Linton, the sister of the deceased, testified that the applicant and the deceased had shared an intimate relationship and that he also oftentimes drove her sister's vehicle. On learning of her sister's untimely passing on 22 June 2011, Ms Linton, via telephone, contacted the applicant, who denied killing the deceased. She further testified that the following day, 23 June 2011, the applicant called and informed her that he would turn himself in at the Sandy Bay Police Station. Another witness for the Crown testified that, on 22 June 2011, the applicant was seen exiting the vehicle owned by the deceased, wearing only a pair of shorts and carrying a black "scandal" bag within a short walking distance from the home of the deceased. Other evidence before the court included testimony that, on 21 June 2011 (that is, the day before her murder) the deceased and the applicant were seen and heard involved in an argument in which the she told him that their relationship was over, which he rejected. The applicant was further implicated in the murder by way of scientific (DNA) evidence and call-data analysis.

[3] The applicant gave an unsworn statement from the dock denying that he killed his girlfriend and stated that he was in Trelawny at the material time. At the close of the defence's case, the learned trial judge gave directions on the burden and standard of proof, and on the main issues, namely, circumstantial evidence, identification, and credibility, as well as giving a good character direction and dealing with the defence of alibi.

The application for leave to appeal

[4] Being displeased with the jury's verdict of guilty and the sentence imposed, the applicant filed an application for leave to appeal against his conviction and sentence, which was refused by a single judge of this court on 3 February 2021. The applicant is now renewing his application for leave to appeal, but this time only against his sentence.

[5] The applicant sought, and was granted, leave to abandon the original grounds of appeal and to argue the following two supplemental grounds:

> "1. The learned trial judge erred in law by imposing a sentence of life imprisonment on the applicant after his conviction for murder without first considering any alternative sentence to be applied, and without applying the relevant aggravating and mitigating factors properly or at all.
>
> 2. In imposing sentence on the applicant the learned trial judge erred in law in failing to credit the applicant with the time spent in custody prior to the trial of the charge against him."

Summary of submissions

Supplemental ground 1: imposing life imprisonment without considering alternative sentence and not properly treating with the aggravating and mitigating factors

Submissions for the applicant

[6] Queen's Counsel, Mr Ian Wilkinson, submitted on behalf of the applicant that a sentence for the offence of murder depended on the circumstances of that murder and, in some murders, a mandatory sentence of life imprisonment would be applicable, with the only question to be considered being the period before which the defendant would become eligible for parole. He further submitted that, in other murders, the sentence of death might be applicable and in yet other cases, the sentencing judge would have a discretion to impose a term of imprisonment of not less than 15 years.

[7] In furtherance of this submission, he argued that the applicant fell to be sentenced in keeping with section 3(1) of the Offences Against the Person Act ('the Act') as opposed to section 2(1)(a) and section 1A of the Act and relied, in this regard, on the case of **Ryan Edwards v R** [2020] Crim 1 (which he stated was similar to this case). He referred to that case to show that the learned trial judge had the discretion of imposing (i) a sentence of life imprisonment with the stipulation of a period to be served before becoming eligible for parole; or (ii) imposing a determinate sentence which ought not to be less than 15 years.

[8] Queen's Counsel further argued that the learned trial judge erred in principle in, firstly, failing to recognise that she had the discretion as to whether to impose a sentence of life imprisonment or a determinate sentence. Secondly, the learned trial judge ought to have indicated why she chose 20 years as opposed to 15 years before eligibility for parole, which was the minimum stipulated in the statute. Thirdly, the learned trial judge ought to have mentioned what weight, if any, was given to the aggravating and mitigating factors. Finally, the methodical, arithmetical, and analytical approach to sentencing as required by the cases of **Meisha Clement v R** [2016] JMCA Crim 26 and **Lescene Edwards v R** [2018] JMCA Crim 4 and the sentencing guidelines was not followed in arriving at the sentence for the applicant.

Submissions for the Crown

[9] On behalf of the Crown, Mrs Johnson Spence submitted that the learned trial judge was not required to show that she had first considered an alternative sentence that could have been imposed. She also relied on the case **Ryan Edwards v R** arguing that the learned trial judge in that case did not indicate in his sentencing remarks the reason he chose to exercise the discretion in the way that he did, and that, notwithstanding that omission, this court did not disturb the sentence that had been imposed. Counsel submitted that the facts were more egregious in the case at bar than in the case of **Ryan Edwards v R**, as the pathologist in this case indicated that severe force was used in wielding the pair of scissors which broke in the attack. Also, the trachea of the deceased was severed completely along with all major arteries and blood vessels in her neck and her spine was almost completely severed.

[10] Counsel further argued that, while the sentencing exercise by the learned trial judge was not conducted completely in keeping with the now-accepted principles of sentencing, it was clear that she bore them in mind and sentenced along those guidelines. Mrs Johnson Spence further argued that the learned trial judge spoke of the aggravating circumstances, those being composed primarily of the brutal nature of the murder; and the mitigating factors in the applicant's favour to include the fact that the community

spoke highly of him, he was employed and quite responsible with no previous convictions and was also expecting his first child.

Discussion

[11] In beginning the discussion, it is useful to bear in mind the threshold requirements for an appellate court to intervene and overturn a sentence passed in a court below. An authority that is often cited in this regard is that of **R v Kenneth John Ball** (1951) 35 Cr App R 164. In that case, Hilbery J, at page 165, is noted to have given the following guidance:

> "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 this Court will intervene." (Emphasis added)

[12] In reviewing this sentence, therefore, the main consideration will be whether a perusal of the transcript discloses any error of principle on the part of the learned trial judge, warranting this court's intervention.

[13] With respect to the learned trial judge's sentencing powers, it is accepted that the statutory provision under which the applicant fell to be sentenced was section 3(1) of the Act. That section reads as follows:

> "3. -(1) Every person who is convicted of murder falling within-
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> (a) section 2(1)(a) to (f) or to whom subsection (1A) applies, shall be sentenced to death or to imprisonment for life;
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> (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."

[14] As section 2(1)(a) to (f) (referred to in 3(1)(a)) treats with murders of persons of particular categories (such as judicial officers and members of the security forces, acting

in the course of their duties), section 3(1)(a) did not apply to the facts of the instant case, which involved the killing of an intimate partner. Neither would section 2(1A) be applicable, the circumstances relevant there being murders committed in the course or furtherance of or arising out of or ancillary to a limited category of offences, such as robbery. It is, therefore, section 3(1)(b) under which the applicant fell to be sentenced. Based on section 3(1)(b), the learned trial judge had the discretion to impose a life sentence with a stipulated period for eligibility on one hand, or impose a determinate sentence on the other hand for murders that fall within section 2(2). Section 3(1C)(b) so far as is relevant, reads as follows:

> "(b) where, pursuant to subsection (1)(b), a court imposes-
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> (i) a sentence of imprisonment for life, the court shall specify a period, being not less than fifteen years; or
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> (ii) any other sentence of imprisonment, the court shall specify a period, being not less than ten years,
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> which that person should serve before becoming eligible for parole."

[15] One aspect of the challenge that has been made to the sentence, arises because of the learned trial judge's selection of one of the options open to the court in sentencing, without stating why that option was preferred to the other. A careful consideration of the wording of the section, however, does not incline us to the view that the learned trial judge's failure to explain the choice amounted to an error of law or principle, necessitating this court's intervention. The language used in the section does not mandate the giving of a reason or reasons for making the choice. Even though someone might wish to argue that modern concepts of open justice could, possibly, make such an explanation desirable and that to do so would be in keeping with present best practices, it is impossible to see how a failure to do so could cause an injustice to a defendant and has caused any injustice to the applicant in this application. It should be noted, as well, for example, that there is no equivalent in these circumstances to section 3(1) of the Criminal Justice (Reform) Act which requires sentencing judges to consider an alternative to imprisonment.

[16] From another perspective, one might say as well that the circumstances of this case themselves give the explanation for the court's choice of life imprisonment and made it clear on which side of 'the fence' the choice lay: having regard to the severity and brutal nature of the attack, resulting in the near severing of the head of the deceased by the applicant. The highest requirement or expectation that we could attribute to the wording of that section is to say that it is best for the reason for making a choice to be stated by a trial judge. Whilst saying so, however, it must be recognized that in cases such as **Daniel Roulston v R** [2018] JMCA Crim 20 the identification of a "sentence range" is given as the first step in the sentencing process. At para. [17] of that case, the following is stated:

> "[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);
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> 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[])."

[17] Accepting "range" as meaning "the area of variation between limits on a particular scale" (see the Oxford Concise Dictionary) then, a contemplation of an alternative sentence or of all sentencing options would appear to be the best practice. However, it bears repeating that it is difficult, if not impossible, to see how not giving such an explanation could amount to a ground of appeal with any real prospect of success. The section gives to a trial judge a very wide discretion in choosing between the two alternatives, with no restricting or delimiting words.

[18] In relation to the learned trial judge's treatment of the aggravating and mitigating features of the case, this is what was stated in the sentencing remarks at pages 527 (line 16) to page 528 (line 7) of the transcript:

> "This particular murder was very brutal, the deceased woman would have suffered before she died, a scissors [sic] was used to cut her throat. Almost completely severing her head. Its [sic] most brutal. We have had many days of trial in this matter, many witnesses have come. You were 29 years old when this murder took place, big enough man to have had your head on your shoulders. The community speaks highly of you. You were employed [from] what we can see, you were quite responsible and part of that responsibility I think you are now just expecting your first child. Those are things in your favour. You have no previous conviction, that is also in your favour…"

[19] In **Meisha Clement v R**, Morrison P, at paras. [32] and [33], identified some of the matters that could be regarded as aggravating and mitigating factors, respectively. At para. [57], in discussing the addition of years to the starting point to take account of the aggravating factors, he observed:

> "The appropriate value to be ascribed to the aggravating factors will usually be a matter for the determination of the sentencing judge, doing the best he or she can in all the circumstances of the particular case."

[20] Then, the court engaged in an arithmetical exercise, resulting in a net accretion of one year to the starting point. That sort of process is what, as we understand it, a sentencing judge ought to engage in. Unfortunately, even though in the instant case the learned trial judge appropriately referred to the aggravating and mitigating factors, she did not engage in a mathematical exercise. That in turn, it appears, led to the further criticism being made of the sentencing process that no reasons were given for the stipulation that the applicant was to serve 20 years instead of 15 years – the statutory minimum. This latter point was advanced in argument but was not, strictly speaking, one of the grounds of appeal. However, had the court below engaged in the arithmetical exercise just discussed, it would not have been possible to raise this point. In all the circumstances, it is apparent that in the sentencing exercise, the process recommended

in such cases as **Meisha Clement v R** and others, was not followed. However, notwithstanding those errors, that is not the end of the matter.

The overall sentence

[21] It seems to us that, in considering the sentence and the sentencing process, it is necessary to also consider the fairness or otherwise of the sentence imposed, having regard to sentences imposed in similar cases for the same offence and also having regard to the guidance given in the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'). At page 35 of the Sentencing Guidelines, the normal range of sentences for murder is stated to be 15 years to life, with no usual starting point being given. It is, however, acknowledged that the Sentencing Guidelines came into effect some time after the commission of this crime and trial.

[22] In **Christopher Thomas v R** [2018] JMCA Crim 31, Morrison P, after reviewing several murder cases in which sentences were imposed after trials, made the following observation at para. [93]:

> "[93] This limited sample of recent sentences imposed after trial for murder seems to us to suggest a usual range of 20 to 40 years' imprisonment, or life imprisonment with a minimum period to be served before becoming eligible for parole within a similar range. The sentence imposed by the judge in this case was therefore right at the top of the range."

[23] Similarly, in **Paul Brown v R** [2019] JMCA Crim 3, after reviewing a number of authorities, this court observed at para. [8], that:

> "[8] These cases show a range of sentencing of between 45 years' and 25 years' imprisonment before eligibility for parole, with the higher figures in the range being stipulated in cases involving multiple counts of murder."

[24] Taken together, these cases show a range of between 20 and 45 years as periods stipulated to be served before eligibility for parole for the offence of murder. We also accept the Crown's submission that a sentence of life imprisonment with the stipulation that the applicant serve 30 years before becoming eligible for parole, was not disturbed

by this court in the case of **Jason Palmer v R**, save that the applicant was credited with the five years that he had spent on pre-sentence remand. That conviction and sentence arose out of the gruesome murder on an elderly pensioner, and so is not very different from the circumstances in this case.

[25] In **Lincoln McKoy v R** [2019] JMCA Crim 35, this court refused an application for leave to appeal against conviction and sentence, despite errors made by the learned trial judge, finding that, the sentence was appropriate in all the circumstances. At para. [54] thereof, the following observation was made:

> "[54] The learned trial judge stipulated a minimum of 25 years' imprisonment before parole, even though he did not demonstrably conduct the requisite analysis of the relevant principles of law and apply the accepted mathematical formula. He had taken into account, as a matter, which would have resulted in a reduction in the sentence, the time spent in custody before trial. He did not, however, indicate the extent of the credit given for pre-trial remand. Despite this, it cannot reasonably be said that the sentence he imposed is manifestly excessive to warrant the intervention of this court. It is well within the established range of sentences for murder committed in these circumstances."

[26] In all the circumstances of this case, we find ourselves unable to say, in relation to this ground, that the transcript discloses any error of principle on the basis of which this court could properly intervene. The applicant, therefore, fails on this ground.

Supplemental ground 2: failing to credit the time the applicant spent in custody

Submissions for the applicant

[27] Queen's Counsel argued that, although the applicant's counsel at trial asked the learned trial judge to take into consideration time spent in custody, that is, 18 months prior to being admitted to bail and another three weeks in custody during the course of the trial, the learned trial judge did not give credit to the applicant for those two periods. He submitted that the learned trial judge's failure to give the full discount of 18 months and three weeks, meant that the sentence imposed was unfair in the circumstances.

[28] Mr Wilkinson argued that, if these submissions found favour with us, then we could impose a lesser sentence on the applicant. He proposed a starting point of 25 years as falling within the sentencing range outlined in **Christopher Thomas v R** and further submitted that, as the mitigating factors outweighed the aggravating factors in this case, a period of 15 years before eligibility for parole would be appropriate in all the circumstances.

Submissions for the Crown

[29] Counsel submitted that, while the sentence given was not excessive in the circumstances, she agreed that, according to the Sentencing Guidelines and authorities, the applicant should have been credited with his time spent in custody. This, she calculated, would amount to an amended sentence of 18 years, five months and one week.

Discussion

[30] Learned Queen's Counsel's submission in relation this ground, criticising the learned judge's approach, is impossible to resist and the Crown was quite correct in the concession that it made.

[31] The position is now quite settled: a convict is to be given full credit for time spent on pre-sentence remand, as a general rule. If there is any departure from that rule, reasons must be provided. In **Callachand & Anor v State of Mauritius** (Mauritius) [2008] UKPC 49 (4 November 2008), Sir Paul Kennedy, writing on behalf of the Board, gave the following guidance, 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."

[32] Similarly in **Meisha Clement v R**, Morrison P, at para. [34] opined:

> "[34] ...in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial..."

[33] In light of this, the applicant succeeds on this ground. The Crown has accurately calculated the sentence to be served when the period of 18 months and three weeks is subtracted from the 20 years stipulated by the learned trial judge: that is, 18 years, five months and one week.

[34] In the result, the following orders are made:

1. The application for leave to appeal conviction is refused.

2. The application for leave to appeal sentence is granted.

3. The hearing of the application for leave to appeal sentence is treated as the hearing of the appeal.

4. The appeal against sentence is allowed in part, in that, while the sentence of life imprisonment is affirmed, the stipulation that the appellant serve 20 years' imprisonment before becoming eligible for parole is set aside. Substituted therefor is the stipulation that the appellant serve a period of 18 years, five months and one week, credit having been given for the pre-sentence time spent in custody by the applicant.

5. The sentence is to be reckoned as having commenced on the date on which it was imposed – that is, 6 July 2017.