[2022] JMCA Crim 39

JAMAICA

IN THE COURT OF APPEAL

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

SUPREME COURT CRIMINAL APPEAL NO 44/2018

SANJAY SPLATT v R

Hugh Wilson for the appellant

Orrett Brown and Ms Renelle Morgan for the Crown

14 December 2021 and 29 July 2022

FOSTER-PUSEY JA

[1] Mr Sanjay Splatt, ('the appellant'), was charged on an indictment containing two counts for the murder and kidnapping of Everton Mullings ('the deceased'). On 16 March 2018, he pleaded not guilty to kidnapping, but guilty to murder. This occurred in the Saint Elizabeth Circuit Court held at Black River in the parish of Saint Elizabeth before Gayle J ('the sentencing judge'). The prosecution did not offer any evidence on the charge of kidnapping. On 23 March 2018, the sentencing judge imposed on the appellant, in respect of his guilty plea to murder, a sentence of 20 years' imprisonment at hard labour, with the appellant to serve 15 years before he would be eligible for parole.

[2] The appellant applied for leave to appeal the sentence on the grounds that, 'based on the facts as presented the sentence is harsh and excessive and cannot be justified when taken into consideration" and "the Learned Trial Judge did not temper justice with mercy as my guilty plead [sic] was not taken into consideration". A single judge of appeal granted the appellant leave to appeal his sentence so that this court could review it.

The grounds of appeal

[3] Mr Hugh Wilson, counsel for the appellant, applied for, and was granted, permission to abandon the grounds originally filed and argue the following instead:

> i. The sentencing judge erred in law in sentencing the appellant to 20 years' imprisonment which was manifestly excessive having regard to the circumstances of the case.
> ii. The sentencing judge erred in law in stipulating that the appellant should serve a minimum pre-parole period of 15 years before he would become eligible for parole, which was manifestly excessive.

[4] Mr Wilson asked that the court, instead, impose a sentence of 15 years' imprisonment, with a specification that he serves a period of 10 years before becoming eligible for parole.

The facts outlined by the prosecution

[5] The appellant contracted with the deceased, at a price of $100,000.00, to kill an individual. He paid the deceased, and went to the area where he expected to see the potential victim. When he saw the potential victim, he made several telephone calls to the deceased for him to kill the potential victim. The deceased did not answer the telephone calls, and did not kill the potential victim.

[6] Upset that the deceased had not lived up to his contractual obligation, the appellant told him that he had some ganja for him at a hut in Saint Elizabeth, and so lured him to journey there. The deceased went to the location, but he was not alone. He was accompanied by a man called 'Rasta'. Unknown to the appellant, Rasta followed the deceased as he went to the hut. When Rasta arrived at the hut, he saw the appellant pointing a firearm at the deceased. The appellant ordered Rasta to put down his cellular phone, however, Rasta managed to escape from the location. The appellant tied up the deceased, and instructed him to call his family members and have them bring

$100,000.00 to him, the appellant, failing which he would kill him. The appellant kept the deceased in the bushes awaiting the requested money. The requested money did not arrive. One day when the appellant was moving the deceased to another location, he tried to escape. The appellant shot and killed him, and transported his body to an area close to a dumpsite near Buena Vista Housing Scheme, in the same parish. There, he set the body afire.

[7] On 27 October 2015, residents in the area discovered the body of the deceased, and summoned the police, who began investigations into a case of murder. When the appellant was taken into custody, he provided a statement under caution in which he outlined what led to him killing the deceased.

The judge's sentencing remarks

[8] The submissions are best considered in the light of the remarks which the sentencing judge made. At pages 12-14 of the transcript, the sentencing judge stated:

> "Stand, Mr. Splatt. You have pleaded guilty which is a plus in your favour and when I look at the facts in this case, how could you pay a person to call[sic] another person? And the person who accepts that contract is as nasty and dirty as you—sorry to use those words but I can't help it. He's not much better than you. Taking a contract from you to kill somebody? It's said that he met his demise by you.
>
> No previous conviction—**how long he has been in custody for?**
>
> ACCUSED: **Approximately two years, your Honour.**
>
> HIS LORDSHIP: **I'll take into consideration the two years spent.**
>
> Mr. M. HOWELL: he has been in custody since, I think, 2016.
>
> HIS LORDSHIP: And **when I look at the Social Enquiry Report, it's a good report**; not a bad report. The fact that you could have reached Deputy

> Head Boy what could have caused you to go the other way into badness? Many persons go on to school not even one subject. You managed to get seven. You could have gone on to university—UTECH or teacher's college and make some good contribution to this country as a young person but instead you chose the wrong path, violence.
>
> **You have pleaded guilty,** as I have said before and the Court has to take that into consideration, **as a sign of remorse.** What is shocking, too, is that this person probably had a change of heart but not a full change of heart because he wanted to indulge in some criminality, too because you managed to get him to come for ganja because you wanted your one hundred thousand and it is there and then, that all things come to an end that you had to kill him; sad situation.
>
> When I look at all the antecedents, Social Enquiry Report, period of time spent and guilty plea and when I look at the Principles of Sentencing, the public must be protected from persons like you because you have a good brain but what you use it to do, a life of crime? To instigate to kill one, then the one who you send to do the killing, you kill him; that's bad. I have to look at '**RETRIBUTION**'. I'm sure you recognize that you did wrong. So, you must expect punishment. Murder is a crime. A life has been lost; '**DETERRENCE'**, persons like you—the society can't become a place where we have big-time contract killers.
>
> When I look at '**REHABILITATION**', you can be rehabilitated; I think so. **So, taking all these things into consideration and the seriousness of the offence for Murder is life imprisonment but I won't go there as you have pleaded guilty.**
>
> So, the sentence of the Court is twenty years imprisonment at hard labour. Not eligible for parole until you have served fifteen years. Thank you…" (Emphasis added to original).

Submissions

Submissions on behalf of the appellant

[9] Mr Wilson submitted that the sentencing judge did not demonstrate, in a structured manner, the basis on which he arrived at the sentence imposed on the

appellant. Learned counsel referred to **Meisha Clement v R** [2016] JMCA Crim 26, and the Sentencing Guidelines for use by Judges of the Supreme Court and the Parish Court, December 2017 ('the Sentencing Guidelines'), and submitted that the sentencing judge ought to have established the normal range of sentence, and a starting point within the range. He submitted that, by failing to identify an appropriate starting point, the sentencing judge was unable to impose a reasonable sentence. He suggested a starting point of 15 years, the statutory minimum sentence, and supported this by arguing that the facts in the case at bar represented murder "at the lower end of culpability". He outlined the features which he saw as aggravating and mitigating, suggesting the addition of five years to reflect the aggravating features of the offence and a deduction of two years to reflect the mitigating features.

[10] Counsel drew attention to the fact that the sentencing judge did not indicate what discount he had given. He noted that the appellant, by virtue of section 42E(2)(a) of the Criminal Justice Administration Act ('the CJAA') would have been entitled to up to 33⅓% for his early guilty plea, and that the court, in determining the discount should have regard to section 42H of the CJAA. He proposed a one-third discount from the resulting 18 years on account of the appellant's guilty plea, and referred to the approximately two years that the appellant spent in custody awaiting trial. He acknowledged, however, that the sentence could not be less than the statutory minimum, and so submitted that a sentence of 15 years' imprisonment would be appropriate in the circumstances. Counsel referred to **Franklyn Williams v R** [2018] JMCA Crim 19, (18-year sentence), **Andre Minott v R** [2016] JMCA Crim 7 (20-year sentence), **Kevin Balfour v R** (15 years) and **Leslie McLeod v R** [2012] JMCA Crim 59 (15 years).

[11] Counsel argued that the sentencing judge had been unduly influenced by the contract to commit murder and the academic qualifications of the appellant.

[12] In answer to an enquiry from the court in respect of the relevance of section 42F CJAA, Mr Wilson said that it was not relevant, as it referred to a life sentence, and it was highly unlikely that the sentencing judge would have contemplated such a sentence.

[13] On the question of the period which the appellant should serve before becoming eligible for parole, counsel submitted that the sentencing judge did not give any specific reason or justification for the imposition of a 'pre-parole period' of 15 years. Relying on **R v Howse** [2003] 3 NZLR 76 and **Roderick Fisher v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 49/2006, judgment delivered 21 November 2008, counsel argued that the underlying legislative intention for the 'pre-parole provision' is to further punish an offender, denounce the crime, deter others from committing similar offences and to protect the society. He submitted that there was nothing in the character of the offending, or the circumstances of the murder, that justified the sentencing judge imposing a pre-parole period of more than 10 years, and urged this court to so rule.

Submissions on behalf of the Crown

[14] Counsel for the Crown, Mr Orrett Brown, submitted that, while the sentencing judge had the correct sentencing principles in mind, he did not abide by the now accepted procedures in arriving at the sentence which he imposed. This was demonstrated, counsel continued, by his failure to (i) demonstrate arithmetically how the time spent on remand affected the sentence, (ii) indicate a notional starting point and adjust it upwards or downwards to account for aggravating and mitigating features and (iii) indicate the reduction for the guilty plea.

[15] In spite of these shortcomings, Mr Brown, relying on **Meisha Clement v R**, **R v Ball** (1951) 35 Cr App Rep 164 and the Sentencing Guidelines, submitted that the 20-year sentence imposed by the sentencing judge was not manifestly excessive and did not warrant the intervention of the court. Counsel also referred to sections 42E and 42F of the CJAA and **Callachand & Anor v The State** [2008] UKPC 49**.**

[16] In response to an enquiry from the court as to the relevance of section 42F CJAA to the sentencing exercise, Mr Brown stated that he tried to reconcile the application of the section in the circumstances, but noted that a sentencing judge 'may' impose a sentence of life imprisonment. He surmised that the section was applicable for the calculation of the length of the sentence.

[17] Counsel proposed that a sentence of 21 years and nine months would have been appropriate. He arrived at this by the following route: A starting point of 25 years, the addition of 10 years reflecting the aggravating features, a reduction of five years for mitigating features. After arriving at 30 years, he proposed a discount of 25% on the basis that, while the appellant pleaded guilty at the first relevant date, it was very unlikely that he could have raised a plausible defence. With this reduction, he arrived at a sentence of 23 years and nine months, from which the period of two years on remand would be deducted, leaving a final sentence of 21 years nine months. In light of the sentence to which his calculations led, counsel submitted that the 20-year sentence imposed by the sentencing judge was not so errant in principle as to require the court's intervention.

[18] Turning to the question of the 15-year pre-parole period, counsel distinguished the cases on which counsel for the appellant relied on the basis that those cases did not "meet the gruesome nature of the acts" in the case at bar. Counsel stated that, while the sentencing judge should have demonstrated how he arrived at his decision in respect of the period that the appellant should serve before he would be eligible for parole, the period imposed was not excessive.

Further submissions

[19] On 22 February 2022, the court requested that counsel for the appellant and the Crown file submissions on:

a. The relevance, if any, of the following authorities to the present case:

    i. **Lincoln Hall v R** [2018] JMCA Crim 17;

    ii. **Tyrone Gillard v R** [2019] JMCA Crim 42; and

    iii. **Troy Smith and others v R** [2021] JMCA Crim 9;

b. The manner in which sections 42E, 42F and 42H of the CJAA should be applied to this case.

[20] We thank counsel for the Crown, who, on 5 April 2022, filed additional submissions as requested. No further submissions were received from counsel for the appellant.

[21] Counsel for the Crown submitted that sections 42E, 42F and 42H of the CJAA outline the matters which a sentencing judge should take into account when a guilty plea is entered. Counsel also submitted that these matters were discussed in **Lincoln Hall v R, Tyrone Gillard v R and Troy Smith and Others v R**. Counsel stated that these authorities were applicable to the instant case "to the extent that there was no clear indication by the learned sentencing judge as to what contemplation he gave to a reduction in sentence in view of the fact that a guilty plea was entered on the first relevant date".

[22] Counsel for the Crown submitted that the full 33⅓% discount for which the legislation provides when a guilty plea to murder is made on the first relevant date, would not be applicable in the case at bar, given the aggravating factors and the gruesome nature of the killing. It was instead recommended that a 15% discount would be appropriate, with the discount taken from the pre-parole period, so that the appellant is not made to suffer a greater sentence than that imposed by the sentencing judge. Counsel referred to **Kelvin Downer v R** [2022] JMCA Crim 12 in support of that submission.

Discussion

The statutory framework

[23] In 2015 the CJAA was amended. Among the matters provided for by the amendments, was the treatment of guilty pleas.

[24] Section 42E of the amended CJAA applies in circumstances where a defendant pleads guilty to the offence of murder falling within section 2(2) of the Offences Against the Person Act ('the OAPA'). The section provides:

> "42E (1) Subject to subsection (3), where a defendant pleads guilty to the offence of murder, falling within section 2(2) of the *Offences Against the Person Act*, the Court may, in accordance with subsection (2), reduce the sentence that it would otherwise have imposed on the defendant had the defendant been tried and convicted of the offence.
>
> (2) Pursuant to subsection (1), the Court may reduce the sentence in the following manner-
>
> (a) where the defendant indicates to the Court, on the first relevant date, that he wishes to plead guilty to the offence, the sentence may be reduced by up to thirty-three and one third *per cent*;
>
> (b) where the defendant indicates to the Court, after the first relevant date but before the trial commences, that he wishes to plead guilty to the offence, the sentence may be reduced by up to twenty-five *per cent*;
>
> (c) where the defendant pleads guilty to the offence after the trial has commenced, but before the verdict is given, the sentence may be reduced by up to fifteen *per cent.*
>
> (3) **Notwithstanding subsection (2), the Court shall not impose on the defendant a sentence that is less than the prescribed minimum penalty for the offence as provided for pursuant to section 3(1)(b) of the *Offences Against the Person Act.***
>
> (4) In determining the percentage by which the sentence for an offence is to be reduced pursuant to subsection (2), the Court shall have regard to the factors outlined under section 42H, as may be relevant." (Emphasis supplied)

[25] Section 3(1)(b) of the OAPA provides that a person convicted of murder falling within section 2(2) of its provisions, "shall be sentenced to imprisonment for life or such

other term as the court considers appropriate, not being less than fifteen years". The prescribed minimum penalty is, therefore, a determinate sentence of 15 years. The OAPA also provides parameters within which the court must establish eligibility for parole. If the court imposes a sentence of life imprisonment, it must specify that the defendant must serve a period, which cannot be less than 15 years, before becoming eligible for parole. On the other hand, if the court imposes a determinate sentence, which as indicated above cannot be less than 15 years, the court must specify a period of not less than 10 years for the defendant to serve before he is eligible for parole.

[26] The provisions of section 42F are important in the consideration of this appeal. It states:

> "Where the offence to which a defendant pleads guilty is one for which the Court may impose a sentence of life imprisonment, and the Court would have imposed that sentence had the defendant been tried and convicted for the offence, then, for the purpose of calculating a reduction of sentence in accordance with the provisions of this Part, a term of life imprisonment shall be deemed to be a term of thirty years."

[27] The other section in the Act, which is crucial for present purposes, is section 42H which provides:

> "Pursuant to the provisions of this Part, in determining the percentage by which a sentence for an offence is to be reduced, in respect of a guilty plea made by a defendant within a particular period referred to in 42D(2) and 42E(2), the Court shall have regard to the following factors namely-
>
> (a) whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;
>
> (b) the circumstances of the offence, including its impact on the victims;
>
> (c) any factors that are relevant to the defendant;

(d) the circumstances surrounding the plea;

(e) where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;

(f) whether the defendant has any previous convictions;

(g) any other factors or principles the Court considers relevant."

[28] The statutory framework in respect of a plea of guilty to a charge of murder falling within section 2(2) of the OAPA is also very helpfully summarised in the Sentencing Guidelines. At paragraph 10.12 of the Sentencing Guidelines reference is made to the various factors outlined in section 42H of the CJAA, which the sentencing judge must keep in mind, so far as they are relevant, in determining the percentage by which a defendant's sentence should be reduced on account of the guilty plea. Paragraphs 10.13-10.20 state:

"10.13 Where the offender pleads guilty to the offence of murder falling within section 2(2) of the OAPA, the sentencing judge may reduce the sentence he or she would otherwise have imposed had the offender been tried and convicted of the offence, by up to:

(a) 33⅓%, where the offender indicates to the court his wish to plead guilty on the first relevant date;

(b) 25%, where the offender indicates to the court that he or she wishes to plead guilty after the first relevant date, but before the trial commences;

(c) 15%, where the offender pleads guilty, after the trial has commenced, but before the verdict is given.

10.14 However, sentencing judges should note that, irrespective of a plea of guilty in these cases, i.e., cases of murder falling within section 2(2) of the

OAPA, the court may not impose a sentence less than the prescribed minimum penalty under section 3(1)(b) of the OAPA.

10.15 In determining the percentage by which the offender's sentence should be reduced on account of a guilty plea in relation to a charge of murder falling within section 2(2) of the OAPA, the sentencing judge must also keep in mind such of the factors set out at paragraph 10.11[sic] above as may be relevant.

General

10.18 **If the offence to which the offender pleads guilty is one for which the maximum sentence is life imprisonment, and that is the sentence which the sentencing judge would have imposed had he or she tried and convicted the offender, then, for the purpose of calculating a reduced sentence on account of the guilty plea, the sentencing judge should treat the term of life imprisonment as though it was one of 30 years.**

10.19 Sentencing judges should keep in mind that the statutorily prescribed percentage discounts speak to the maximum levels of discount allowable for guilty pleas. The actual level of the discount to be allowed in any particular case will therefore remain a matter for the discretion of the sentencing judge in light of the circumstances of the case and the submissions made by the prosecution and the defence.

10.20 In addition to the timing of the guilty plea, other factors, such as the strength of the case against the offender, may also be relevant to the decision of what discount to apply in a particular case. So, for instance, the sentencing judge may consider that an offender who pleads guilty in the face of overwhelming evidence ought not to receive the same discount as one who has a plausible defence." (Emphasis supplied)

Case law

[29] For reasons which will be clear from our analysis of the legislative framework, **Franklyn Williams v R**, **Andre Minott v R**, **Kevin Balfour v R** and **Leslie McLeod v R**, all cases on which the appellant relied, were not particularly helpful. None of those cases related to sentencing after guilty pleas within the context of the CJAA.

[30] Although sections 42E and 42F of the CJAA came into force in 2015, there have not been many cases in this court interpreting and applying them. **Lincoln Hall v R, Tyrone Gillard v R and Troy Smith and Others v R**, are among the first cases in which this court interpreted and applied these legislative provisions**.** There is, however, an important difference between the case at bar and the three cases mentioned. In the instant case, the judge imposed a determinate sentence and made it clear that, had the appellant been tried and convicted for murder to which section 3(1)(b) of the OAPA refers, he would have imposed a life sentence. In the three referenced cases, the trial judges imposed sentences of life imprisonment on the applicants who pleaded guilty to murder to which section 3(1)(b) of the OAPA refers. It is likely that a different approach is required where life sentences are imposed, but that issue need not be explored in the case at bar due to the distinguishing feature we have identified.

[31] The following can be observed from the legislative regime**:**

a. The first step is to identify the stage at which the guilty plea has been entered pursuant to section 42E of the CJAA, eg is it the first relevant date, after the first relevant date but before the trial commences, or after trial has commenced but before the verdict is given? This will indicate the maximum discount which can be granted in the circumstances;

b. Where a sentence of life imprisonment could be imposed by the sentencing judge, and the court would have imposed it if

the defendant had been tried and convicted, for the purpose of calculating a reduction in sentence on account of his guilty plea, a term of life imprisonment is deemed to be a term of thirty years. In **Lincoln Hall v R** Morrison P referred to this term of 30 years as a "statutory fiction" (see paragraph [19]);

c. In light of the statutory fiction of 30 years, there is no need to look at a starting point or an assessment of aggravating and mitigating factors with a view to arriving at the sentence which would have been imposed had the defendant been tried and convicted;

d. The judge should consider the actual percentage by which, in the exercise of his/her discretion, he/she has decided that the sentence should be reduced, within the applicable range in 42E, bearing in mind the factors outlined in section 42H. It is noteworthy that the factors outlined in section 42H include matters which are normally considered under the headings of aggravating and mitigating factors in the determination of sentences;

e. Section 42H gives the court a wide discretion to limit the extent of the discount to be applied after a defendant enters a guilty plea.

f. If the maximum level of discount of 33⅓% is applied to the statutory fiction of 30 years, this will result in a term of 20 years. This can be further reduced if pre-sentence remand must be taken into account, but the sentence cannot fall below the statutory minimum of 15 years stipulated in section 3(1)(b) of the OAPA.

[32] In reviewing the sentence of a judge at first instance, we are mindful of the guidance of Morrison P in **Meisha Clement v R**. At paragraph [42] of the judgment Morrison P cited the case of **Alpha Green v R** (1969) 11 JLR 283, 284, in which the court adopted the following statement of principle by Hilbery J in **R v Ball** 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 this Court will intervene**." (Emphasis added)

Application

[33] Turning to the case at bar, both grounds of appeal will be considered together as they impact each other. On an examination of the sentencing judge's remarks during the sentencing exercise, it is clear that he considered a number of relevant factors including:

i. The circumstances of the offence, he referred to the fact that the appellant had paid the deceased to kill an individual and that the deceased was not much better than the appellant, as he had taken the contract;

ii. The appellant had no previous conviction;

iii. The appellant had been in pre-sentence custody for approximately two years;

iv. The appellant had a good social enquiry report, had been a deputy head boy at his school and had acquired sufficient subject passes to have matriculated for

university or teacher's college, but instead chose a path of violence;

v. The appellant had pleaded guilty and this was a sign of remorse,

vi. The principles of sentencing including retribution, deterrence and rehabilitation and in respect of the last principle, that the appellant could be rehabilitated; and

vii. Murder was a serious offence for which the sentence is life imprisonment, but he would not impose that sentence since the appellant had pleaded guilty.

[34] All of the factors outlined above were relevant, and reflected matters which the judge ought to have taken into account pursuant to section 42H of the CJAA. However, the sentencing judge did not identify the maximum level of discount which the appellant could have been granted, and the actual discount that he concluded was appropriate in all the circumstances. In addition, while the sentencing judge stated that he had taken into account the approximately two years which the appellant had spent in custody, because he did not indicate the sentence to which he had arrived after applying the discount, it is difficult to know whether his arithmetic was correct. In light of the statutory framework governing guilty pleas, such an indication is essential so that it can be shown how the issue of pre-sentence remand was addressed. As their Lordships stated in **Callachand and Anor v The State**, "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". In our view, the sentencing judge erred in this regard. This does not inevitably mean that the sentence imposed was manifestly excessive. This court will have to proceed with a fresh sentencing exercise so as to determine whether the sentence which was imposed was manifestly excessive.

[35] It is first necessary to determine the highest level of discount which the appellant could have been granted. When the appellant was taken into custody, he gave a caution statement outlining the circumstances which led to the demise of the deceased, and pleaded guilty at the first circuit court before which he appeared. This was, therefore, the first relevant date at which he could have pleaded guilty. In the circumstances, in accordance with section 42E(2)(a), on account of the appellant's guilty plea, the sentencing judge could have reduced the sentence, which he would otherwise have imposed on the appellant, by up to 33⅓%. It is within that parameter that we have considered the sentence of the appellant.

[36] The next question to be considered is whether the sentencing judge would have imposed a sentence of life imprisonment had the appellant been tried and convicted for murder. The sentencing judge stated, at page 14 of the transcript, "So, taking all these things into consideration and the seriousness of the offence [sic] for Murder is life imprisonment but I won't go there as you have pleaded guilty". In our view, it can be inferred that, but for the appellant's guilty plea, the sentencing judge would have imposed a sentence of life imprisonment.

[37] In accordance with section 42F of the Act, for the purpose of calculating a reduction of sentence, a term of life imprisonment is deemed to be a term of 30 years.

[38] The next step in the process is to determine what discount would be appropriate, bearing in mind the factors outlined in section 42H of the Act.

> *i. The circumstances of the offence, including its impact on the victims (42H(b)*
>
> We firstly considered the circumstances of the offence, including its impact on the victim. The appellant contracted the deceased to kill an individual, lured the deceased to St. Elizabeth with a view to killing him after he failed to carry out the contract, and sought to extract money for the deceased's release. When the deceased attempted to

escape he killed him. The facts are gruesome. We do not agree with Mr Wilson's submissions that this was an offence "at the lower end of culpability". This is equivalent to an aggravating feature.

ii. Factors relevant to the appellant (42H(c))

The appellant had a good social enquiry report. The community in which he lived knew him as a calm and hardworking individual. He was deputy head boy at his high school and had succeeded at five CSEC and five SSE subjects. This is in the appellant's favour.

iii. The circumstances surrounding the plea (section 42H(d))

There is no doubt that the defendant cooperated with the police at an early date by giving a caution statement, admitting his involvement when he was taken into custody. This is in the appellant's favour.

iv. Where the appellant was charged with more than one offence, whether he pleaded guilty to all of the offences. (section 42H(e))

In the case at bar, the appellant was charged on an indictment containing two counts for the murder and kidnapping of the deceased. He pleaded not guilty to kidnapping, but guilty to murder. This could limit the level of discount granted.

v. *Whether the appellant had any previous convictions* (section 42H(f))

The appellant did not have any previous convictions. This is also in the appellant's favour.

vi. Any other factors or principles the court considers relevant

We did not identify any other factor, save that the appellant was in custody for approximately two years, and this will be specifically considered below.

[39] As an overarching principle in these matters, the court must ensure that any reduction of the sentence on account of the guilty plea is neither disproportionate to the seriousness of the offence, nor so inappropriate that it would shock the public conscience (section 42H(a) of the Act). The facts in this matter are very troubling and reveal a plot in which the appellant engaged the deceased in a contract to kill another person, lured the deceased to a location and killed him when he failed to carry out the contract and failed to raise money to secure his release from the appellant's custody. Contract killings are sadly becoming more frequent in our society. In our view, it would shock the public conscience to reduce the possible sentence of the appellant by the maximum percentage possible. His good social enquiry report and seeming excellent potential for rehabilitation could, when also taken into account, however, justify a discount of 27% or a reduction of eight years and one month from the 30-year fiction representing life imprisonment, resulting in a term of 21 years and 11 months. From this, the time the appellant spent in custody which was said to be approximately two years, if deducted, would lead to a sentence 19 years and 11 months. Bearing in mind that the specific dates for the time spent in custody were not provided, the sentence to which we have arrived is not far off from the 20 years which the sentencing judge imposed. In all the circumstances, we concluded that the sentence of 20 years which the sentencing judge imposed was not manifestly excessive.

<u>The period for eligibility for parole</u>

[40] Mr Wilson has also challenged the 15-year period which the sentencing judge ruled that the appellant should serve before he is eligible for parole. Counsel placed heavy reliance on **R v Howse**, a case decided by the Court of Appeal of New Zealand in the context of the Sentencing Act 2002 of New Zealand ('the Sentencing Act'). We note

counsel's submission as to the underlying legislative intention for the 'pre-parole' provision, as well as his submission that there was nothing in the character of the offending that justified the sentencing judge imposing a pre-parole period of more than 10 years.

[41] The Sentencing Act, before it was later amended, in its subpart 4, addressed sentencing for murder. Section 102 provided that there was a presumption in favour of a sentence of life imprisonment unless such a sentence "would be manifestly unjust". If a court did not sentence an offender to life imprisonment, it had to justify that decision with written reasons.

[42] Section 103 of the Sentencing Act then addressed the imposition of a minimum period of imprisonment where a sentence of life imprisonment was imposed. If the court did not impose a minimum period of imprisonment, the Act provided that the offender would serve a minimum period of 10 years as was provided in the Parole Act 2002 (New Zealand). Where a court sentenced an offender convicted of murder to life imprisonment, the court could, within 28 days of the imposition of the sentence, also order that the offender serve more than 10 years. The court could do so if it was satisfied that the circumstances of the offence were sufficiently serious to require such an order. In order to be satisfied in this regard, the court had to conclude that the circumstances took the offence out of the ordinary range of offending of the particular kind and had to, again, give written reasons.

[43] Section 103 was subject to section 104 which addressed the imposition of a minimum period of imprisonment of 17 years. Section 104 was not applicable at the time when **R v Howse** was decided. Tipping J, who delivered the judgment of the court wrote at para. 58:

> "There is no dispute that the case fulfils the sufficiently serious criterion prescribed in s 103(3) and justified a longer minimum period than the period of ten years referred to in s 103(1). Mr King argued [for the appellant] that the 28-year period was too long and out of line with comparable levels of culpability

> in other cases. The purpose of a minimum period order is to achieve greater punishment, denunciation and deterrence than would be allowed by the normal period of ten years: See R v Brown [2002] 3 NZLR 670, which held that culpability was at the heart of this issue…Once it is determined that the instant case justifies an increase above ten years, the question becomes how much additional punishment, denunciation and deterrence is appropriate. That depends on the level of culpability involved in the crime or crimes for which the additional period is being imposed."

[44] It is clear that these remarks were made in the context of the particular statutory framework that existed in New Zealand at the time. A sentence of life imprisonment was to be imposed on an offender convicted of murder, unless such a sentence was seen as manifestly unjust. The statute also provided that the usual minimum period to be served was 10 years, and the circumstances of an offence had to be out of the ordinary range before a higher minimum period could be imposed.

[45] In light of the specific statutory framework in which Tipping J wrote, in our view, it would be dangerous to transpose those principles to our context, as the legislative provisions in Jamaica are markedly different. It would be even more challenging to apply such principles in the context of sentencing after a guilty plea, where the CJAA has outlined a range of factors which must be taken into account, including the circumstances of the offence. It follows that we do not accept Mr Wilson's invitation to utilize the principles reflected in **R v Howse**, which he assumed reflected the legislative intent in Jamaica also, in determining an appropriate pre-parole period.

[46] The case of **Roderick Fisher v R** on which Mr Wilson also relied, and in which reference was made to **R v Howse**, was determined in 2008, before the passage of the amendments to the CJAA, and was not concerned with sentencing after a guilty plea. We have also not seen the principles outlined in **R v Howse**, on the basis of the New Zealand statutory framework at the time, being applied in our sentencing cases. It is to be noted that the excerpt from **R v Howse** to which this court referred in **Roderick Fisher v R** appears in the judgment delivered by Tipping J in the New Zealand Court of Appeal.

However, it appears that, in error, reference was made to the judgment of the Privy Council, which did not consider the question of the appellant's sentence.

[47] In our view, any matters concerning the sentence to be imposed on a defendant who has pleaded guilty to murder, to which section 3(1)(b) of the OAPA refers, should be determined on the basis of the statutory framework of the CJAA, bearing in mind sections 42E, 42F and 42H in particular, and within any other applicable sentencing principles developed in our jurisdiction.

[48] The question therefore remains as to whether the 15-year period which the judge imposed for the appellant to serve before he is eligible for parole is manifestly excessive. Having already applied a discount to arrive at the determinate sentence, the procedure to arrive at the period which the appellant would be ordered to serve before he is eligible for parole, is not clear from the statutory framework. The only clear guidance is that the sentence must not fall below the minimum pre-parole period for murder as provided in the OAPA.

[49] Section 2 of the Parole Act defines parole as "…the authority granted to an inmate under the provisions of this Act to leave the adult correctional centre in which he is serving a sentence and to spend a portion of the period of that sentence outside of the adult correctional centre".

[50] Section 3(1C) of the OAPA provides:

> "In the case of a person convicted of murder, the following provisions shall have effect with regard to that person's eligibility for parole, as if those provisions had been substituted for section 6(1) to (4) of the Parole Act-
>
> (a) …
>
> (b) where, pursuant to subsection (l)(b), a court imposes- (i) a sentence of imprisonment for life, the court shall specify a period, being not less than fifteen years; or (ii) any other sentence of imprisonment, the court shall specify a period,

being not less than ten years, which that person should serve before becoming eligible for parole."

[51] As is reflected in the OAPA, in the case of a defendant sentenced to life imprisonment for murder pursuant to sections 2(2) and 3(1C)(b) of the OAPA, he must serve a period of 15 years before he is eligible for parole. If, on the other hand, a defendant is sentenced to a determinate sentence, the minimum of which is 15 years, he must serve a minimum of 10 years before he is eligible for parole. It was clearly open to the sentencing judge to have imposed a lower pre-parole period. However, his imposition of a pre-parole period of 15 years is in keeping with the legislative provisions and is not manifestly excessive.

Disposal of the appeal

[52] The appeal against sentence is therefore dismissed. The sentence of 20 years' imprisonment at hard labour with the appellant to serve 15 years before he will be eligible for parole is affirmed. The sentence imposed is to be reckoned as having commenced on 23 March 2018, the date on which it was originally imposed.