[2020] JMCA Crim 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 52/2015

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA (AG)

KHORAN THOMAS v R

Ms Jacqueline Cummings instructed by Archer, Cummings & Company for the appellant

Ms Natalie Malcolm and Ms Tamara Merchant for the Crown

27 January and 25 June 2020

MCDONALD-BISHOP JA

[1] On divers days between 17 April and 5 May 2015, the appellant, Mr Khoran Thomas, appeared in the Home Circuit Court as the defendant in a trial on an indictment before G Smith J ("the learned trial judge"), sitting with a jury. He was charged with the offence of murder arising from the fatal shooting of Mr Samora Buchanan, also known as Ussman ("the deceased") in the Kingston 11 area in the parish of Saint Andrew. He was convicted and on 2 July 2015, sentenced to life

imprisonment at hard labour with the stipulation that he was to serve a minimum period of 18 years before being eligible for parole.

[2] The appellant applied to this court for leave to appeal his conviction and sentence. The application was based on four grounds of appeal, which, in broad outline were: misidentification by the witnesses; unfair trial; lack of evidence; and miscarriage of justice. He stated no ground of appeal concerning sentence. His application was considered by a single judge of this court who granted him leave to appeal both conviction and sentence. The reasons for the grant of leave, however, were not stated.

[3] At the hearing of the appeal, counsel Ms Jacqueline Cummings, who appeared on behalf of the appellant, commendably conceded that despite the several grounds of appeal that had been filed concerning the appellant's conviction, there was no viable basis upon which the conviction could be successfully challenged. She, however, did not see it fit to formally abandon the appeal against conviction but was content not to advance arguments in support of them.

[4] Counsel, however, sought and was granted leave to argue one supplemental ground of appeal in relation to sentence. This ground was formulated by counsel as follows:

> "The learned trial judge erred when she specified that [the appellant] should serve 18 years before being eligible for parole as she indicated no aggravating factor that outweighed the mitigating factors to warrant such a long sentence. In the premises the sentence imposed by the learned trial judge was manifestly excessive"

[5] Upon the conclusion of oral arguments from counsel for the appellant and the Crown, the court made these orders:

i. The appeal is dismissed.

ii. The sentence of life imprisonment with the stipulation that the appellant is not eligible for parole until after 18 years is affirmed.

iii. The sentence is to be reckoned as having commenced on 2 July 2015.

[6] We promised at the conclusion of the hearing to reduce to writing the reasons for our decision. This is in fulfilment of that promise.

The case at trial

A. *The prosecution's case*

[7] The case for the prosecution against the appellant rested on four significant planks as pointed out by the learned trial judge to the jury (pages 700 to 703 of the transcript). They were:

i. the eyewitness account of Miss Donnette Gayle, which was adduced by way of the admission of her police witness statement into evidence, pursuant to section 31D of the Evidence Act;

ii. an oral admission made by the appellant to the investigating officer at the Hunts Bay Police Station lockup after he was cautioned;

iii. incriminating statements made by the appellant in a caution statement given to the police; and

iv. incriminating responses from the appellant given to the police in a 'question and answer' interview.

[8] The case presented by the prosecution, in summary, was that on 19 July 2009, at approximately 9:30 pm, Miss Donnette Gayle who at the time was the girlfriend of the deceased, was walking with him along D'Aguilar Road towards Waltham Park Road, in the parish of Saint Andrew. While walking, she looked behind her and observed the appellant (whom she knew before) along with two other men, all armed with guns, running towards the deceased and her. She and the deceased ran in opposite directions. She then observed the three men running in the direction of the deceased and firing their guns at him. The deceased was shot and injured and was taken to the Kingston Public Hospital, where he later succumbed to his injuries.

[9] A post mortem report subsequently confirmed that the deceased died from gunshot wounds to various parts of his body.

[10] Detective Sergeant Pink, the investigating officer, gave evidence to the effect that on 22 July 2009, she spoke to the appellant while he was detained at the Hunts

Bay Police Station lockup in relation to the killing of the deceased. She cautioned him, at which point he responded in these terms:

> "Mi just done play football ... mi a go dung, mi see Ussman ...mi neva waan pass him, mi go 'tru' one trappie, when mi a go back dung mi see him, mi run up pon him and shoot him."

[11] The appellant was subsequently taken to the Major Investigation Task Force where, in the presence of his duty counsel, he gave a caution statement, in which he again admitted to shooting the deceased. He was permitted to speak to his counsel, in the absence of the police, before the taking of the caution statement. This caution statement was admitted into evidence at the trial. In that statement, the appellant explained that on the day in question, he was walking along D'Aguilar Road when he saw the deceased in his yard. According to him (page 314 lines 14 to 22 of the transcript):

> "When mi see him in the yard, mi never waan pass him. Because him have a gun. Mi turn back and go a Espeut and go get di gun and go back a D'Aguilar Road and him did go out a dumpling shop and when him coming back, mi attack him and from there so the shooting take place. But him never dead same time. Dem did teck him to the hospital. A doan know what take place after there so."

[12] The investigating officer also testified that after taking the caution statement, she conducted a question and answer interview with the appellant on 23 July 2009, in the presence of the same duty counsel who was at the taking of the caution statement.

The question and answer statement was also admitted into evidence. During that interview, the appellant initially denied shooting and killing the deceased but later admitted to doing so because the deceased had threatened him. The following were his responses on this issue during the interview with the police (page 338 lines 10 to 19 of the transcript):

"Question 66:	What threatening words did he use to you?
Answer:	Him seh him a go kill mi.
Question 67:	Did you report the threat to the police?
Answer:	No
Question 68:	How long ago was this threat issued to you?
Answer:	Some time in this year, I do not remember which month.
Question 69:	**Is this the reason why you shot andkilled him?**
Answer:	**Yes**." (Emphasis added)

B. *The appellant's case*

[13] At the trial, the appellant made an unsworn statement from the dock, denying any involvement in the murder. He stated that on 22 July 2009, he was at his sister's house, when the police came to the premises, apprehended him and took him to his mother's house, where the police searched the premises. The police then took him to the Hunts Bay Police Station lockup. He had been beaten by the police at the Hunts Bay Police Station lockup and forced by threats on his life to admit to being responsible for the deceased's murder. He was also forced by the police to agree to the contents of the

caution statement. His duty counsel, he stated, did not tell him what to say when he was giving the statement. He also acknowledged that he had participated in the question and answer session but that although the duty counsel was present, she failed to tell him what questions to answer or what to do.

Discussion

The appeal against conviction

[14] We entirely understood and agreed with the position taken Ms Cummings not to pursue arguments concerning the appeal against conviction. Any argument advanced against the propriety of the conviction would have been an effort in futility and would have been a waste of precious judicial time. The issues that arose for the jury's consideration depended purely on the view that the jury would take of the credibility and reliability of the case presented by the prosecution, on the one hand, and the unsworn statement of the appellant, on the other. Those were matters that were entirely for the jury's determination. The learned trial judge gave impeccable directions to them on the relevant law and its application to the crucial facts of the case.

[15] The jury accepted the witnesses for the prosecution as being credible and reliable and rejected the appellant's account in his unsworn statement. That was within their sole purview. There was more than enough evidence to satisfy the jury, once they accepted it, that the appellant was correctly identified as an active participant, with the requisite *mens rea*, in a joint enterprise to shoot and kill the deceased. There was ample evidence to satisfy the jury, beyond a reasonable doubt, that he murdered the deceased.

[16] Accordingly, in the light of the overwhelming strength of the evidence presented by the prosecution against the appellant, which established the charge of murder brought against him to the extent that the jury felt sure that he was the perpetrator, it could not be said by this court that the verdict was not supported by the evidence. The jury's verdict was found to be unassailable. The conviction was, therefore, safe and could not lawfully be disturbed by this court.

[17] The appeal against conviction, inevitably, failed.

The appeal against sentence

[18] During her oral submissions on the solitary ground of appeal against sentence, Ms Cummings raised three issues for our consideration. They were:

i. whether the sentence was manifestly excessive as a result of the failure of the learned trial judge to apply the relevant principles of law in determining the appropriate sentence;

ii. whether the learned trial judge erred when she imposed a sentence of life imprisonment instead of a fixed term of imprisonment; and

iii. whether the learned trial judge erred in stipulating that the appellant was to serve a minimum term of 18 years imprisonment before being eligible for parole.

Issue (i)

Whether the sentence was manifestly excessive as a result of the failure of the learned trial judge to apply the relevant principles of law in determining the appropriate sentence

[19] The statutory framework applicable to the learned trial judge's consideration of sentence is to be found in subsections 2(2) and 3(1) of the Offences against the Person Act ("OAPA"), which provide that:

> "(2) Subject to subsection (3), every person convicted of murder other than a person-
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> (a) convicted of murder in the circumstances specified in subsection(1)(a) to (f); or
>
> (b) to whom section 3 (1A) applies,
>
> shall be sentenced in accordance with section 3 (1)(b)."

[20] Section 3(1)(b) reads:

> "3.- (1) Every person who is convicted of murder falling within-
>
> (a) ...
>
> (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."

[21] Ms Cummings' primary grouse was with respect to the methodology employed by the learned trial judge in arriving at the sentence. Counsel maintained that she had failed to indicate what mitigating or aggravating factors had been taken into account before imposing the sentence she did. Ms Cummings argued that while the learned trial

judge was empowered to impose a sentence of life imprisonment, she would have been required to demonstrate that she weighed both aggravating and mitigating factors in arriving at her decision.

[22] Had this structured approach been adopted, Ms Cummings argued, the learned trial judge would have demonstrated that she took into account such factors as:

i. the appellant's personal characteristics;

ii. circumstances preceding the commission of the offence;

iii. the effect the sentence would have on persons other than the appellant;

iv. additional hardships resulting from the conviction;

v. the appellant's conduct after the commission of the offence; and

vi. factors arising from the conduct of the proceedings against the appellant.

[23] Counsel also noted that several mitigating factors enured to the appellant's credit, which were not taken into account by the learned trial judge. These factors, she said, were:

i. the appellant's previously unblemished character and good behaviour;

ii. the appellant's age at the time of conviction, being 25 years old;

iii. the fact that the appellant was not deemed to be a danger to society. Also, witnesses as to his character expressed the view that his actions were out of character and pleaded for leniency;

iv. the act was not committed in furtherance of any other offence; and

v. the subsequent good conduct of the appellant since his incarceration, up to the year 2015.

[24] Ms Natalie Malcolm, responding on behalf of the Crown, submitted that while the learned trial judge did not outline, in any standardised way, the method which had been employed by her during the sentencing process, it could not reasonably be argued that the sentence was manifestly excessive. She pointed out, by reference to excerpts from the transcript of the sentencing hearing (in particular, pages 774 to 775 of the transcript), that the appellant's complaint that the learned trial judge did not take into account several mitigating factors was without merit.

[25] Admittedly, the learned trial judge did not have the benefit of relatively recent cases, such as **Meisha Clement v R** [2016] JMCA Crim 26, as well as the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ("the Sentencing Guidelines"). The 'post - Meisha Clement' case law on sentencing and the Sentencing Guidelines have introduced a more structured and

systematic approach to the sentencing process than what previously obtained. However, the requirement for some semblance of a structured approach to sentencing, had long been established as reflected in such earlier decisions as, **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002. The learned trial judge would have had the benefit of the guidance afforded by those older authorities in determining what an appropriate sentence should have been. On account of her failure to demonstrate that she has had regard to the relevant authorities, her reasoning was devoid, for instance, of such considerations as to the possible range of sentences for the offence committed by the appellant and the starting point within that range. She also failed to explicitly identify and treat with the aggravating features of the offence.

[26] It would, therefore, be correct to say that the learned trial judge's approach was not in keeping with the prescribed method to sentencing that is now to be regarded as the norm. As a result, she failed to demonstrate that she had applied the relevant principles and that she had adequately balanced the various factors (some of which she had highlighted) in arriving at the sentence imposed. This omission on the part of the learned trial judge would have amounted to a misdirection in law, which would have justified interference from this court.

[27] It was noted, however, that although the learned trial judge had erred in principle in failing to properly demonstrate how she had arrived at the sentence she had imposed, she did provide a perspicuous overview of the factors that were considered by her, to the benefit of this court. She also demonstrated a general appreciation for some

of the principles of sentencing and some of the factors to be considered in the sentencing exercise.

[28] She noted these matters to the benefit of the appellant (pages 774 line 7 to 776 line 5 of the transcript):

i. his age (by her comment that he was still a young man);

ii. no previous conviction;

iii. he was gainfully employed;

iv. the favourable view of him held by the community as attested to by his witnesses as to character who were called during the sentencing hearing;

v. the Antecedent Report showing a "spotless record" prior to his conviction;

vi. the favourable findings in the Social Enquiry Report, which corroborated the evidence of his two witnesses as to character; and

vii. the time he spent in custody on pre-trial remand.

[29] Ms Cummings' contention that the learned trial judge had failed to take into consideration mitigating factors relating to the age of the appellant, his good character and antecedent history, was proved to have been inaccurate from a careful perusal of

the transcript. Similarly incorrect was her argument that the learned trial judge had not considered the appellant's good behaviour, while he was incarcerated before his conviction.

[30] The appellant's pre-conviction conduct was expressed in the Antecedent and Social Enquiry Reports, to which the learned trial judge had regard, and found to be favourable. The learned trial judge said this (page 775, lines 2 to 9 of the transcript):

> " I will also take into account the **antecedent record** which was presented. **Up to the point of your conviction for this offence, you had a spotless record. I will also bear in mind the findings that were stated in the Social Enquiry Report**, which corroborated what both Mr Chin-See and Mrs Boothe had to say about you." (Emphasis added)

[31] The learned trial judge's reference to "up to the point of [the appellant's] conviction for this offence", would have meant for all his life up to 5 May 2015, when he was convicted. The Social Enquiry Report would also have disclosed findings pertaining to his conduct up to the point of his conviction. It is clear from the reasoning of the learned trial judge that she had taken into account the appellant's good character and unblemished antecedents up to the point of his conviction, which would have included the period during which he was on pre-trial remand. His good conduct on pre-trial remand would have been part and parcel of his pre-conviction good character, which was accepted, generally, as a mitigating factor by the learned trial judge. She had regarded nothing in his personal circumstances as an aggravating factor. Therefore, the learned trial judge could not be faulted for not specifically singling out the pre-trial behaviour in custody as a separate and distinct mitigating factor. There

was no more benefit that the appellant could have derived from his hitherto unblemished character, up to the date of sentencing.

[32] The learned trial judge had noted, quite correctly too, that she had to weigh the Social Enquiry Report on the same scale with the facts of "this offence" for which he was convicted. She was correct in doing so because she was obliged to consider not only the circumstances of the appellant as the offender but of the offence. Therefore, there had to be a balancing of factors pertinent to the offence as well as the offender.

[33] By referring to "the facts of the offence", the learned trial judge was disclosing her thought process as to matters that would have reduced the effect of his good character on sentence. Those matters would have related to the nature and circumstances of the commission of the offence. Regrettably, she did not identify those factors beyond saying that the offence resulted in the death of the deceased. That consideration, however, would not have been an aggravating factor because death is inherent in the commission of the offence itself. She would have had to identify aggravating factors that countervailed the mitigating factors, which she did not do. It was this omission which led Ms Cummings to, initially, contend in her written skeleton arguments that there was no aggravating factor identified by the learned trial judge to reduce the effect of the mitigating factors, and so, the sentence was excessive.

[34] Counsel, however, during her oral submissions, rightly admitted that even though the learned trial judge had not explicitly identified any aggravating factors, there were three in the circumstances of the commission of the offence. She highlighted, the

use of firearm to commit the offence, the number of perpetrators and the prevalence of the offence.

[35] We did accept, as contended by Ms Cummings, that the learned trial judge had failed to identify relevant aggravating factors in the commission of the offences, which would have been an error, in principle. We also accept counsel's concession that there were, in fact, the three aggravating features, identified by her, which ought to have been considered by the learned trial judge. We found that there were aggravating factors arising from the circumstances of the commission of the offence, including those highlighted by Ms Cummings, that would have reduced the positive effect of the mitigating factors, which would have emerged from the personal circumstances of the appellant. Some of the readily apparent aggravating factors of significant weight were:

i. premeditation;

ii. the use of a firearm in the commission of the offence;

iii. the number of perpetrators;

iv. the number of weapons used in the commission of the offence;

v. location of the commission of the offence (public thoroughfare); and

vi. the prevalence of these types of offences.

[36] These aggravating factors were of significant weight to negatively impact the benefit to the appellant that would have been derived from the mitigating factors that were identified by counsel and the learned trial judge.

[37] The argument of Ms Cummings that the learned judge ought to have considered the fact that the murder was not committed in furtherance of another offence did not gain any traction with the court. That consideration was of no relevance as a mitigating factor in the sentencing process and, so, ought not to have been accorded any weight by the learned trial judge.

[38] The contention of counsel that the sentence was manifestly excessive due to the failure of the learned trial judge to apply the relevant principles of law in sentencing the applicant was, therefore, without merit.

Issue (ii)

Whether the learned trial judge erred when she imposed a sentence of life imprisonment instead of a fixed term of imprisonment

[39] Ms Cummings further submitted that the learned trial judge should have imposed a fixed-term sentence of 18 years with the stipulation that the appellant was to serve a minimum of 12 years' imprisonment, before eligibility for parole. She argued that by failing to do so, the learned trial judge imposed a sentence that was "too long". The court did not agree that the learned trial judge was wrong not to have imposed a fixed term of imprisonment.

[40] Section 3(1)(b) of the OAPA is clear that the learned trial judge was empowered to impose the sentence of life imprisonment or, in the alternative, a fixed term of imprisonment not being less than 15 years. Although the learned trial judge did not explicitly explain her reasons for not imposing a fixed term of imprisonment, this court could not say that she erred in law. When the record of sentences of the court for similar offences of this nature, which was helpfully provided by Crown Counsel, were examined, it could not be said that the sentence of life imprisonment for an offence of this nature was excessive. There was no basis on which this court could correctly find that the learned trial judge wrongly exercised her discretion in electing the life imprisonment option for this offence and offender (see **Danny Walker v R** [2018] JMCA Crim 2).

Issue (iii)

Whether the learned trial judge erred in stipulating that the appellant was to serve a minimum term of 18 years imprisonment before being eligible for parole

[41] Regarding the minimum period that was specified for eligibility for parole, the crux of Ms Cummings' submission rested on her interpretation of section 6 of the Parole Act. The section reads:

> "6.-(1) Subject to the provisions of this section, every inmate serving a sentence of more than twelve months shall be eligible for parole after having served a period of one-third of such sentence or twelve months, whichever is the greater.
>
> (2) Where concurrent sentences have been imposed on an inmate, such inmate shall be eligible for parole in respect of the longest of such sentences, after having served one-third

of the period of that sentence or twelve months, whichever is the greater.

(3) Where consecutive sentences have been imposed on an inmate, such inmate shall be eligible for parole after having served one-third of the aggregate of such sentences or twelve months, whichever is the greater.

(4) Subject to subsections (4A) and (5), an inmate -

(a) who has been sentenced to imprisonment for life; or

(b) in respect of whom-

(i) a sentence of death has been commuted to life imprisonment; and

(ii) no period has been specified pursuant to section 5A,

shall be eligible for parole after having served a period of not less than seven years."

[42] Subsections 6(4A) and (5) provide:

"(4A) Subject to subsection (5), an inmate who has been sentenced to imprisonment for life, or for a period of fifteen years or more, for-

(a) any offence under section 4,9,10 (7)(a), 20(4), 24 or 25 of the Firearms Act; or

(b) any of the following offences referred to in section 20 (2) of the Offences Against the Person Act, namely-

(i) shooting with intent to cause grievous bodily harm or with intent to resist or prevent the lawful apprehension or detainer of any person; or

(ii) wounding with intent, with use of a firearm, committed after the coming into operation of this Act, shall be eligible for parole after having served a period of not less than ten years.

(5) **Upon the expiration of** -

(a) the period of ten years,

(b) **the period specified pursuant to section 5A of this Act or section 3 (1C) of the Offences against the Person Act or sections 6(1)(a) or 10(4)(a) of the Sexual Offences Act,**

whichever is the greater, the Board shall review the cases of inmates who are serving a sentence of life imprisonment for the purpose of deciding whether or not to grant parole to them." (Emphasis added)

[43] Ms Cummings contended that the learned trial judge ought to have applied the provisions of section 6 of the Act, which would have meant that the appellant would have been required to serve a minimum of 10 years and not the 15 years minimum term provided for under the OAPA. Counsel submitted that on this basis, the minimum time that the appellant should serve before eligibility for parole would be 12 years because he ought to have been sentenced to the fixed term of 18 years' imprisonment.

[44] The OAPA, which prescribes the sentences for the offence of murder, makes specific provision regarding eligibility for parole. Section 3(1C) states that:

"(1C) 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) where a court imposes a sentence of imprisonment for life pursuant to subsection (1)(a), the court shall specify a period, being not less than twenty years, which that person should serve before becoming eligible for parole; or

(b) where, pursuant to subsection(1)(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." (Emphasis added)

[45] It is clear from the provisions of section 3(1C) of the OAPA that where a judge specifies the exact term of imprisonment that should be served, the minimum time a person would be required to serve before being eligible for parole would be 10 years. Where the sentence imposed is life imprisonment, however, the minimum term of imprisonment before eligibility for parole would be 15 years. In this case, since the sentence imposed was life imprisonment, it would logically follow that the minimum term that the learned trial judge was required to specify before the appellant was eligible for parole would have been 15 years.

[46] The learned trial judge was required to adhere to the sentencing requirements as expressly stipulated by the governing statute, which was the OAPA. Section 3(1C) of the OAPA makes it indisputable that as it relates to parole concerning a conviction for murder, its provisions are to be read as if substituted for section 6(1) to (4) of the Parole Act. There was, therefore, no requirement for the learned trial judge to consider section 6 of the Parole Act, in determining the minimum period the appellant was required to serve before being eligible for parole.

[47] In any event, when one examines the Parole Act itself, it can clearly be seen that specific provision has been made for the Parole Board to review an inmate's sentence of life imprisonment, having regard to any specific period which may have been imposed in accordance with section 3(1C) of the OAPA.

[48] The Parole Board is, therefore, only able to review an inmate's sentence after a minimum period of 10 years, where life imprisonment had been imposed in the case of other offences under the OAPA, other than murder. Ms Cummings' argument, therefore, that the minimum term of imprisonment that the appellant would have been required to serve before being eligible for parole was 10 years was, with all due respect, not grounded in law.

[49] There was no merit in the ground of appeal challenging sentence. The sentence was not, at all, excessive in any respects. If anything could be said about the length of the sentence is that, fortunately for the appellant, it falls outside the lower end of the usual range for a case that involved murder by a group of men, all armed with firearms, and which proceeded to trial on such overwhelming evidence, including a confession. The history of sentences gleaned from cases from this court, cited by Crown Counsel, show a range of sentences starting at 23 years' imprisonment before eligibility for parole for murder committed in like circumstances, following a trial. We shared the opinion of Crown Counsel that the sentence was "very, very generous" in all the circumstances. The appellant had no basis to complain about it.

[50] Notwithstanding the valiant effort of Ms Cummings, in seeking to convince the court that the sentence should be reduced, the court was not persuaded by her that the sentence was manifestly excessive and should be disturbed. Therefore, the appeal against sentence also failed.

Conclusion

[51] For the reasons above, the court found no basis on which it could properly hold that the conviction and sentence were impeachable. The appeal was, accordingly, dismissed and consequential orders made, as detailed at paragraph [5] above.