[2021] JMCA Crim 41

JAMAICA

IN THE COURT OF APPEAL

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

SUPREME COURT CRIMINAL APPEAL NO 80/2014

KEVIN BANDIE v R

Miss Gillian Burgess for the applicant

Miss Sophia Thomas for the Crown

30 November 2020 and 5 November 2021

P WILLIAMS JA

Background

[1] Mr Kevin Bandie ('the applicant') was charged on an indictment containing one count for the offence of murder of Dalianne Dixon ('the deceased'). On 30 July 2014, after a trial before Morrison J ('the learned judge') and a jury in the Circuit Court for the parish of Saint Thomas, which had lasted some five days, he was found guilty. Thereafter, he was sentenced to life imprisonment with the stipulation that he is not eligible for parole until he has served 25 years.

[2] The applicant applied for leave to appeal against both conviction and sentence and leave was refused by a single judge of this court. As he is entitled to do, he has now renewed his application before this court.

The case for the Crown

[3] The applicant and the deceased were said to have been involved in an intimate relationship. At the time of her death, 27 November 2006, the deceased was staying with her parents in Leith Hall in the parish of Saint Thomas. On that day, sometime after 4:00 pm, her mother, Mrs Dawnette Dixon, returned home from work and found the deceased on the floor lying on her back with a sheet over her head and an extension cord wrapped and tied around her neck, over the sheet.

[4] Mrs Dixon loosened the cord whilst calling out her daughter's name and shaking her. When Mrs Dixon eventually removed the sheet, she realised that her daughter was not moving. Mrs Dixon noticed that her eyes were closed with her tongue protruding from her mouth, and she appeared to be dead. Mrs Dixon "threw the sheet back over her [daughter's] head" and went to the deceased's aunt who lived nearby and told of her discovery. The aunt and her husband accompanied Mrs Dixon to the Morant Bay Police Station where they made a report.

[5] The investigating officer, Detective Sergeant ('Det Sgt') Neville Gordon, was on duty at the police station that day, and he received information that caused him to go to the Dixon's home in Leith Hall. He was shown a body that was identified to be that of the deceased. He made observations of the house and made arrangements for the scene to be processed by personnel from the scenes of crime unit.

[6] Det Sgt Kevin Maine, who was then stationed at Area 4 Scenes of Crime, was the officer who visited and processed the scene. He testified that he made observations of an entrance door noting that "the area of the lock [was] damaged". He also saw what appeared to be a smudged shoe impression on the outside of the door. He concluded from these observations that the door had been kicked in by someone from the outside.

[7] After the police visited the scene Mrs Dixon had to be taken to hospital and then was taken to Prospect to stay for a while. She testified that when she returned to her home, she discovered that some photographs she had of her daughter were missing. She

usually kept the photographs displayed on a dresser and whatnot in the house. She said she had got the photographs from the deceased over periods of between six to seven years and longer.

[8] Mr Ludlow Saunders, the stepfather of the applicant, testified that on Wednesday, 29 November 2006, the applicant called him sometime between 4:00 pm and 4:15 pm. Mr Saunders said that the applicant reported that he and the deceased had a fight and that he squeezed her throat and that she had died as a result. Mr Saunders said that about two to three days later, he went to Retreat to the home of the applicant, where he saw and spoke with him. Mr Saunders said the applicant again admitted to having killed the deceased.

[9] Under cross-examination, Mr Saunders explained that the first time he told the police about his conversations with the applicant was sometime in 2007 after some thirty-odd police had visited his home and taken him into custody. He insisted that although he had felt a "wee bit shaken" by the manner that he was taken in, what he told them about the conversations with the applicant was the truth.

[10] Det Sgt Gordon denied that thirty-odd officers went to the home of Mr Saunders. His evidence suggested that the interest in Mr Saunders was more concerned with getting information on the location of the applicant.

[11] On 14 December 2006 Mr Devon Dixon, the father of the deceased, attended the post-mortem examination and identified his daughter's body. The pathologist, Dr Prasad Kadiyala, in his evidence stated that the cause of death was asphyxia as a result of ligature strangulation. He opined that this was caused by constriction of the neck by a piece of cloth, or some similar material hung around the neck and pulled tightly. He agreed that an extension cord qualified as similar material.

[12] On 12 January 2007, whilst driving his taxi along Queen Street in Morant Bay in the parish of Saint Thomas, Mr Dixon saw the applicant. After following him for a while, Mr Dixon said that he saw two police officers in uniform and made a report to them.

[13] Sergeant Calbert Lammie and Corporal Livingston Brown were the officers to whom Mr Dixon made the report. The officers were on foot patrol in the area when Mr Dixon approached them, and they immediately went in search of the applicant. Upon seeing him, they ordered him to stop but he ran off. As he did so, the two officers saw him drop something that appeared to be pieces of paper. The officers testified that they separately each retrieved some of the items and discovered them to be five photographs of a female. The applicant was eventually held by Corporal Brown and taken into custody.

[14] The five photographs were handed over to Det Sgt Gordon. They were identified by Mrs Dixon as the ones she had on display in her house although they were altered in that they were cut down to "wallet size". The five photographs were admitted into evidence.

[15] On 24 January 2007, a question-and-answer interview was conducted with the applicant in the presence of the attorney-at-law who was then appearing for him. The written record of this question-and-answer interview was admitted into evidence.

[16] In his defence, the applicant made an unsworn statement in which he merely stated that he knew nothing about the murder of the deceased for which he had been charged.

The appeal

[17] The applicant sought and was granted permission to abandon the original grounds of appeal and to argue, instead, the following supplemental grounds:

> "1. The learned trial judge misdirected the jury in leaving the doctrine of recent possession of the photographs as circumstantial evidence on which they could rely to convict the applicant of murder.
>
> 2. The learned trial judge erred in his directions to the jury with respect to the evidence of Mr Ludlow Saunders.
>
> 3. That the sentence is manifestly excessive."

Ground 1: The learned judge misdirected the jury in leaving the doctrine of recent possession of the photographs as circumstantial evidence on which they could rely to convict the applicant of murder

Applicant's submissions

[18] Miss Gillian Burgess submitted that the doctrine of recent possession does not relate to a case of murder, because the doctrine is a device that places criminal liability on a person found in possession of items that were stolen.

[19] Counsel contended that the case for the Crown was that the applicant, being in possession of these photographs, must have taken them while murdering the deceased. She submitted that this was a dangerous inference for four reasons. The first reason she posited was that Mrs Dixon's description of the circumstances surrounding the disappearance of the photographs from her home, left much to be desired. Counsel noted that the photographs had not been secured and that this raised the question of whether the photographs had been stolen. Secondly, she contended that the items were not sufficiently rare and therefore their identification was in issue.

[20] Counsel submitted, thirdly, that the evidence regarding the retrieval of the photographs also left much to be desired. She contended that that evidence raised the question of whether the photographs were ever in the applicant's possession. Fourthly, counsel contended that the circumstances of the retrieval of the photographs did not fit into the thesis that the possession was recent, in that, the incident with the police was more than a month after the deceased was killed.

[21] Miss Burgess submitted that even if the jury were convinced that the applicant stole the photographs, this was insufficient to link the theft to the murder of the deceased. Mrs Dixon's evidence was not such that it could only be concluded that the photographs could only have been taken during the killing of her daughter. On this ground, she concluded that, in all these circumstances, the verdict was unsafe.

Respondent's submissions

[22] On behalf of the Crown, Miss Sophia Thomas acknowledged that the prosecution of the applicant relied on circumstantial evidence and the confession he made to his stepfather. She submitted that it was legitimate for the learned judge to include the recent possession of the photographs of the deceased, which were stolen from the house, as a part of the circumstances which pointed to the guilt of the applicant. She pointed out that the learned judge correctly explained the doctrine of circumstantial evidence to the jury. Further, counsel contended, the inference was that the applicant was trying to destroy evidence that incriminated him and established his guilt.

[23] Counsel relied on **Shepherd v R** [1991] LRC (Crim) 332 in arguing that it was the essential elements of the offence which must be proved, and that it did not mean that every piece of evidence relied upon to prove an element inferentially, must itself be proved beyond a reasonable doubt. Thus, she contended that the learned judge was entitled to leave the fact of the photographs being in the possession of the applicant, a little over one month after the death of the deceased, as this may assist the jury in determining whether they were satisfied of the guilt of the applicant.

[24] Counsel submitted that in **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26 this court followed the reasoning in **Shepherd v R** and that the instant case is similar to **Melody Baugh-Pellinen v R**, where reliance was placed on circumstantial evidence and an alleged confession. She urged that, in the instant case, both the circumstantial evidence and the applicant's confession presented a compelling case against the applicant and the jury was satisfied of his guilt.

[25] Counsel submitted that the emphasis of the recent possession was critical because it demonstrated that the applicant was present at the scene of the crime, and the fact that he tried to destroy the photographs, was a further circumstance pointing to his guilt.

Discussion

[26] It is indisputable that the doctrine of recent possession is usually relied on in cases involving larceny or receiving stolen property. Where someone is found in possession of stolen items soon after they were stolen, the doctrine can assist in asserting that the person in possession stole the items or had them in his or her possession knowing that they were stolen. In **Ashan Spencer v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 14/2007, judgement delivered on 10 July 2007 Morrison JA (as he then was), writing on behalf of the court, made this useful observation at paragraph 26:

> "It is always important to bear in mind, we think, that what Archbold 2007 describes (at paragraph 21-125) as 'the so-called doctrine of recent possession' is really 'no more than the application of common sense'. It is purely evidentiary in effect (per Fraser JA in **Ghany v R** (1967) 12 WIR 372, 393)."

[27] It has, however, been recognised that the doctrine can be relied on as part of the circumstantial evidence that may link the possessor of stolen items to other offences other than stealing. In **Calvin Powell and Lennox Swaby v R** [2013] JMCA Crim 28, Brooks JA (as he then was), writing on behalf of the court, considered this issue, and had this to say at paras [68] and [69]:

> "[68] Guidance to trial judges, in addressing the issue of recent possession can be found in yet another Scottish case, **Fox v Patterson** [1948] JC 104. In that case, the Lord Justice-General (Cooper), after identifying the presumption that recent possession imports, impressed the need for all three elements of the concept to be present. He said:
>
> > 'If the rule is to have full effect … three conditions must concur: - (a) that the stolen goods should be found in the possession of the accused; (b) that the interval between the theft of the goods and their discovery in the accused's possession should be short-how short I need not in this case inquire; and (c) that there should be 'other criminative circumstances' over and above the bare fact of possession. If all these conditions are not present

> … the facts which can be proved may well constitute ingredients (quantum valeant) in the case and may combine with other factors to enable the Crown to establish guilt. But, unless all three conditions concur, the accused cannot be required to accept the full onus of positively excluding every element of guilt. Even when they concur, the weight of the resulting presumption, and the evidence required to elide it, will vary from case to case.'
>
> [69] From those cases, it appears that the principle to be applied is that where the offence involves the use of violence, then the presumption imported by the recent possession of stolen goods, does not apply. The three conditions above, even though all present, only constitute circumstantial evidence that may link the possessor to the offence involving the use of violence. It is for the jury to decide if the evidence leads to the sole conclusion that the possessor is the perpetrator of that offence. As was stated in Archbold, quoted above, each case will depend on its own facts."

[28] Brooks JA went on to review several cases that dealt with the issue and ultimately stated "that recent possession by itself is not sufficient to found a conviction. It can only be part of the evidence that the tribunal of fact may examine along with other evidence" (see para [75]).

[29] In this case, the evidence presented by the prosecution was that five photographs of the deceased were missing from Mrs Dixon's home where the murder was committed. Mrs Dixon testified that she had last seen most of the photographs on 26 November 2006, and she described the circumstances under which she had seen and handled them while cleaning. She said she had last seen one photograph on the morning of 27 November 2006, before leaving for work.

[30] It was not initially very clear, from her evidence, when it was that she had returned to the home after going to Prospect to discover that they were missing. For example, when first asked how long she stayed at Prospect, she stated that she did not know because "[she] was so unconscious, [she] don't remember how long [she] was there".

However, the following exchange took place between her and the prosecutor during re-examination:

> "Q. Mrs. Dixon, please listen and answer carefully, what I just asked you when the Registrar showed you pictures, just awhile [sic] ago, one you said that was on the watnot [sic] and you remember and you tell the members of the jury, before Mr Gordon showed these [pictures] to you at the Morant Bay Police Station, when was the last time you saw that particular picture that you saw on the watnat [sic]?
>
> A. When I went down from Prospect the same 27th, and I was looking around in the house and I looked on the watnat [sic], I saw that that was gone too, the passport size picture was gone."

[31] This was, therefore, sufficient evidence that she noticed them missing sometime on 27 November 2006, the same day she had discovered her daughter's dead body. It was also significant that the evidence was that the pictures were the only items that Mrs Dixon noted were missing from the home. It is indeed correct that there was no evidence as to whether the house had been secured during the time Mrs Dixon had spent in Prospect. However, there was certainly enough evidence for the jury to decide whether they believed the pictures had been taken from the home on the same day the deceased was killed and if they had been taken by someone for whom they had some significance.

[32] Mrs Dixon was subjected to intense cross-examination as to her ability to identify the photographs admitted into evidence as the ones, she said, she had missed from her home. She was questioned about the possibility that other copies of the photographs could have existed and that other persons could have had copies. When asked whether she could say, with certainty, that those were the only copies of the photographs, she responded that "[she] can only say with certainty about those that [the deceased] gave to me. [She] did not see [the deceased] with any other copy of those …, only what [the deceased] gave to [her]...". She insisted that although there were no distinguishing marks on the photographs, she knew them.

[33] During the question-and-answer interview conducted with the applicant, he acknowledged that he had five "full size photographs" of the deceased which he said she had given to him, although he could not remember when she had done so. It was open to the jury to accept or reject this explanation of his being in possession of photographs of the deceased. Further, when asked for the photographs the applicant responded that "[t]hey suppose [sic] to be at Morant Bay Police Station". In the absence of any explanation from him as to how they came to be at the station, it was certainly open to the jury to accept the account given by the prosecution. The evidence of the two police officers who had apprehended him was that the applicant had thrown away items when they had called to him to stop, and these items were retrieved and found to be five photographs of the deceased.

[34] Before the learned judge directed the jury on recent possession, he directed them on inferences and stated the following:

> "It is not everything in this case which can be proved by direct evidence, I see. Some evidence will have to be inferred. That is to say, commonsense conclusion will have to be drawn from proven facts. If you find that one thing happened, Mr. Foreman and your members, and another thing happened and that a third thing happened. You might say on the basis of this, therefore, the fourth thing must have happened."

[35] The learned judge subsequently gave directions in relation to the missing photographs as follows:

> " ... [I]f you accept that ...the deceased, had given her mother those photographs and that the photographs belonged to her mother, it stands to reason that if the mother went home and no longer saw the photographs, it must be somebody took those photographs without her permission, which leads me to something I am going to tell you about now, which is call [sic] the doctrine of recent possession. And it is simply this, since she did not give anybody permission to take those photographs, you are going to say or infer that these photographs were stolen. When stolen goods are found in a [sic] possession of a person, recently after receiving it [sic],

> then subject to any explanation that the person who is found in possession of those [sic], in this case the photographs, you, Mr. Foreman and your fellow jurors, may presume that she [sic] came by those goods dishonestly. Before that doctrine can be applied, you must be satisfied, one: [t]hat the goods were stolen. Look at the facts. She left them there and she gave no one permission and she went back and they were not there. Inference is open to you that they were stolen.
>
> Two, that they were found in the possession of the [applicant], I'm going to come back to that now, shortly. Three, that this was shortly after the stealing or the taking, and four, any explanation proferred [sic] that it is untrue ..."

[36] The learned judge then reminded the jury of the evidence as to how these pictures were retrieved, and the fact that they were shown to Mrs Dixon who identified them as the photographs which her daughter gave to her. He then gave the following guidance:

> "This is how you are going to use the doctrine of recent possession to determine whether or not they were, in fact, photographs given to her by her daughter. She [sic] said that they were in the possession of the [applicant]. If you reject his explanation, that the photographs had been given to him by [the deceased], because you would have to reject that in order to come to the conclusion, based on the doctrine of recent possession, that's one of the evidence, but I will come back to that again ..."

The learned judge went on to highlight the fact that the photographs had been altered or cut down to "wallet size", according to the evidence given by Mrs Dixon.

[37] On the question of whether the time that had elapsed between the theft of the photographs and their recovery, indirectly from the applicant, satisfied the requirement of being classified as recent, it is to be borne in mind that for this classification, every case depends on its own facts. For possession to be considered recent, the time will vary dependent on the nature of the item that was stolen. It has been said that where items are of such nature that they can be passed quickly from person to person, the time is expected to be relatively short, like within a few days. In this case, an important consideration about the nature of the item must be that they would have been of

significance or value to only a few persons, and certainly would not have been given readily to anyone. The time of a little more than a month, in these circumstances, could be classified as recent.

[38] After his review of all the evidence presented by the prosecution, and after giving unexceptional directions on circumstantial evidence, the learned judge, in his concluding remarks, gave the following directions:

> "I did point out to you, Mr Foreman and your members, it is not on the circumstantial evidence, we have the evidence of confession evidence made by Mr Ludlow. But let us look at pieces of circumstantial evidence.
>
> Mrs. Dawnette [Dixon], five photographs, dresser wattnut [sic], gave her daughter the key to go home on Monday. She goes home and she discovered the body of her daughter, the photographs are missing. That is one. Then we have the evidence of [Corporal] Brown and [Sergeant] Lammy, about chasing the [applicant] and having him dropping a bucket and pieces of paper. Papers are retrieved by [Corporal] Brown and [Sergeant] Lammy themselves, gave it to [Det Sgt] Gordon, who then invites Mrs. Dixon, the mother of the deceased who [Dalianne] gave the photographs to, same five miraculously turned up. Although she did infact [sic] say she wasn't able to identify one of them. I already told you about the doctrine of recent possession.
>
> So, Mr. Foreman and your members, these are the little pieces of evidence which you need to consider, in answer to the question whether or not there are any circumstantial evidence in this case and I already told you how to deal with it."

[39] The evidence in relation to the photographs being stolen was circumstantial evidence, which could establish that the applicant could have been present at the deceased mother's house at a time approximate to the murder. The evidence regarding the applicant's possession of the photographs was such that the learned judge ought not to be faulted for giving directions on it and its implication.

[40] It is important to bear in mind the significance of the fact that the prosecution was also relying on the confession by the applicant to his stepfather. It is notable that the learned judge, in discussing Mr Saunders' evidence, stated:

> "... I come to what I consider or who I consider to be the pivotal person in this case. This is where the case resides and turns, Ludlow Saunders."

[41] The learned judge's reference to the doctrine of recent possession was not inappropriate based on these circumstances. Importantly, the jury was not invited to use the fact that the prosecution was relying on the evidence that the applicant was seen in possession of the photographs, recently stolen from the home in which the deceased's body had been found, as the sole basis for concluding that he had killed her. There was more significant evidence which the prosecution relied on to establish the nexus between the applicant and the murder of the deceased. Thus, in these circumstances, the learned judge did not err in referring, as he did, to the doctrine of recent possession as part of the body of evidence presented to the jury to prove the applicant's guilt.

[42] This ground must therefore fail, as the learned judge's reference to the doctrine of recent possession, did not cause any prejudice or unfairness to the applicant. The verdict of the jury ought not to be disturbed on this ground.

Ground 2: The learned judge erred in his directions to the jury with respect to the evidence of Mr Ludlow Sanders

Applicant's submissions

[43] Miss Burgess submitted that Mr Saunders gave evidence of some excesses that were used to procure his statement that the applicant had confessed to him. His evidence, counsel argued, was that he was put in fear by the police but that his evidence was nevertheless the truth. Thus, the complaint on this ground was about the way in which the statement from Mr Saunders, implicating the applicant, was obtained.

[44] In the written submissions counsel outlined the learned judge's summation and went on to submit that, in all the circumstances, the learned judge ought to have invited

the jury to consider whether the conduct of the police affected the content of the witness' statement.

[45] Counsel noted that Mr Saunders spoke of many police officers "invading" his yard and one officer being hostile towards him. She asserted that the learned judge had emphasized that he believed the witness to be forthright and described him as "this earthy creature of ours, earthy brother, earthy sibling of this land". She submitted that it was a matter of public policy that evidence that was obtained unfairly should be excluded.

Respondent's submission

[46] Miss Thomas submitted that the evidence given by Mr Saunders was convincing and it remained so even after he had been thoroughly cross-examined. In addition, counsel contended that the learned judge's summing-up, reflected the weaknesses and strengths of the alleged admission by the applicant, and the circumstances which led Mr Saunders to give a statement to the police.

[47] She submitted that the overall effect and strength of the evidence of Mr Saunders overwhelmed the weaknesses and satisfied the standard of proof. Also, she noted that the learned judge reminded the jury that it was important that the admission was free and voluntary. The statements by the applicant to Mr Saunders, it was submitted, satisfied both limbs.

[48] Counsel also submitted that although Mr Saunders indicated that he was not pleased with the invasion of his home by the police and the hostility shown by one of the officers, he maintained that he did not feel fearful or intimidated.

[49] Counsel's final submission was that although there were some imperfections surrounding the circumstances in which Mr Saunders gave the police a statement regarding the alleged confession made to him by the applicant, when one examines the overall statement, there was no doubt that the statement made by Mr Saunders was accurate. Further, she noted, the applicant, in his unsworn statement, did not challenge the evidence of Mr Saunders.

Discussion

[50] Since the applicant was challenging the way the learned judge dealt with Mr Saunders' evidence, it is necessary to outline Mr Saunders' evidence in relation to his conversations with the applicant. His evidence, during examination-in-chief, was as follows:

> "Q. Can you remember which day of the week it was now that you heard from [the applicant]?
>
> A. I don't remember, not presently.
>
> Q. Not presently, all right, just take your time and go along now. Tell us how you heard from [the applicant]?
>
> A. Via telephone.
>
> Q. Where were you at the time when you heard from [the applicant]?
>
> A. Home
>
> Q. Can you remember if it was about somewhere around 4:00 to 4:15 in the afternoon?
>
> A. Yes, please.
>
> ...
>
> Q. Take your time, sir, and tell us now what is it that happened when you heard from [the applicant] on that afternoon?
>
> A. He called me and said to me ...
>
> ...
>
> A. 'Luddy, mi get myself inna trouble'. I then now turn to him and say in a Jamaican language and say, 'Fi wha?'
>
> Q. What happened, sir, when you say that to him in Jamaican language?
>
> A. He sighed for a while and then say to me, 'A mi and mi girlfriend.'

...

Q. Yes, sir.

A. After him say that to me, me pause for a minute.

Q. Yes, sir.

A. I ask him, after mi say, 'Fi wah?' mi ask him it again. Him and him girlfriend have a fight.

Q. Yes, sir.

A. And him squeeze her throat and she dead.

..."

[51] Mr Saunders told the court that within days of that telephone conversation, he saw and spoke with the applicant. The evidence was as follows:

"Q. Yes. Are you able to remember, Mr. Saunders, if when you went to Retreat some two to three days later and you saw [the applicant], was it in the morning or was in [sic] the night?

A. Afternoon.

...

Q. Now, when you went to the house in Retreat, East Down Oaks and you saw [the applicant], can you tell the Court where exactly at the house was [sic] [the applicant] when you saw him?

A. Sitting on the back step of the yard.

...

Q. ... Now, when you went and you saw [the applicant] sitting on the back step, tell us what happened and take your time, please.

A. I turned to him and asked him ...

...

A. I turned to him and asked him, 'Man, a wah draw yuh out?'

Q. Stop. What you meant when you said those words to [the applicant], 'Man, a wah draw yuh out?'

A. After I said, 'Man a wah draw yuh out,' it meant that a wah cause him fi really do wah him do, that mean kill the girl.

...

Q. ... when you asked [the applicant] those words, 'Man, a wah draw yuh out', did [the applicant] answer you?

A. Yes, please.

Q. Take your time now and tell us what did [the applicant] say to you at that time.

A. Him paused for a while and then say 'Luddy bwoy, mi did vex, yuh nuh'.

Q. Stop. Yes, did he say anything else?

A. No, please."

[52] Another aspect of Mr Saunders' evidence, which is useful to recount, is his description of the way he was taken to the police station where he gave his statement to the police. Under cross-examination, he said:

> "At the time I was at my home thirty-odd police invade mi yaad like dem hear say mi a thief or mi a gunman or mi kill somebody, those are the words I say to some of them. And in the same breath, one of them was very hostile and out of the pack a second one came to the front and say, 'Brethren, easy man, a just some information wi want,' I did not know the hostile one was still in front. The calmer one repeat it again, 'Brethren, just cool yuhself man, a just some information wi want.' I stand there for about ten minutes before I move."

[53] He told the court that he eventually left with the police "and on reaching Morant Bay in a CIB office the hostility continue [sic]". He denied feeling fearful or intimidated

and insisted that his statement contained the truth. In response to counsel's question about how he felt at the time, he said that he was:

> "Just a wee bit shaken seh thirty-odd police come fi mi a mi yaad and mi nuh duh nutten."

Under cross-examination, Mr Saunders explained to the court that he was fearful of being locked up by the police because of his closeness to the applicant.

[54] Given the circumstances of the case and the significance of Mr Saunders' evidence, the learned judge was required to give guidance to the jury as to the need to properly assess Mr Saunders' credibility and determine whether the applicant had, in fact, made what amounted to a confession.

[55] The learned judge invited the jury to consider Mr Saunders' character, based on how he presented himself to the court when he was giving his evidence. The learned judge thoroughly went through the evidence given by Mr Saunders in a thorough manner. He also, commendably, explained to the jury the issue of voice identification since the confession was initially made over the telephone.

[56] The learned judge explained what was meant by the credibility of the witnesses and how to assess it in the following manner:

> "Mr. Foreman and your members, part of the cross-examination in this case was as to the credibility of the witness who gave evidence, is this person capable of belief, that's what it means. Now, Mr. Foreman, I tell you here and now, the credibility of a witness depends upon, 1: his or her knowledge of facts of which he testifies; 2: His or her disinterestedness, that is to say, this his or her evidence [sic] from personal interest or advantage not influenced by any selfish motive; 3: Is he found to speak the truth by such on oath as he or she deems as … or by such affirmation as may be substituted for an oath. The degree of credit his or her testimony deserves will be in proportion to your assessment of those qualities which I have refer [sic] to ..."

The learned judge continued:

> "In the final analysis, Mr. Foreman and your members, you will have to determine whether the witnesses are credible witnesses on who you can rely. So, Mr. Foreman and your members, you must have regard for a witness' power of observation and his ability to put accurately into words what he or she wishes to say and, of course, the witness' level of intelligence. These are the things you must look out for."

[57] The learned judge usefully juxtaposed the cases for the prosecution and the defence as it related to Mr Saunders' evidence as follows:

> "... The Prosecution is saying that the [applicant] made a confession on which you rely [sic]. The [applicant] says, by way of suggestions put to the witness in cross-examination or to this particular witness, that he did not make a confession and that the case was fabricated. They must be saying in other words, Ludlow Saunders a tell lie pan him."

[58] The learned judge subsequently recounted the evidence concerning the confession and explained to the jury what a confession was how to treat with it. He directed the jury as follows:

> "Now was that a confession, Mr Foreman and your members? It is a statement made by the [applicant] in which he has admitted to doing the crime. A confession cannot be used as evidence against the accused person unless it is free and voluntary. That is to say, it must not have been extracted or induced by any sort of threat nor obtained by any promise or favor [sic] nor the exertion of him by any improper influence. The burden on the Prosecution to prove that this statement was free and voluntary. So let us examine the circumstances when this statement was made, if you accept that Ludlow Saunders was being truthful, and ask yourselves this question, whether or not the statement was made and if the answer is, yes, the question is whether it was made freely and voluntarily, because it is the evidence of Ludlow Saunders that ... when [the applicant] called him he said to him 'Luddie, mi get myself in a trouble' isn't that free and voluntary? Ask yourselves that question.
>
> Next question you must ask yourselves, is this, what does it mean? In other words what do these words mean. 'A mi an mi girlfrien, mi an mi girlfrien have a fight an mi squeeze

> har choat an shi dead'. What do those words mean? That as a result by squeezing or applying pressure to her throat, she is dead. No longer in the land of the living. Those are the plain obvious meaning of those words, 'shi dead' ... and in order for him to have known that she was dead he would have to be there."

The learned judge explained to the jury how they were to assess the evidence regarding the confession as follows:

> "... So after deciding what the statement means, you then say to yourselves, what weight and what value is to be attached to it. If you are not sure that he did so, ... you must disregard it. On the other hand, if you are sure he did make that statement and that it was true, you may take into [sic] account when you go to consider your verdict."

We find that these directions were sufficiently accurate and therefore unobjectionable.

[59] The learned judge went on to discuss the second occasion on which Mr Saunders said that he spoke to the applicant about the killing, and fairly and comprehensively reviewed the evidence that had been given. The learned judge also similarly reviewed the circumstances under which Mr Saunders said he gave his statement to the police and dealt with it as follows:

> "Remember some dispute, because counsel had put to him, [Det Sgt] Gordon, that there was [sic] about 30 odd policemen gone there, as opposed to four or five, as to what Mr Gordon had said. Here are they, 30 or four, and according to to [sic] this witness, Ludlow, in the same breath one of them was hostile to him and said a some information them want and one said 'Brejrin, a some information wi want'. After he said that he got some clothes and left with them. He said the hostility continues when he got to the police station. He described this hostility as verbal words. I felt a wee bit shaken he said. He sat down and questions were thrown at him and he answered. He didn't give the police a statement before. The content of the statement he said, he gave without malice and importantly he was not intimidated. He didn't feel intimidated. He didn't give the statement out of any intimidation or fear.

> All that was in his mind, 'A road mi a guh, a road mi a pree. What I said is true' ..."

It is to be noted that the learned judge did refer to the discrepancy in the accounts given by Mr Saunders and that of Det Sgt Gordon.

[60] Ultimately, in his concluding remarks, the learned judge stated:

> "…You have to go back to the Crown's case to see if it satisfies you so that you feel sure to see if it satisfies you so you feel sure …. Particularly, so, Ludlow Saunders, to see whether or not this earthy creature of ours, earthly brother, earthy sibling of this land, who spoke without varnishing his evidence, whether or not he spoke the truth about a confession being made to him by the [applicant]; not once, when he spoke to him on the telephone, but on another occasion when they spoke to each other face to face, because that is where the Crown's case is and the Crown's case rest ..."

[61] We are satisfied that the learned judge dealt adequately with the issues arising from Mr Saunders' evidence. Mr Saunders made it clear that he had not felt fearful and had not been intimidated by what he said had happened with the police and he insisted that he had simply told the truth. The learned judge, in his summation, discharged his duty by giving proper guidance to the jury which, no doubt, assisted them in determining the relevant issues in the case. Although in her submissions Miss Burgess had asserted that the learned judge had emphasized his belief that Mr Saunders was forthright, a careful reading of the summation failed to reveal any material to support this assertion. The learned judge made it abundantly clear to the jury that it was their duty to assess and determine if they found Mr Saunders to be a credible witness on whose evidence they could rely. There was no miscarriage of justice based on the learned judge's summation on this issue and this ground accordingly fails.

Ground 3: The sentence is manifestly excessive

Applicant's submissions

[62] Miss Burgess acknowledged that the learned judge did not have the benefit of the Sentencing Guidelines for the use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') but noted that the principles enunciated in the Sentencing Guidelines were distilled from cases decided by this court.

[63] It was submitted that the learned judge did not reveal the process by which he arrived at the sentence he imposed, and the court was referred to the decision in **Curtis Grey v R** [2019] JMCA Crim 6. Further, counsel submitted that having determined that a custodial sentence was appropriate, the learned judge should then have applied the principles to determine the appropriate sentence.

[64] Miss Burgess contended that there was no indication in the learned judge's reasoning that he considered a starting point or gave full credit for time spent in pre-trial custody. She urged that if the conviction was not quashed, in the alternative, the sentence should be reduced by the time the applicant spent in custody. She said that he had spent about five years in custody pending trial. Ultimately, counsel also urged that no re-trial should be ordered in this matter, as more than 13 years have elapsed, and the applicant has served a number of years in custody.

Respondent's submission

[65] Miss Thomas conceded that the learned judge did not give reasons in accordance with the guidance outlined in **Meisha Clement v R** [2016] JMCA Crim 26 and **Daniel Roulston v R** [2018] JMCA Crim 20. Further, she recognised that there was no indication whether credit was given for time spent in custody prior to sentencing. She noted that the learned judge, prior to sentencing, had however pointed to the aggravating factors, one of which was the applicant's previous convictions. Counsel further submitted that the learned judge demonstrated an awareness of the four classical principles of sentencing as outlined in **R v Sergeant** (1974) 60 Cr App Rep 74 and had the relevant principle of

deterrence in mind when he imposed the sentence. She also contended that the learned judge clearly listened to the plea in mitigation but indicated that the court had a duty to protect the society.

[66] Counsel submitted that the sentence was not manifestly excessive but in keeping with the new regime and guidance for judges in sentencing, a sentence of 20 years' imprisonment could be substituted if the court deems it just.

Discussion

[67] The main thrust of the complaint on this ground was that the learned judge did not reveal the process by which he arrived at his sentence. In approaching this review of the sentence, a necessary starting point must be the oft-cited statement of Hilbery J in **R v Ball** (1951) 35 Cr App Rep 164 at page 165:

> "In the first place, this Court does not alter a sentence which is subject of an appeal merely because the members of the Court might have passed a different sentence. The learned 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."

[68] It is accepted that the learned judge did not have the benefit of the guidance given by this court relating to the proper approach to sentencing, now most usefully and comprehensively set out in **Meisha Clement v R**. Some guidance, however, existed other earlier decisions, of which the learned judge ought to have been aware of them. One such case is **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered on 5 July 2002. Harrison JA, writing on behalf of the court at page 4, gave the following guidance:

> "If therefore the sentencer considers that the 'best possible sentence' is a term of imprisonment, he should again make a determination, as an initial step, of the length of the

sentence as a starting point, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise."

[69] The learned judge's sentencing remarks were sufficiently brief for them to be rehearsed here as follows:

> "... I have listened to your counsel with interest. When I consider what you did, which is blood chilling, mind curdling; here is a young lady who, having gone home with her peanut punch or porridge or whatever it was, in the confines of her mother's home and having securely locked up herself in, the door was kicked open, fitted sheet was put over her head and an extension cord was used to throttle, suffocate, asphyxiate her for two to five minutes. It was a brutal calculated act, brutal. You used your physical strength and overpowered her and from what the doctor says, the blood vessels in her head ruptured causing blood to flow through her nose and the tongue to stick out the side of her mouth.
>
> This is supposed to have been a person who was your girlfriend, someone who you called – what's the expression – heartbeat. I can't imagine if she was not your heartbeat, what would have happened to her, I can't imagine and I won't even think of that.
>
> You have had opportunities to reform your life from the 7th of January, 1998, when you were sentenced to six months imprisonment at hard labour for Assault OB Harm. Then on the 8th of December, 1998, eighteen months imprisonment at hard labour for escaping custody ... On the 16th of December, 1998, sentenced to ten years imprisonment at hard labour for the offence of Illegal Possession of Firearm. So what I'm seeing here is a graduation…. Now, this has gone to murder.
>
> I hear all kinds of things about anger, that you need counselling in anger management and all of that, but I can tell you this, I would be remiss in my duty to this society and the principles of sentencing, one of which is to protect the society in which I am from. I would also be remiss were I to send the wrong message to others, like yourself, to deter them from pursuing acts of this heinous nature.

> I do not accept retribution as one of the principles by which I should be guided in sentencing you, but whatever reformation you may obtain you may have to obtain that after you have served twenty-five years. So, it's life imprisonment and you are eligible for parole after twenty-five years."

[70] From these sentencing remarks, it is apparent that while demonstrating an appreciation of the general principles of sentencing the learned judge failed to sufficiently demonstrate how he arrived at the sentence he had imposed. The complaint, therefore, is well made. As a result, this court will have to conduct its own assessment in determining if the sentence imposed was excessive.

[71] A person convicted of murder of this nature is to be sentenced in accordance with section 3(1)(b) of the Offences Against the Persons Act ('the OAPA'), which provides for "imprisonment for life or such other term as the court considers appropriate, not being less than 15 years". In the circumstances of this case, we think the imposition of the sentence of life imprisonment was wholly appropriate and, indeed, there was properly no challenge to this aspect of the sentence.

[72] Of concern, therefore, must be the period stipulated to be served before eligibility for parole. Section 3(1C)(b)(i) of the OAPA provides that where pursuant to section 3(1)(b), the court imposes "a sentence of imprisonment for life, the court shall specify a period, not being less than fifteen years". This court has, in several decisions, carried out an exercise of reviewing the varying sentences passed for murder to ascertain the most appropriate range of such sentencing. One such is **Christopher Thomas v R** [2018] JMCA 31, where it was concluded that the authorities suggested "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" (see para [93]).

[73] Considering the circumstances as identified by the learned judge of the brutal snuffing out of the life of this young woman after breaking into her home, an appropriate starting point would be 25 years. The applicant could not be found for some time after the murder and tried to evade the police when they sought to apprehend him. He was

found in possession of photographs of the deceased which was taken from her home. The applicant has four relevant previous convictions for assault occasioning actual bodily harm, escaping custody, illegal possession of firearm and receiving stolen property. These were all clearly aggravating factors. Thus, the previous convictions along with the other aggravating features could have operated to significantly increase his sentence. There were no significant mitigating factors ascertainable.

[74] Having regard to the principles of sentencing, a truly appropriate sentence could be in the range of 30-35 years' imprisonment before becoming eligible for parole. Therefore, it seems to us that in these circumstances a sentence of 25 years could be regarded as lenient. So, although the learned judge did not go through the sentencing exercise in the requisite structured way, we find that the sentence imposed was not manifestly excessive and fell well within the usual range for murder of this kind.

[75] The concern must now turn to the fact that the learned judge erred in failing to deduct the time spent in custody by the applicant prior to being sentenced.

[76] In **Meisha Clement v R**, the court, in explaining the approach that should be taken in relation to time spent in custody prior to sentencing, stated at para [34] that:

> "... 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. As the Privy Council stated in **Callachand & Anor v The State** [2008] UKPC 49, an appeal from the Court of Appeal of Mauritius –
>
> > '... 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'."

At para [56] Morrison P went on to state:

> "... As is now clear from the authorities, the allowance to be given by the sentencing judge under this head should reflect the actual time spent in custody pending trial ..."

[77] Miss Burgess informed us that the applicant had been on bail for some period but as far as she was aware, he had spent approximately five years in custody awaiting trial. The records before this court did not reveal otherwise and we were advised by Miss Thomas that the records from the court below could not be located. In the attempt to verify this claim made by Miss Burgess, assistance was sought from Mrs Sharon-Milwood-Moore, Senior Deputy Director of Public Prosecutions, who had conduct of the trial in the court below. From the information she supplied, it was ascertained that the applicant had initially spent 13 months on remand before he was admitted to bail. He was again remanded in October 2010 and remained so until his trial. Thus, he had spent four years and eight months in custody pending trial and, although having received a sentence that could not be considered manifestly excessive, is entitled to credit for this time.

Conclusion

[78] The grounds of appeal seeking to challenge the conviction of the applicant have failed. The learned judge gave entirely appropriate directions to the jury to facilitate their consideration of the issues that arose on the evidence which was presented to them.

[79] Although, he, however, did fail to adequately demonstrate how he arrived at the sentence he imposed, the sentence of life imprisonment with a stipulation that the applicant serve 25 years' imprisonment before eligibility for parole was appropriate in the circumstances. His failure to deduct the time the applicant spent in custody prior to his trial means the period stipulated must be reduced by four years and eight months.

Order

[80] The order of the court is as follows:

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

2. The application for leave to appeal sentence is granted and the hearing of the application is treated as the hearing of the appeal.

3. The appeal against sentence is allowed in part. The sentence of 25 years imprisonment to be served before becoming eligible for parole is affirmed. However, in giving credit for the time of four years and eight months spent in custody before trial, the period to be served by the appellant before becoming eligible for parole shall be 20 years and four months.

4. The sentence shall be reckoned as having commenced on 30 July 2014.