[2024] JMCA Crim 4

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CRIMINAL APPEAL NO COA2022CR00030

ANDRE BROOMFIELD v R

Mr Norman Godfrey for the appellant

Malike Kellier and Dwayne Green for the Crown

29 January and 6 February 2024

Criminal Law – Notice of application for leave to appeal sentence – Whether sentence for manslaughter manifestly excessive – Whether sentence exceeds the upper limit of the normal range for the offence of manslaughter –Whether applicant deprived of full benefit of guilty plea – Section 42D of The Criminal Justice (Administration) (Amendment) Act, 2015

ORAL JUDGMENT

STRAW JA

[1] This is an application for leave to appeal against sentence. The applicant, Andre Broomfield, pleaded guilty to the offence of manslaughter on 16 May 2022 in the Manchester Circuit Court before Shelly-Williams J ('the sentencing judge'). On 31 May 2022, the applicant was sentenced to 18 years and five months' imprisonment at hard labour.

Background

[2] The facts surrounding this case are undisputed. The applicant was involved in an intimate relationship with Shantell Whyte ('the deceased'). Both the applicant as well as

the deceased were employed to the MasterMac Food Store in Mandeville, Manchester. On 31 December 2019, at approximately 6:15 pm, the deceased was seated in the lunchroom of the MasterMac Food Store along with another co-worker. The applicant, thereafter, entered the lunch room and spoke to the co-worker saying, "mi a go tell you something weh happen earlier today, Keido come inna the lunchroom and hug har up and kiss har on her cheek". The deceased responded, "a shoulda pon mi lip him kiss me". The applicant then pulled his licenced firearm, fired several shots at the deceased and then ran out of the room. The deceased died as a result of the injuries, which were noted as cranium cerebral injuries and multiple gunshot wounds to the face.

[3] The following day, 1 January 2020, the applicant surrendered himself to the custody of the police and handed over his licenced firearm along with an empty magazine. The applicant spoke to Constable Oquino Baker and said the following words, "Baker, mi nuh know wah come over mi". He was then cautioned, after which he said, "mi tek up dis girl and give her everything, build her all two-bedroom house, pay off her credit card and mi realise seh she have another man, the auditor name 'Keido'. Mi see di youth a kiss-kiss har up. Mi talk to har and she a diss mi up. Mi just snap". The shooting was captured on surveillance camera, and the footage was widely circulated via traditional and social media platforms.

[4] The applicant was charged with the offences of illegal possession of firearm and murder. On 16 May 2022, the applicant pleaded not guilty to illegal possession of firearm and guilty to the offence of manslaughter. This date was accepted by both the Crown and the defence as the first relevant date for the purposes of the 2015 amendment to the Criminal Justice (Administration) Act ('CJAA'). On 31 May 2022, after having the benefit of the applicant's social enquiry report, antecedents, plea in mitigation by counsel as well as having heard a victim impact statement from the deceased's mother, the sentencing judge sentenced the applicant to a term of 18 years and five months' imprisonment at hard labour. The Crown offered no evidence in relation to the offence of illegal possession of firearm.

[5] On 8 June 2022, the applicant filed three grounds of appeal. On 4 November 2022, the applicant's application for leave to appeal sentence was considered by a single judge of this court and was refused. The applicant renewed his application before this court and subsequently filed two additional grounds of appeal on 16 January 2024. At the hearing, counsel for the applicant, Mr Norman Godfrey ('Mr Godfrey'), sought and was granted leave to argue two additional grounds of appeal along with the original grounds filed. The grounds of appeal, as argued by counsel, were as follows:

> "a) The sentence is harsh and manifestly excessive in all the circumstances, and cannot be justified.
>
> b) The Learned Trial Judge misapplied section 42D of The Criminal Justice (Administration) (Amendment) Act, 2015 and thereby deprived the Appellant the benefit of his guilty plea.
>
> c) The Learned Trial Judge erred when she failed to demonstrate the method of calculation applied in arriving at the global figure of 18 years for aggravating circumstances, which exceeds the upper limit of the normal range for the offence had the defendant been tried and convicted for the offence.
>
> d) The Learned Trial Judge erred when she failed to demonstrate under which of the four classical principles of sentencing, namely retribution, deterrence, prevention and rehabilitation, she applied in arriving at the sentence imposed on the Appellant."

[6] Mr Godfrey, at the start of the hearing, indicated that the facts of the case were not in issue and that his only contention was with the sentence imposed, his client having entered a plea of guilt at the first relevant date for the purposes of the CJAA.

[7] Commencing with ground d at the hearing, counsel argued that the sentencing judge failed to demonstrate which of the four classical principles of sentencing (retribution, deterrence, prevention and rehabilitation) she utilised in arriving at the sentence she imposed on the applicant (see **Meisha Clement v R** [2016] JMCA Crim 26). He contended that one could not say what the sentencing judge took into consideration in her sentence as there was no demonstration of this on the record. She did not take into account the personal considerations specific to the offender and the

offence (see **R v Sydney Beckford and David Lewis** (1980) 17 JLR 202). Counsel argued that she failed to consider the principle of rehabilitation, which was the most relevant to the applicant. He also argued that rehabilitation did not warrant the length of the sentence that was imposed.

[8] Mr Godfrey then went on to argue ground c, that the sentencing judge erred when she failed to demonstrate the method of calculation applied in arriving at the sentence of 18 years and five months. He argued that she arrived at her decision having ascribed to the aggravating circumstances a period of 18 years without demonstrating the method she applied to arrive at that calculation.

[9] In relation to ground b, Mr Godfrey submitted that there was a misapplication of the CJAA. He argued that the applicant had entered a plea on the first relevant date, which would entitle him to a discount of up to 50% pursuant to section 42D(2)(a) of the CJAA. He argued that the applicant "did not receive the full benefit of his guilty plea" because he only received a 10% discount. He referred the court to paras. [57] to [61] of the case of **Javone Leslie and Jamelia Leslie v R** [2023] JMCA Crim 60.

[10] In relation to ground a, Mr Godfrey advanced that having looked at a number of cases treating with similar circumstances, a more appropriate and justifiable sentence, given the totality of circumstances, including the mitigating factors, would be between six to 10 years' imprisonment at hard labour.

[11] Counsel for the Crown, Mr Malike Kellier, relied on his written submissions and contended that there is no rigid formula that a sentencing judge must utilise when embarking on a sentence and no explicit need for a judge to say expressly which principle she is focusing on. What was important, he submitted, was that the sentencing judge had an appreciation for the sentencing principles and that she applied those principles. He advanced that it was clear from the transcript of the proceedings below that the sentencing judge, through her identification of aggravating and mitigating factors, was guided by the principles of sentencing.

[12] In relation to ground c, Mr Kellier argued that the sentencing judge did not err when she did not mechanically indicate how she arrived at the sentencing figure of 18 years and five months as she demonstrated an appreciation of the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') and principles of sentencing and took into consideration the aggravating and mitigating factors concerning the applicant. She also did a balancing exercise before she arrived at her sentence and indicated the principles of sentencing that guided her judgment. He referred the court to the cases of **Meisha Clement v R, Daniel Roulston v R** [2018] JMCA Crim 20, **Natalie Williams v R** [2020] JMCA Crim 19 and **R v Beckford and Lewis.**

[13] Concerning ground b, Mr Kellier contended that the sentencing judge had not erred in her application of section 42D(2)(a) of the CJAA. He submitted that the use of the words "may reduce the sentence" in section 42D(2) of the CJAA provides the sentencing judge with a discretion in terms of the percentage discount to be applied to the sentence of an offender who enters a plea on the first relevant date. He also posited that the section of the CJAA was to be read in conjunction with section 42D(2), which provides that the court should consider factors such as those set out in section 42H of the CJAA in determining the appropriate discount.

[14] Regarding ground a, Mr Kellier submitted that the sentencing judge utilised the correct principles and methodology in determining the applicant's sentence and urged that this court ought not to interfere with the sentence imposed as it was neither harsh nor manifestly excessive. He referred the court to the cases of **Matthew Hull v R** [2013] JMCA Crim 21, **Glenford Campbell v R** [2018] JMCA Crim 10 and **R v Ball** [1951] 35 Cr App R 164.

Discussion and analysis

[15] Section 14(3) of the Judicature (Appellate Jurisdiction) Act ('JAJA') outlines this court's authority on an appeal against sentence, to quash or substitute a sentence or dismiss an appeal. The section provides as follows:

> "(3) On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."

[16] Notwithstanding the powers given to this court by virtue of section 14(3) of the JAJA, the court must be slow to interfere with a sentence imposed by a judge who had conduct of the matter in the proceedings below. Hilbery J in **R v Ball** at page 165 opined as follows:

> "…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 as to character he may have chosen to call. **It is only when a sentence appears to err in principle that the 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)

[17] Therefore, considering the authorities referred to above, we would only interfere if the sentencing judge departed from the established principles or imposed a sentence that is manifestly excessive (see **Matthew Hull v R** para. [9]).

[18] As far as ground d is concerned, we do not hold the view that the sentencing judge committed any significant error by failing to mention specifically her consideration of the four classical principles of sentencing as referred to in **R v Sergeant** (1975) 60 Cr App 74, 77 (see also para. [20] of **Meisha Clement**). These four principles of rehabilitation, retribution, deterrence and prevention or a combination of them, must be reflected in the sentencing process. The sentencing judge, in her assessment of the mitigating and aggravating features, as counsel for the Crown submitted, demonstrated her consideration of a combination of three of the relevant principles (deterrence, rehabilitation and retribution (see pages 45, 46 and 51 of the transcript).

[19] Concerning the application of the discount of 10% (ground c), the sentencing judge properly took into account sections 42D and 42H of the CJAA. This consideration is demonstrated at pages 48 to 51 of the transcript. She clearly set out what were the factors considered and why she only granted the applicant a discount of 10%. In particular, she spoke to the fact that the evidence against the applicant was overwhelming and that any large discount would shock the public conscience. This was in her discretion to do considering the relevant factors set out in section 42H of the CJAA.

[20] The sentencing principles to be followed by a sentencing judge in order to determine the ultimate sentence to be imposed are found in the authority of **Meisha Clement v R and Daniel Roulston v R**. In **Daniel Roulston v R**, the steps are set out as follows:

i. Identifying the sentence range;

ii. Identifying the appropriate starting point within the range;

iii. Considering any relevant aggravating factors;

iv. Considering any relevant mitigating features (including personal mitigation);

v. Considering, where appropriate, any reduction for a guilty plea;

vi. Deciding on the appropriate sentence (giving reasons); and

vii. Giving credit for time spent in custody, awaiting trial for the offence (where applicable).

[21] The sentencing judge essentially adhered to that procedure. She selected a starting point of seven years, having considered the Sentencing Guidelines as well as Brooks JA's (as he then was) review of several authorities relevant to the offence of manslaughter in **Shirley Ruddock v R** [2017] JMCA Crim 6. This review concerned sentences imposed for that offence, including sentences where guilty pleas were entered and cases with similar features, such as killings caused by defendants who were or had

been involved in an intimate relationship with the deceased. The range of sentences imposed in those cases was between seven and 21 years.

[22] In the case at bar, the sentencing judge identified the aggravating factors as follows:

> 1. The prevalence of this type of crime in the society.
>
> 2. The deceased was the girlfriend of the applicant and, in fact, was the intimate partner of the applicant, so this amounts to intimate partner violence.
>
> 3. A life was lost.
>
> 4. The deceased was shot and killed at her workplace in the presence of a co-worker. The incident took place at MasterMac, which is a wholesale, at 6:15 pm in the day.
>
> 5. The applicant used his licenced firearm to shoot and kill the deceased at her workplace.

As a result of these factors, the sentencing judge increased the starting point of seven years by 18 years.

[23] She identified the following as mitigating factors:

> 1. The remorse of the applicant.
>
> 2. The applicant had a good antecedent report.
>
> 3. The applicant's social enquiry report was favourable.
>
> 4. He pleaded guilty at the first relevant date.
>
> 5. He surrendered himself to custody.
>
> 6. He handed over his licenced firearm.
>
> 7. The applicant had no previous convictions.

[24] The sentencing judge, however, applied the discount of 10% before making any reduction as a result of the mitigating factors. This was a deviation from the steps to be followed as set out in **Meisha Clement v R and Daniel Roulston v R.** Further, when adjusting the years on account of the mitigating factors, the sentencing judge only referred to the good antecedent and social enquiry reports (despite the factors that she identified above), to which she ascribed one year each. This resulted in a sentence of 20 years and 10 months, from which she then subtracted two years and five months for the pre-sentence detention. The ultimate sentence arrived at was 18 years and five months' imprisonment at hard labour. Based on her calculation, however, 10% discount of 25 years would be two years and five months . This would be two years and six months. The result would be 22 years and six months before her subtraction of two years on account of the mitigating factors and two years and five months for the pre-sentencing detention. The ultimate result should therefore have been 18 years and one month.

[25] In relation to ground b, we would admit that the sentencing judge's addition of 18 years for aggravating factors to the starting point of seven years could be considered as excessive. Further, the loss of life should not be listed as a distinct aggravating factor but rather to be properly included in an assessment of the intrinsic seriousness of the offence in order to arrive at an appropriate starting point (see **Meisha Clement v R** para. [29]) and **Natalie Williams v R** [2020] JMCA Crim 19). Also, we identified other mitigating factors that were not applied by the sentencing judge to adjust the years to be imposed. These were the expression of remorse by the applicant and his cooperation with the police after the commission of the offence by surrendering himself to custody. To these would be added his good antecedent report and good social enquiry report as applied by the sentencing judge. In light of all of the above, we formed the view that the sentencing process should be recommenced as the learned judge erred in principle in respect of some aspects of the sentencing process.

[26] We are of the view that the starting point of seven years was not appropriate for the particular circumstances of the present case. The applicant shot the deceased, with

whom he had been having an intimate relationship, five times in her head with his licensed firearm. These resulting injuries were described as cranial cerebral injuries and multiple gunshot wounds to the face. The intrinsic serious nature of this offence would require a starting point at the higher end of the scale (see **Meisha Clement v R** para. [29]); **Natalie Williams v R** para. [20]). We thought that a starting point of 15 years would be more appropriate, taking into consideration the applicant's culpability and the harm caused.

[27] In addition to the aggravating factors listed above as identified by the sentencing judge (with the exception of the loss of life), we considered the age of the applicant (32 years) to be an aggravating factor (the maturity of the offender). These aggravating factors would, therefore, increase the sentence to 23 years, which would then be reduced to 20 years on account of the mitigating factors. Applying the discount of 10% given by the learned sentencing judge for the applicant's guilty plea, which we have no basis to disturb, given that she correctly took into account the relevant factors under section 42(H) of the CJAA in arriving at that figure, the sentence would be further adjusted to 18 years.

[28] Having considered the compendium of sentences imposed for manslaughter as reviewed by Brooks JA in **Shirley Ruddock**, we note that in the majority of those cases, the most common sentences imposed for convictions for manslaughter has been one of 15 years, where persons have pleaded guilty to manslaughter in incidents involving personal or domestic violence. (see paras. [27] to [30]). Brooks JA also opined that a sentence at the higher end of the range (above 15 years) would be more appropriate for what could be termed as non-domestic incidents, such as killings in the course of a robbery. Therefore, a term of imprisonment of 18 years would still be above the most common sentence of 15 years for offences of this nature. However, as aptly expressed by Rowe JA in **R v Beckford and Lewis** at page 204:

> "There is no scientific scale by which to measure punishment, yet a trial judge must in the face mounting violence in the community impose a sentence to fit the offender and at the same time to fit the crime."

[29] The applicant, by right, is to be given credit for the period of the pre-sentence detention of two years and five months (see **Daniel Roulston** para. [17]). The ultimate sentence to be imposed would, therefore, be 15 years and seven months.

[30] Having regard to the discussion above, we were constrained to conclude that ground c has merit. We identified some errors in the approach adopted by the sentencing judge as it related to the steps to be followed in the calculation process, as well as the adjustment for the aggravating factors. We also identified a minor error in her application of the mitigating factors. We would, therefore, grant the applicant leave to appeal his sentence, allow the appeal and substitute a sentence of 15 years and seven months' imprisonment at hard labour, the pre-detention period of two years and five months having been deducted.

Order

[31] The court, therefore, orders as follows:

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

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

3. The sentence of 18 years and five months imprisonment at hard labour for manslaughter is set aside; and substituted therefor is a sentence of 15 years and seven months imprisonment at hard labour, the pre-sentence period of two years and five months having been deducted.

4. The sentence is to run as of 31 May 2022, the date it was imposed.