[2014] JMCA Crim 1

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 104/2010

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

GAYNAIR HANSON v R

Mrs Ann-Marie Feurtado-Richards for the appellant

Mrs Suzette Sahai Whittingham-Maxwell for the Crown

13, 15 and 24 January 2014

MORRISON JA

[1] The principal issue raised by this appeal is whether this court has the power to entertain an appeal from a conviction based on a plea of guilty; and, if it does, in what circumstances. If the court does have such a power, there is a further question whether the court has the power to substitute a conviction for some other offence for the one in respect of which the plea of guilty was originally entered.

[2] The matter arises in this way. On 29 September 2010, the appellant was indicted for murdering Sashuana Baker on 27 August 2010. The appellant appeared before Beckford J in the Circuit Court for the parish of Clarendon on 4 October 2010, at which

time he was represented by Mr Hopeton Clarke of counsel. Upon the appellant's plea of guilty to the offence of murder, the facts of the case were outlined to the court by counsel for the Crown.

[3] At about 6:30 am on 27 August 2010, Miss Baker was found dead at her home in Gimme-mi-bit, Clarendon, by her grandmother. When the police went to the home, the appellant, who was Miss Baker's boyfriend, was brought to the scene. Cautioned by the police then and there, he said, "Mi never mean fi kill her wid the piece of 2 x 4." The appellant was subsequently taken to the May Pen Police Station, where he gave a statement under caution to the police, in the presence of two justices of the peace. In the statement, he admitted to hitting Miss Baker in the head with a 2' x 4' plank two to three times, while she was lying in bed watching television. At a question and answer session with the police on 27 September 2010, the appellant again admitted killing Miss Baker and, when he was arrested, charged and cautioned, he said, "Mi never mean fi kill her officer." The post mortem examination revealed that Miss Baker's death was the result of intracerebral haemorrhage due to head injury.

[4] Mr Clarke then told the court that there was "[p]roof of cause on the crown's case", in that, in the record of the questions and answers, the appellant had indicated that he was upset at the fact that Miss Baker "had taken off her clothes in front of the children and he said no to it". Mr Clarke requested that a social enquiry report be done and the matter was adjourned to 7 October 2010.

[5] On 7 October 2010, the appellant's antecedent history, from which it appeared that he was born on 31 August 1987 and had no previous convictions, was read to the court. However, as regards the social enquiry report, which had been prepared by Ms Diane Brown, a probation officer for the parish of Clarendon, all concerned, at the suggestion of the judge, were content to take it as read. There is accordingly no indication of what the report contained on the record of the proceedings.

[6] In the course of his plea in mitigation on the appellant's behalf, Mr Clarke made this comment:

> "There has to be something more. There has to be something else to hit your spouse in the head in the dead of the night and walk away. There has to be something more, and a doctor, I believe, can discover that thing when he goes where he is going, psychiatric treatment for him and as the probation officer says, he is always laughing and smiling and that is not normal."

[7] The learned judge also speculated at the possibility of a bipolar disorder and, during further exchanges between bench and bar along similar lines, remarked that, "[w]hat is causing me some concern, is that like you said I hoped to get some sort of assistance, I don't know what is his problem". Yet further, the judge observed, "I am just wondering what else it was because it don't [sic] seem too right." The appellant was then sentenced to imprisonment for life, with the recommendation that he should serve a minimum of 15 years before becoming eligible for parole.

[8] By notice of application filed on 1 November 2010, the applicant sought leave to appeal against this sentence on the ground that it was "harsh and excessive having

regards [sic] to the circumstances which led to [the] conviction". The learned single judge of this court who considered the application noted that no psychiatric report had been ordered for the purposes of sentencing and observed that this might be a matter of concern for the court. Accordingly, on 19 June 2012, the applicant was granted leave to appeal against sentence and the judge ordered that a psychiatric report should be provided for the court in advance of the hearing.

[9] In due course, Dr Clayton Sewell, a consultant forensic psychiatrist attached to the Department of Community Health and Psychiatry of the University of the West Indies and the Department of Correctional Services in the Ministry of National Security, provided a report dated 9 November 2012. Dr Sewell's report was based on his interview and examination of the appellant, which lasted for approximately one hour and 15 minutes, on 6 November 2012, more than two years after the incident in which Miss Baker was killed. During the interview, Dr Sewell found that the appellant was cooperative and displayed no abnormal behaviour. He was oriented in time, place and person and gave no appearance of cognitive impairment.

[10] Dr Sewell subjected the appellant to the 'Psychopathy Checklist: Screening Version' ('PCL:SV'), which is "an observer rating scale designed to assess the lifetime presence and severity of a wide range of symptoms of psychopathy in adults". Based on the appellant's results, which showed him to be "in the low range for the presence of Psychopathy requiring further evaluation", Dr Sewell's overall opinion on the appellant was as follows:

"1. It is my opinion, with a reasonable degree of medical certainty, that Mr. Hanson does not meet the criteria for an Antisocial Personality Disorder (ASPD). This is based on the interview and his PCL:SV score and indicates a lower risk of future aggressive behavior and recidivism when compared to someone with ASPD.

2. He admits to the offence for which he was convicted and expressed some remorse for his actions.

3. His cognitive abilities are essentially normal and he is probably of average intelligence.

4. Regarding the offence of Murder, examination of Mr. Hanson indicates in my opinion that he was not operating under the influence of an abnormality of the mind at the time the offence occurred. It should be noted that there was no additional source of information which may assist further in forming this opinion. However, based on Mr. Hanson's own admission that he has had no violent or aggressive behavior when consuming similar quantities of alcohol, I am of the view that his actions were unlikely to be the result of substance use.

5. He currently has feelings of sadness related to his circumstance."

[11] When the matter came on for hearing before us, Mrs Feurtado-Richards on behalf of the appellant asked us to make an order, pursuant to section 28(a) of the Judicature (Appellate Jurisdiction) Act ('the Act'), for the production of the following documents: (i) the statement under caution taken from the appellant on 28 August 2010; (ii) the appellant's question and answer dated 7 September 2010; and (iii) the social enquiry report prepared by Ms Brown, which was dated 5 October 2010. Mrs Whittingham-Maxwell for the Crown did not oppose this application.

[12] By virtue of section 28(a) of the Act, this court enjoys a discretionary power to "order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears…to be necessary for the determination of the case". The origin of this provision may be traced to section 9 of the English Criminal Appeal Act 1907 and the virtually identical provision can now be found in section 23(1)(a) of the Criminal Appeal Act 1968 (for the legislative history, see paras 6-11 of the judgment of Lord Bingham of Cornhill in ***R v Pendleton*** [2001] UKHL 66). In ***R v Lattimore and Others*** (1975) 62 Cr App R 53, the Court of Appeal expressly approved an earlier statement by Walton J in ***R v Perry and Harvey*** (1909) 2 Cr App R 89, 92 that the court should exercise its discretion under the section "[i]f it was plainly made out that justice required it".

[13] All three of the documents in respect of which the application under section 28(a) was made in this case were referred to, but not reproduced, in the record of the proceedings before Beckford J. We therefore considered that it would plainly be in the interests of justice and of assistance to the court in the determination of this matter to have access to them in their entirety and the order sought was made accordingly.

[14] From the statement under caution, it emerged that the appellant had been smoking marijuana a couple hours before Miss Baker was killed. He went on to say that, immediately before inflicting the fatal injury to Miss Baker -

> "…mi get tormented hot and frustrated…me nuh know wey come inna me me get up and go out a door and see the piece a two by four plank whey did dey near the fire side tek it up and walk back inside a the house and use it and lick

> Karen about two or three times in her head whilst she was lying in the bed watching the television and come back outside with the piece of two by four and throw it on the fire that me was burning earlier…"

[15] Of the questions and answers, the following are relevant:

> "Question 13: Why did you feel hot and tormented?
>
> Answer: Mi nuh know maybe because mi smoke the weed mi jus feel hot and tormented…
>
> Question 20: Why did you hit her with the piece of wood in her head?
>
> Answer: I don't know…
>
> Question 25: Why did you hit her so many times [sic] did you intend to kill her?
>
> Answer: No.
>
> Question 26: Why did you kill her?
>
> Answer: I don't know I never meant to kill her."

[16] And in the social enquiry report, under the rubric 'Interview and personality appraisal', the probation officer said this:

> "During his interview, Mr. Hanson appeared cooperative and forthcoming. He had a simple disposition and at times his thought process seemed incoherent.
>
> The accused recounts that on the night of the incident he went to an annual Indian festival. Tashauna [sic] Baker was also in attendance but left early and went to her home. Subject left the event afterward and went to the deceased's home. This however, was not strange as Gaynair said he slept at her home on the nights when he did not have to work. Subject shared that while he was walking home he began feeling tormented. His feeling of disquiet continued

> when he got to Ms. Baker's home, so he began watching television.
>
> After watching television for a little while, Gaynair shared that his tormented feeling was too much to bear so he took up a piece of board and hit Tashauna [sic] Baker on her head twice while she slept. He then left for the fish farm where he worked. The police came for him later that day at his place of work and arrested him.
>
> When asked why he did such a thing to Ms. Baker, he said it was because he felt tormented. Gaynair says he feels bad about what happened because he hates being in jail. When asked about the relationship he had with Tashauna [sic], he shared that it was good and that she treated him well."

[17] Against this background, Mrs Feurtado-Richards sought permission to argue two supplemental grounds of appeal. The complaint in the first is that the appellant's conviction pursuant to the plea of guilty "was insufficiently supported by a full and balanced presentation of the facts upon which [he] was arraigned and the unavailability of information which grounded an alternative verdict precluded the Learned Trial Judge from making the appropriate assessment as to whether the Court ought to have accepted the plea as given". In the second ground, the appellant complains that the minimum period stipulated by the learned trial judge before he will become eligible for parole is manifestly excessive in all the circumstances of the case, having regard to the appellant's age and his previously unblemished criminal record. In this regard, the appellant also complains of the judge's failure to request a psychiatric evaluation report.

[18] Although the appellant was granted leave to appeal against sentence only, the first ground in effect challenges the appellant's conviction for murder. Despite the fact that the appellant did not originally move the court on this basis, Mrs Feurtado-Richards

was permitted to address us on this ground, which we will treat as an application for leave to appeal against the conviction.

[19] As the argument unfolded, it quickly became clear that the real issue for the court on this ground was whether an appeal lies from a conviction following on from a plea of guilty. In submitting that this court is competent to consider an application for leave to appeal in these circumstances, Mrs Feurtado-Richards (who was supported in this by Mrs Whittingham-Maxwell for the Crown) relied on the following statement of Avory J in ***R v Forde*** [1923] 2 KB 400, 403:

> "A plea of guilty having been recorded, this court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the charge or did not intend to admit he was guilty of it, or (2) that upon the admitted facts he could not in law have been convicted of the offence charged."

[20] In ***Joseph Grey v R*** [2012] JMCA Crim 3, para. [16], Hibbert JA (Ag), speaking for the court, accepted Avory J's dictum as "the correct approach to be adopted by a Court of Appeal" in the case of an appeal after conviction upon a plea of guilty. The court therefore applied the first limb of the dictum in that case, it being considered that the appellant had not appreciated the nature of the charge to which he pleaded guilty.

[21] In a passage to which we were also referred by Mrs Feurtado-Richards, the learned editors of Blackstone's Criminal Practice, 2006 cite (at para. D24.13) a number of instances in which applications for leave to appeal have been entertained following pleas of guilty. Based on the various authorities, their conclusion is that Avory J's

dictum in ***R v Forde*** "is no longer an exhaustive statement of when a convicted person may be allowed to appeal notwithstanding a guilty plea" (and see ***R v Lee*** [1984] 1 All ER 1080, 1084, in which Ackner LJ remarked that "Avory J's observation could not…be taken as an all-embracing one").

[22] However, it is not necessary to go beyond ***R v Forde*** for the purposes of this application, since Mrs Feurtado-Richards' submission is that this case falls within the second limb of Avory J's dictum, in that, upon the admitted facts, the appellant "could not in law have been convicted of the offence charged". In advancing this submission, Mrs Feurtado-Richards (again supported by the Crown) made the point that, on the material which was before the learned trial judge, there was no evidence that the appellant had the requisite mens rea for murder.

[23] Ultimately, despite the concern expressed by the learned trial judge as to the appellant's mental health, not much support can be derived in this regard from Dr Sewell's report, which does not suggest that the appellant suffers, at present at any rate, from any infirmity of mind. But Mrs Feurtado-Richards was able to direct our attention to the several statements made by the appellant - upon being cautioned initially by the police, when he was later arrested and charged, in his caution statement and in the question and answer session - that he did not intend to kill Miss Baker. On this basis, we were invited to accept the appellant's version of the unfortunate events which resulted in Miss Baker's death and to consider manslaughter as an alternative to murder.

[24] In ***R v Pearlina Wright*** (1988) 25 JLR 221, the appellant was convicted in the resident magistrate's court on her plea of guilty of unlawful wounding. On 2 February 1988, she was sentenced to 12 months' imprisonment at hard labour. She appealed against this sentence, complaining that it was manifestly excessive in the circumstances. The explanation which had been given by the appellant to the Resident Magistrate was that, while she and the complainant were passengers in a pick-up, the latter had touched her private parts with his foot. Instead of removing his foot when asked by her to do so, the complainant used dirty words to her and kicked her in the region of her private parts. It was in these circumstances, she said, that she lost control and inflicted the injuries complained of. Delivering the judgment of the court, Rowe P said this (at page 221):

> "The rule of law is that when a person pleads guilty, the learned trial judge, as the tribunal of fact, should sentence on the set of facts which [is] most favourable to the accused. If that rule had been applied in this particular case it would show that this appellant had been grossly provoked by the complainant. It was an impertinent sort of assault to which she reacted."

[25] On this basis, the court in ***R v Pearlina Wright*** considered that the sentence of 12 months' imprisonment was manifestly excessive. The appeal against sentence was allowed and a sentence expiring on 14 June 1988, the day on which the appeal was disposed of, was substituted.

[26] On the admitted facts in this case, there was no evidence that the appellant intended to kill Miss Baker. Indeed, the material available to the court, all of which came from him, suggested that he had no such intention. In our view, although the facts of the case are not on all fours with those in ***R v Pearlina Wright*** (since there was no question in that case that the facts admitted by the appellant were sufficient to support the charge of unlawful wounding), the principle that a judge upon a guilty plea should approach the sentencing exercise on the version of the facts most favourable to the defendant should also apply in this case. The appellant's version did not provide the basis for a conviction for the offence of murder. It follows from this that the appellant's plea of guilty of murder, based as it was on those facts, ought not to have been accepted by the judge.

[27] We therefore consider this a case in which it is open to this court to entertain the application for leave to appeal against conviction, notwithstanding the appellant's plea of guilty. In the circumstances, the application for leave to appeal against the conviction must be granted. We will treat the hearing of the application as the hearing of the appeal, allow the appeal, quash the conviction for murder and set aside the sentence.

[28] The question which next arises is what order should the court make in relation to the appellant in these circumstances. In addition to quashing a conviction in a case in which the court determines that an appeal should be allowed, section 14(2) of the Act empowers this court to "direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time or place as the Court may think fit".

[29] The question of an acquittal obviously does not arise in this case, the appellant having, on his admission, killed Miss Baker. But both Mrs Feurtado-Richards and Mrs Whittingham-Maxwell urged us to the view that it is within our powers to substitute a conviction for manslaughter for the conviction for murder and to sentence the appellant accordingly. In this regard, we were referred to section 24(2) of the Act, which provides as follows:

> "Where an appellant has been convicted of an offence and the Resident Magistrate or jury could on the indictment have found him guilty of some other offence, and on the finding of the Resident Magistrate or jury it appears to the Court that the Resident Magistrate or jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the judgment passed or verdict found by the Resident Magistrate or jury a judgment or verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

[30] Mrs Feurtado-Richards very helpfully referred us to ***R v Horsman*** [1998] QB 531, in which the English Court of Appeal was concerned with the former section 3 of the Criminal Appeal Act 1968. That section was in terms very similar to section 24(2):

> "(1) This section applies on an appeal against conviction, where the appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of the other offence.

> (2) The court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of the other offence, and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity."

[31] Delivering the judgment of the court, Waller LJ said this (at page 537):

> "In our view, most unfortunately, the power of the Court of Appeal to substitute does not exist where a defendant has pleaded guilty prior to being put in charge of the jury. The words which provide the Court of Appeal with the power to substitute contemplate expressly a verdict from a jury, and there is no other power provided."

[32] Despite the fact that its wording is not identical to that of section 3 of the English Act, section 24(2) must in our view attract the same conclusion: the repeated references to "the Resident Magistrate or jury" plainly denote the legislative intent that the power of substitution granted by the subsection should only be exercisable where a verdict has been rendered by the relevant tribunal of fact. (We observe that the English section 3 has now been amended as a result of section 316 of the Criminal Justice Act 2004, to give the Court of Appeal a power to substitute a verdict of guilty of an alternative offence, even after conviction on a plea of guilty in the Crown Court – see Blackstone's Criminal Practice 2006, para. D24.37.)

[33] We have accordingly come to the conclusion that, in this case, the court does not have the power to substitute a conviction for manslaughter for the appellant's

conviction for murder following his plea of guilty. We would therefore order that the matter be remitted to the Circuit Court for the parish of Clarendon for a new trial as early as may be convenient. At that time, the matter can be dealt with by the appellant's legal advisors and the court, mindful of the social enquiry report, the psychiatric report, and all that has been said in this judgment. Because of the disposal of the matter, the second issue identified at para. [17] above (as regards the minimum period to be served before parole) no longer arises.

[34] We cannot leave this matter without remarking with pleasure the salutary demonstration of responsible professional conduct to which we have been treated by both counsel in the case. We are greatly obliged to them.