[2011] JMCA Crim 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 60/2009

BEFORE: THE HON. MRS JUSTICE HARRIS JA
THE HON. MR JUSTICE MORRISON JA
THE HON. MR JUSTICE DUKHARAN JA

ONIEL HUDSON v R

Robert Fletcher for the appellant

Miss Paula Llewellyn, QC, Director of Public Prosecutions and Miss Cadeen Barnett for the Crown

22 and 25 February 2011

ORAL JUDGMENT

HARRIS JA

[1] On 20 May 2009, the appellant Oniel Hudson "o/c King", pleaded guilty to the offence of manslaughter in the circuit court for the parish of Saint James, he having been indicted for the murder of Richard Binns. He was sentenced to 18 years imprisonment at hard labour. He was granted leave to appeal against sentence by a single judge. This appeal is now before us.

[2] The facts in this case are grounded on a cautioned statement given by the appellant. Essentially, they are that, on 19 June 2007 the appellant visited the home of the deceased Mr Binns, which is a three storey house. Mr Patrick Palmer was also present at the house. At the invitation of Mr Palmer, the appellant and Mr Palmer went upstairs and both were about to engage in sexual activity when they were accosted by the deceased. A struggle ensued between the deceased and Mr Palmer. The struggle ended on the balcony over which the deceased fell. Thereafter, Mr Palmer invited the appellant to accompany him downstairs. He complied. While passing through the kitchen, Mr Palmer took up a knife and they both went outside. There, they saw the deceased lying on the ground gasping and his body contracting spasmodically. Mr Palmer requested the appellant to hold the deceased's foot. He acceded to the request. Thereafter, Mr Palmer used the knife to cut the deceased's throat.

[3] The original ground of appeal was abandoned and Mr Fletcher was granted leave to argue the following supplemental ground:

> "The sentence was manifestly excessive."

[4] Mr Fletcher submitted that the sentence of 18 years falls outside of the broad range of sentences appropriate to manslaughter, in cases, as in the present case, in which the appellant is not the primary offender. He further argued that the learned judge fell into error by ordering a "consecutive" sentence

by adding three years to the sentence of 15 years, mainly for the purpose of the appellant receiving psychiatric evaluation and treatment.

[5] It was also argued by him that the learned judge, in sentencing, appeared to have discounted the value of the appellant to his children for the reason that he was absent from the island for a period and had homosexual propensity. Further, he argued, the learned judge failed to attach weight to the fact that on the Crown's case, it is shown that the appellant stated that he disagreed with Mr Palmer, in the commission of the offence.

[6] In imposing sentence, the learned trial judge took into account the fact that the appellant had no previous convictions relating to violence. She expressed doubt as to the value of his parenting, he being absent from his children for a considerable period and he having admitted that he had homosexual propensity. We agree with Mr Fletcher that the learned judge ought not to have given consideration to either the absence of the appellant from his children or his homosexual proclivity as having an impact on his being a good parent**.** His absence was due to his being overseas. The Constitution affords him a right to a sexual preference. Although the learned judge took into consideration a social enquiry report obtained in respect of the appellant and observed that his community seemed astonished that he had committed the offence, she nonetheless took into account the fact that the probation officer was of the opinion that he displayed a callous attitude during the interview with

him. It cannot be ignored that the appellant pleaded guilty. Nor can we disregard the fact that he said that when he released the deceased's foot, Mr Palmer abused him and he, the appellant, said, "I am not into what you are into." These, clearly, are the mitigating factors which inure to his benefit as to the length of the sentence which ought to be imposed.

[7] Curiously, the learned trial judge initially imposed a sentence of 15 years on the appellant and thereafter imposed a further three years, stating that he will be in need of psychiatric evaluation and treatment. There is no legislative mandate which would have permitted her to have imposed a sentence based on the appellant's need for psychiatric evaluation and treatment. It is obvious that she perceived a need for him to obtain psychiatric help. Surely, this could have been done by a letter of recommendation to the Commissioner of Corrections. There is little doubt that such assessment could have been accomplished within the first month of his incarceration and any treatment, if necessary, he could have received within the early period of his incarceration.

[8] We agree with Mr Fletcher that the sentence of 18 years is in excess of the range of sentences ordinarily imposed for manslaughter in a case of this type and that the learned judge fell into error by imposing such a sentence. A sentencer must at all times bear in mind "the total effect of a sentence on an offender". It does not appear to us that the learned judge, in sentencing, had taken all relevant factors into consideration. We are of the view that if the

appellant, upon a trial, had been convicted, a sentence of 15 years would ordinarily be imposed. He pleaded guilty. As rightly submitted by Mr Fletcher, he is not the principal offender and he indicated that he was somewhat an unwilling participant. In these circumstances, the sentence of 15 years ought to be discounted.

[9] The sentence of 18 years is manifestly excessive and must be set aside. the appeal against sentence is therefore allowed. The sentence of 18 years imprisonment at hard labour is quashed and a sentence of 12 years imprisonment at hard labour is substituted therefor. The sentence should commence on 20 August 2009.