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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 8/93

**COR: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE GORDON, J.A
THE HON. MR. JUSTICE PATTERSON, J.A.**

**IVAN KELLY
VS
REGINA**

Applicant unrepresented

Deborah Martin for Crown

November 9, December 5, 1995

PATTERSON J.A.

On February 3, 1993, in the St. Ann Circuit Court Division of the Gun Court before Chester Orr J., Ivan Kelly, the applicant, was convicted on his plea of guilty of the offence of non-capital murder on an indictment which charged him of the capital murder of Azariah Parkes on the 7th December, 1987. He was sentenced to imprisonment for life, and the court specified that he should serve a period of twelve years before becoming eligible for parole. The applicant applied for leave to appeal against sentence. This application was refused by a single judge, and he renewed his application for consideration and determination by the Court. He was not represented before us, and the only ground of appeal tersely stated that the "sentence is harsh and excessive".

The preliminary question that arose to be determined was whether the applicant had a right of appeal to the Court. Section 13 (1) of the Judicature (Appellate Jurisdiction) Act provides:-

“A person convicted on indictment in the Supreme Court may appeal under this Act to the Court -

(a) ...

(b) ...

(c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.” (Emphasis supplied)

The sentence for a person convicted of non-capital murder, is provided for in Section 3A of the Offences against the Person Act (as amended by the Offences against the Person (Amendment) Act, 1992). It reads:-

“3A.-(1) Subject to the provisions of this Act, every person who is convicted of non-capital murder shall be sentenced to imprisonment for life”.

There can be no doubt that the sentence on conviction of non-capital murder is fixed by law, and it follows that a person so sentenced has no right of appeal. We concluded that the applicant had no right of appeal against the sentence of imprisonment for life.

But a second question came up for consideration. What was the position with regard to the period specified by the learned judge which the applicant must serve before becoming eligible for parole?

A person who has been sentenced to imprisonment for life is normally eligible for parole after having served a period of not less than seven years, (Section 6(4) (a) of the Parole Act) but if the conviction is of non-capital murder, the judge may specify a longer period than the seven years. Section 3A-(2) of the Offences against the Person Act (as amended by the Offences against the Person (Amendment) Act., 1992) provides:-

“Notwithstanding the provisions of section 6 of the Parole Act, on sentencing any person convicted of non-capital murder to imprisonment for life, the Court may specify a period, being longer than seven years, which that person should serve before becoming eligible for parole”(Emphasis supplied)

In our view, the trial judge is given a discretion whether or not to invoke the provisions of this section. If he does not, then the provisions of the Parole Act apply, and the convicted person must serve at least seven years imprisonment before becoming eligible for parole. But when the provisions of this section are invoked, that seven year period is substituted by any longer period which the trial judge may specify. Such a period is in his discretion, and it manifests itself in an order made with reference to and enforceable against the convicted person. So is there an appeal to this Court from that Order? There could only be if it qualifies under the expression “sentence”.

Section 2 of the Judicature (Appellate Jurisdiction) Act provides inter alia, that in the Act:-

“judgment” or ‘sentence’ includes any order of a court made on conviction with reference to the person convicted....,etc “

Undoubtedly, the period specified by the court which the applicant should serve before coming eligible for parole is an "order of a court made on conviction"

It is abundantly clear, therefore, that the order is a sentence within the meaning of the Judicature (Appellate Jurisdiction) Act, and that there is a right of appeal against this order with the leave of the Court of Appeal, it being against the sentence passed on conviction. (Section 13(1 (c) - Supra).

We were referred to the judgment of Carey J. A. in **R. v. Cleveland Downie** (unreported) (S.C.C.A 79/94 delivered 25th September 1995) where in a case similar to the instant case, he said: "We are minded to treat this application not against the sentence which is fixed by law but for the term of 15 years which was recommended by the trial judge." (See also **R. v. Dalton** [1995] 2 All E.R 349).

The short facts of the instant case may now be considered. The deceased, a grocer, and his family retired to bed on the night of the 7th December, 1987. During the night a number of men, including the applicant, attacked his home. Gunshots were fired at the closed door and the deceased was mortally wounded in the confines of his home. The applicant and the others then entered the house and stole a number of articles. Although it is clear that the murder was committed in furtherance of a robbery, the prosecution expressed the view that they would be unable to prove who fired the fatal shot, or that the applicant used violence on the deceased. In other words, they could not prove capital murder in the applicant. Nevertheless, he was part and parcel of a most vicious attack on a family. Here was a man who had many previous convictions and seemed bent on a life of crime. The only mitigating factor was his plea of guilty. We think that the learned

judge was most lenient in specifying only twelve years as the period he should serve before becoming eligible for parole. We were reminded of what this Court said in **R.v Donald Cousley** (unreported) S.C.C.A. 77/91 dated 15th March, 1993):-

“That murder remains an abhorrent crime and anyone convicted of non-capital murder must expect to serve a period of retribution and deterrence which must necessarily be long.”

In the event and for the reasons stated we refused the application for leave to appeal against sentence.