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 79/2016

WAYNE MARTIN v R

Ravil Golding for the appellant

Miss Kathy-Ann Pyke for the Crown

2 and 13 May 2024

Criminal Law – Unfair trial – Inadequate directions on provocation – Conviction for murder set aside – Verdict of manslaughter substituted – Section 6 of the Offences Against the Person Act - Section 24(2) of the Judicature (Appellate Jurisdiction) Act

Criminal law - Sentencing – Sentence for manslaughter - Credit for time spent on pre-trial remand - The Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017

ORAL JUDGMENT

V HARRIS JA

[1] On 3 August 2016, the appellant, Mr Wayne Martin ('Mr Martin'), was convicted in the Home Circuit Court on an indictment that charged him with the offence of murder after a trial before a judge ('the learned trial judge') sitting with a jury. On 7 October 2016, he was sentenced to life imprisonment with a stipulation that he should serve 19 years before being eligible for parole.

[2] On 11 May 2020, a single judge of this court refused Mr Martin's application for leave to appeal his conviction but granted him leave to appeal his sentence on the basis

that the learned trial judge did not credit him for the time he spent in custody awaiting trial.

Factual background

[3] On 4 February 2012, at about 8:15 am, the appellant, Mr Martin, went to the home of the deceased, Ms Kerry-Ann Watson, on McVille Terrace, in the parish of Saint Andrew. A heated argument developed between Mr Martin and the deceased regarding a conversation that had taken place between Mr Martin's girlfriend and the deceased. During this argument, Mr Martin threw stones at the deceased, who was inside the house. The argument eventually subsided when one of Mr Martin's friends intervened. Apparently, the deceased had reported to Mr Martin's girlfriend that he was having an affair with another woman and that he was in the habit of giving her things from the shop that they (Mr Martin and his girlfriend) owned and operated.

[4] At about 8:45 am, the argument between Mr Martin and the deceased resumed. They were at a distance from each other in the lane, arguing, cursing expletives and threatening each other. Eventually, Mr Martin ran towards the deceased and threw stones at her, which she dodged. At that time, the deceased had a shovel in her hand, which she used to hit Mr Martin, causing injuries to his forehead. She then ran towards her house. Mr Martin proceeded to the gate of her house. While standing at the gate, two of the deceased's brothers ran from the house towards him. One of the brothers spoke to Mr Martin while her sister, Mrs Kaneisha Miller, pleaded with him to end the dispute. While pleading with him Mrs Miller held on to Mr Martin's hands when she saw him put one of his hands down the front of his pants. She held on to that hand and continued pleading with him. At this point, the deceased's brother, "Buggo", who was armed with a knife, went to where they were on the road in front of the gate and stabbed at Mr Martin. The result was that Mr Martin's right hand was injured.

[5] Subsequently, Mrs Miller realised that Mr Martin had a firearm in the front of his pants. Upon this discovery, she told the deceased and her brothers to run. She remained with Mr Martin, continued holding on to his hand, and pleaded with him. The deceased

had, by this time, run towards the back of the house. Mrs Miller said she saw when the deceased was peeping around the side of the house, looking towards the gate where she and Mr Martin were. Mr Martin removed his hand from the front of his pants, pointed the firearm in the deceased's direction, and fired a single shot. The deceased fell to the ground. Mrs Miller ran but fell, and while on the ground, she observed Mr Martin leaving with the firearm in his hand. The deceased's cause of death was as a result of a gunshot wound to her head.

[6] The matter was reported to the police, who later came to the scene of the incident. A spent casing and the blade of a knife were recovered from the scene. The investigating officer, Detective Inspector Simpson, went to the Hope Bay Police Station in the parish of Portland on 6 February 2012, where he saw and spoke to Mr Martin, who had been taken to the police station by his uncle. Mr Martin told him, under caution, that he was in a dispute with the deceased when he was set upon by her and other members of her family. During the incident, he sustained two injuries, having been hit in his forehead with a shovel by the deceased and stabbed in his right hand by one of her brothers. Mr Martin also said that during the incident, he was wrestling with Buggo, who had a firearm. Buggo, he said, was trying to point the firearm at him, and he was trying to disarm him. According to Inspector Simpson, Mr Martin told him that it was during the tussle for the firearm that the deceased was accidentally shot and killed.

[7] At the trial, Mr Martin gave an unsworn statement from the dock. He stated that he was acting in lawful self-defence when he tried to take the firearm away from Buggo, and that the killing of the deceased was an accident. His uncle gave evidence of certain facts in issue and his good character.

The appeal

[8] Before us is Mr Martin's renewed application for leave to appeal his conviction and the appeal of his sentence. At the hearing, learned counsel for Mr Martin, Mr Ravil Golding, applied on his behalf for permission to abandon the original grounds of appeal and argue the following two supplemental grounds:

> "1. The Learned Trial Judge fell into error when in sentencing the [appellant] she failed to take into consideration the fact that at that date the [appellant] had already been in custody from February 6, 2012 to October 7, 2016, i.e. 1705 days = 4 years 8 months and 3 weeks, in essence she failed to credit the [appellant] for the pre-trial imprisonment.
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> 2. The Learned Trial Judge did not adequately explain to the jury the consequence of provocation and the effect it would have had on the [appellant], nor did she adequately highlight to the jury the instances of provocation whether by words or deeds either by the Deceased or by the siblings of the Deceased.
>
> In failing to adequately address the issues of provocation the Learned Trial Judge deprived the [appellant] of a possible verdict of manslaughter instead of murder."

Discussion

[9] We will first address ground two, which seeks to challenge Mr Martin's conviction for murder. Mr Golding's main complaint was that the learned trial judge's directions to the jury on the issue of provocation were inadequate in that she failed to bring to the jury's attention certain provocative words and conduct of the deceased and her family members. He contended that this was a material non-direction on the part of the learned trial judge, which resulted in Mr Martin not receiving a fair trial since the non-direction deprived him of a possible verdict of manslaughter. He further urged us that in the light of the miscarriage of justice that has resulted, the court ought to set aside the verdict of guilty of murder and substitute a verdict of guilty of manslaughter. Reliance was placed on the case of **R v Rupert Johnson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 98/1996, judgment delivered 8 December 1997, for this submission.

[10] The Crown conceded that the non-directions resulted in a substantial irregularity and miscarriage of justice since the deceased's act of telling Mr Martin's girlfriend of his infidelity should have been identified to the jury as a possible provocative act. Crown Counsel, Ms Pyke, also acknowledged that Buggo's conduct should have been considered in determining whether Mr Martin was provoked. It was her position that if the appellant

were to be successful in his appeal against his conviction, then the verdict of manslaughter should be substituted for the murder conviction. The cases of **Robert Smalling v R** [2001] UKPC 12 and **Raymond Bailey v R** [2021] JMCA Crim 34 were cited in support.

[11] Upon carefully reviewing the evidence in this matter, we find that the Crown's concession is well-founded. We are of the view that while the learned judge was correct to leave the issue of provocation to the jury irrespective of the defence that Mr Martin put forward (see **Joseph Bullard v The Queen** [1957] AC 653, **R v Stewart** [1995] 4 All ER 99 and **Alton Baker v R** [2022] JMCA Crim 20) her directions to the jury on the issue of provocation were inadequate. Although she specifically directed the jury on provocation, she failed to identify for their consideration the potentially provoking conduct of the deceased before the altercation between her and Mr Martin, as well as the conduct of her brother, Buggo. The learned trial judge had pointed out the evidence of provocation that took place during the incident. However, the deceased's act of notifying Mr Martin's girlfriend that he was unfaithful and had been giving away items from the shop they owned and operated had initially provoked him to confront her. Not to mention that during their confrontation, the deceased had hurled numerous inflammatory insults at Mr Martin (including that he was a "batty bwoy" and that he sucked pussy), which the learned judge failed to bring to the jury's attention. Additionally, Buggo's conduct during the altercation, having cut Mr Martin with a knife on his hand, would also constitute an act of provocation. Those aspects of the evidence ought properly to have been pointed out to the jury by the learned judge as capable of constituting provocative words and conduct.

[12] It is settled law that once there is evidence of provocation, whether by words and/or conduct, the question of whether the provocation was sufficient to cause a reasonable person to suddenly and temporarily lose his self-control and do as he did should be left to be determined by the jury (see **R v Duffy** [1949] 1 All ER 932 and section 6 of the Offences Against the Person Act). Having determined that there was a live issue of provocation, the learned trial judge had a duty to direct the jury to the

evidence that could be considered provocation. The learned trial judge failed to highlight aspects of the evidence that were crucial for the jury's determination of that question. We cannot say with certainty that the jury would have inevitably found that Mr Martin was guilty of manslaughter instead of murder had the learned trial judge pointed out all the evidence of provocation. However, the effect of her non-direction is that Mr Martin was deprived of a fair trial. Accordingly, this ground must succeed. As a result, we will invoke section 24(2) of the Judicature (Appellate Jurisdiction) Act that gives this court the authority to substitute a verdict of guilty for another offence for which the jury could have convicted an appellant; and set aside Mr Martin's conviction for murder and substitute therefor a verdict of manslaughter.

[13] Regarding the appeal of the sentence, Mr Golding submitted that the sentence imposed was manifestly excessive and further that the learned trial judge had failed to credit Mr Martin for the four years, eight months and three weeks he spent on remand prior to his conviction. Learned Crown Counsel also conceded that the learned trial judge erred when she failed to give Mr Martin full credit for the time he spent in pre-trial custody when she sentenced him for the offence of murder. Again, Miss Pyke's concession on this issue is proper.

[14] We invited the parties to file further submissions on sentencing for the offence of manslaughter based on provocation and are grateful to Mr Golding and Crown Counsel for their submissions, which were filed on 10 and 8 May 2024, respectively. Mr Golding cited and distinguished the cases of **Huey Gowdie v R** [2018] JMCA Crim 58 and **Shirley Ruddock v R** [2017] JMCA Crim 6 ('**Shirley Ruddock**'), as well as the several authorities reviewed in the latter case. He submitted that the appropriate sentence to be imposed in the present case is 11 years and four months, taking into account Mr Martin's pre-trial detention. Miss Pyke also cited several cases, such as **R v Dosane Jackson** [2020] JMCA Crim 3, **Franklyn Chong v R** [2013] JMCA Crim 67 and **Daniel Robinson v R** [2010] JMCA Crim 75. She contended that the appropriate sentence for manslaughter in the

circumstances of the present case would be 12 years and four months, taking into account the time Mr Martin spent in custody awaiting trial.

[15] In light of the substituted verdict, it is necessary for us to embark on a fresh sentencing exercise to determine the appropriate sentence for manslaughter. The statutory maximum sentence for manslaughter is life imprisonment. However, as stated by Morrison JA (as he then was) in **Meisha Clement v R** [2016] JMCA Crim 26 ('**Meisha Clement**'), citing **R v Harrison** (1909) 2 Cr App R 94, **R v Byrne and others** (1975) 62 Cr App R 159 and **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrate Criminal Appeal No 55/2001, judgment delivered on 5 July 2002, "the maximum sentence of imprisonment provided for by statute for a particular offence should be reserved for the worst examples of that offence likely to be encountered in practice" (para. [29]). The present case cannot be so classified.

[16] We are cognisant of and take into account the relevant sentencing principles and the methodology to be employed when determining the question of an appropriate sentence (see **R v Sargeant** (1974) 60 Cr App R 74, **Daniel Roulston v R** [2018] JMCA Crim 20 (at para. [17]) and the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'). We are also mindful of the well-established principle that an offender should receive full credit for time spent in custody pending trial (see **Meisha Clement v R** and the Privy Council decision of **Callachand & Anor v The State** [2008] UKPC 49).

[17] The Sentencing Guidelines state that manslaughter convictions attract a normal range of sentences of three to 15 years with a usual starting point of seven years. However, following a detailed review of several cases emanating from this court in respect of the offence of manslaughter based on provocation, Brooks JA (as he then was), in **Shirley Ruddock**, established that the normal range of such sentences falls within seven to 21 years. Bearing in mind that this incident stemmed from a domestic dispute and an illegal firearm was utilised to commit the crime, we will adopt that principle and accept the range of sentences for offences of this nature as being seven to 21 years. We are

also of the view, given the circumstances of the present case, that the appropriate starting point (the notional point within the broad range (of seven to 21 years) from which the sentence will be increased or decreased to allow for aggravating and mitigating factors (**R v Saw and Others** [2009] EWCA Crim 1), and which "reflects the intrinsic seriousness of the offence and includes the offender's culpability in committing the offence, any harm caused, that was intended or might have been foreseen" (per Morrison JA) in **Meisha Clement**), is 14 years.

[18] Turning now to the aggravating factors (which far outweigh the mitigating factors), we have considered that these are (1) Mr Martin was 29 years old at the time of the offence, he was not a youthful offender; (2) Mr Martin armed himself with a firearm before the final confrontation with the deceased; (3) the killing was brazen as it occurred in broad daylight on the road and was witnessed by persons in the community; (3) Mr Martin and the deceased were friends; (4) the deceased was 22 years old and the mother of a very young child; (5) Mr Martin ignored Mrs Miller's pleas and attempts to deescalate the hostilities; (6) the adverse effect of the offence on the family of the deceased and the community; and (7) the prevalence of fatalities and offences involving firearms in Jamaica. On account of the aggravating factors, the starting point would be adjusted upwards to 19 years.

[19] The mitigating factors are few. Mr Martin had no previous convictions and was gainfully employed. Those mitigating features would adjust the sentence downwards to 17 years. Giving Mr Martin the full credit of four years, eight months and three weeks he spent in pre-trial remand, the sentence of 17 years would be further reduced to 12 years, three months and one-week imprisonment. We believe this is the appropriate and just sentence that Mr Martin should serve, after considering the nature and context of the offence against the background of Mr Martin's personal circumstances.

[20] For the reasons stated above, we make the following orders:

1. The application for leave to appeal conviction is granted, and the hearing of the application is treated as the hearing of the appeal.

2. The appeals against conviction and sentence are allowed.

2. The conviction for murder on the sole count of the indictment is quashed, judgment and verdict of acquittal are entered, and a verdict of guilty of manslaughter is substituted.

3. The sentence of life imprisonment at hard labour with the stipulation that the appellant serve 19 years before becoming eligible for parole is set aside, and a sentence of 12 years and three months and one-week imprisonment for manslaughter is substituted, the appellant having been credited for four years eight months and three weeks spent in pre-trial remand.

4. The sentence is to be reckoned as having commenced on 7 October 2016.