[2023] JMCA Crim 41

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 4/2014

ROMAINE NEMBHARD v R

Leroy Equiano for the applicant

Ms Shauna-Kaye James for the Crown

14 and 16 December 2021 and 29 September 2023

Criminal law - Sentence- Whether Sentence manifestly excessive- Pre-sentence custody-

Constitutional law - Delay- Breach of constitutional right to a fair trial within a reasonable time - Redress

F WILLIAMS JA

[1] On 14 December 2021, we heard the applicant's renewed application for permission to appeal against his sentence. The applicant was sentenced to life imprisonment with the stipulation that he should serve 23 years before eligibility for parole. That sentence was imposed on 27 November 2013, subsequent to his guilty plea for the offence of murder. On 15 December 2021, with a promise that brief reasons would follow, we ordered that:

> "1) The application for permission to appeal sentence is granted.

2) The hearing of the application for permission to appeal against sentence is treated as the hearing of the appeal.

3) The appeal against sentence is allowed in part in that:

(a) The sentence of life imprisonment is affirmed.

(b) However, in giving credit for the time of 3 years spent in custody before trial and the year credited to the applicant for the breach of his constitutional right to a fair trial within a reasonable time, the stipulation that the applicant serve 23 years at hard labour before becoming eligible for parole is set aside. Substituted therefor is the stipulation that the applicant serve 19 years at hard labour before becoming eligible for parole.

4) The sentence is to be reckoned as having commenced on the date on which it was originally imposed, to wit, 27 November 2013."

Proceedings in the court below

[2] The applicant and his co-accused (his brother) were arrested and charged with the murder of Hortense McNeil and were jointly arraigned before the Hanover Circuit Court. The court records indicate that the applicant had pleaded guilty prior to 22 November 2012, but that the plea was withdrawn on 17 May 2013, in order for a psychiatric evaluation to be conducted on him. The applicant's legal representation was then settled in June 2013 and disclosure made to his counsel on 11 November 2013.

[3] In a caution statement and a question and answer session held with the police, the applicant admitted to the murder. He stated that he and his co-accused had forcibly entered the deceased's home by cutting a grill, between 26 and 28 October 2010, sometime after 8:00 pm. The deceased, who was an 82-year-old woman, had lived alone. The applicant further admitted that he and his co-accused had waited in the deceased's home, for her to emerge from her bedroom, as that door was locked. In the morning, when the deceased did so, the applicant tried to cover her mouth with a piece of cloth to prevent her from raising an alarm, and a struggle ensued between them. The co-accused

repeatedly hit the deceased with his hand, and the applicant then used a knife to stab the deceased in her neck. The duo then took food, money and a cell phone from the house.

The application for permission to appeal

[4] The application for permission to appeal was initiated by way of form B1, filed on 6 January 2014. The said application was considered and refused by a single judge of appeal on 16 February 2021. It was premised on two grounds of appeal:

> "(a) Unfair trial: that the sentence is harsh and excessive as based on the circumstances this cannot be justified under law.
>
> (b) That the learned trial judge did not temper justice with mercy as my guilty plea was not taken into consideration."

[5] When the matter was renewed before this court, counsel for the applicant, Mr Equiano, relied on his application filed on 10 December 2021, to crave the court's permission to add a supplemental ground of appeal and reformulate his existing grounds. Having been so permitted, counsel merged the two original grounds. The reformulated ground of appeal then read as:

> "The sentence of the Court was manifestly excessive."

The supplemental ground of appeal as introduced stated that:

> "The inordinate delay between conviction, filing of the appeal and appeal constitute a breach of the Applicant's constitutional right to a trial within a reasonable time."

[6] Thus the arguments in this application addressed the appropriateness of the sentence imposed and the impact of the delay surrounding the conviction. We will now proceed to consider the appropriateness of the sentence imposed.

Issue (i): was the sentence imposed manifestly excessive?

<u>Submissions before the court</u>

[7] Counsel for the applicant contended that, in the light of the fact that the applicant had pleaded guilty, the sentence imposed by the court was manifestly excessive. In further support of that argument, counsel argued that it seemed that the sentencing judge had overlooked the consideration that the applicant had pleaded guilty at the "first opportune occasion" (paras. 7 and 15 of his skeleton submissions) and so was entitled to a 30% discount. Additionally, counsel submitted that, while the sentencing judge had referred to the applicant's pre-conviction remand period, it was not demonstrated that it was numerically accounted for in the sentence imposed. To further buttress his submission, counsel submitted that, although the present statutory framework which governs discounts and guilty pleas was enacted after the applicant's sentencing, the same principles would have applied by virtue of the common law.

[8] In proposing what he considered to be a suitable period for the applicant to serve before eligibility for parole, counsel submitted that 15 years would be appropriate when all adjustments are made, using a starting point of 20 years. To this starting point would be added a further 10 years for aggravating factors. Five years would be subtracted for mitigating factors, with a discount of 25% applied on account of the guilty plea and a further subtraction of three years for the period spent on pre-sentence remand. There should also be a year subtracted for breach of the applicant's constitutional right to a fair trial within a reasonable time, it was further submitted.

[9] Ms James, for the Crown, submitted that the sentence of life imprisonment imposed was appropriate but that there was a concern in relation to the period imposed before eligibility for parole. It was argued that, although the sentence imposed fell within the usual range of sentences for similar offences, there was no clear indication that a discount was applied for the guilty plea (which, it was conceded, was entered at the earliest opportunity) or that the time spent by the applicant on pre-conviction remand was accounted for in the pre-parole period imposed.

[10] In recommending what she regarded as an appropriate sentence, Ms James submitted that a starting point of 30 years was appropriate with an additional six years

to be added thereto on account of aggravating factors. There should, she further submitted, be a subtraction of four years for mitigating factors which would then be followed by a discount of 30% for the guilty plea. A further deduction of three years for time spent in pre-sentence custody and one year for the breach of the applicant's constitutional right should be made. That would result in a period of 18 years and six months before eligibility for parole.

Discussion

[11] We thank counsel in this matter for their industry and the helpful submissions presented to the court.

[12] In approaching the matter, we are guided by the case of **R v Kenneth Ball** (1951) 35 Cr App Rep 164, in which Hilbery J outlined the principle that the appellate court is not at liberty to interfere with a sentence imposed unless the sentencing judge erred in principle.

[13] At page 165 of that judgment, Hilbery J observed:

> "In the first place, 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 to character he may have chosen to call. It is only when a sentence appears to err in principle that this 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."

[14] Thus, in order for the court to interfere with the sentence, it must be demonstrated that the sentencing judge erred.

[15] In the transcript, the sentencing judge referred to the applicant's employment history and religious involvement. He also mentioned the need to balance the mitigating factor of the applicant's psychiatric history with the aggravating circumstances of the

murder. He also stated that the applicant had taken responsibility for the murder and was not beyond redemption. In his concluding remarks on sentencing, the sentencing judge stated that he had considered the above stated factors along with the extensive plea in mitigation, the social enquiry report, the antecedent report and the psychiatric report in imposing the sentence of life imprisonment with the stipulation that the applicant should serve 23 years before becoming eligible for parole.

[16] Some aspects of the social enquiry report and the applicant's antecedents were mentioned in the plea in mitigation by counsel on behalf of the applicant in the court below. Counsel stated that, prior to the murder, the applicant had only been a petty thief, and involved in antisocial behaviour but that, up to that point, there had been no incident of violence in his history. He also referred to the youthfulness of the applicant, he having been 18 years of age at the time of the commission of the offence, along with his strained family relations and lack of supervision from a tender age.

[17] When sentences for similar offences on a guilty plea are considered, the sentence imposed on the applicant does not appear to be manifestly excessive. By way of comparison, in the case of **Cornelius Robinson v R** [2022] JMCA Crim 16, the applicant had strangled and dumped the body of a 14-year-old girl who had threatened to reveal their relationship and her pregnancy to his family. The applicant was sentenced to life imprisonment with the stipulation that he serve 25 years before becoming eligible for parole. This court adjusted that figure only in order to give the applicant credit for the period of 21 days spent in custody prior to his conviction.

[18] In **Gawayne Thomas v R** [2022] JMCA Crim 11, Laing JA (Ag) writing on behalf of the court, indicated a range of 18 to 29 years' stipulation for eligibility for parole on a guilty plea for murder (see para. [36] of that judgment).

[19] In the case of **Tyrone Gillard v R** [2019] JMCA Crim 42, this court adjusted the period for eligibility for parole from 22 years to 20 years, on account of the fact that the sentencing judge had failed to have proper regard to the Criminal Justice Administration

Act, 2015 ('CJAA') in determining the discount to be given for the guilty plea. In the case at bar, the discount to be afforded for a guilty plea was a matter at the discretion of the sentencing judge, the arraignment and sentencing having been concluded prior to the enactment of the CJAA.

[20] In addition, the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, introduced in December of 2017, were not in existence at the time of the applicant's sentencing in 2013. However, having regard to the principles expounded in **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002, the sentencing judge was even then required to have had regard to certain factors. Harrison JA stated that:

> "If therefore the sentencer considers that the 'best possible sentence' is a term of imprisonment, he should again make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise. The factors to be considered in mitigation of a sentence of imprisonment are, whether or not the offender has:
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> (a) pleaded guilty;
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> (b) made restitution or
>
> (c) has any previous conviction.
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> These factors must be considered by the sentencer in every case before a sentence of imprisonment is imposed."

[21] The sentencing judge, in the instant case, indeed considered the above factors, but he did not indicate an initial starting point. Also, while he mentioned that account would be taken of the period spent on pre-sentence remand, there is no clear indication of the reduction given in that regard. However, it is an established principle that an accused is to be offered full credit for the time spent in pre-sentence custody. That principle was expounded in, among others, **Romeo DaCosta Hall v The Queen** [2011]

CCJ 6 (AJ). The exception to that principle arises, for example, in the case of mandatory minimum sentences, where to give such credit would cause the sentence to fall below the mandatory minimum. That should not be done, as to do so would be contrary to the intention of parliament (as per **Kerone Morris v R** [2021] JMCA Crim 10). However, the exception does not apply in these circumstances.

[22] In the result, at this point, the only adjustment made to the instant sentence is that three years were deducted from the applicant's sentence on account of his pre-sentence remand period.

[23] The issue of delay and its possible impact on the applicant's constitutional right to a fair trial within a reasonable time will now be explored.

Issue (ii): was there inordinate delay and if so what was the effect of such delay?

Submissions

[24] Counsel for the applicant submitted that there had been a delay of eight years between the filing of the application for leave to appeal and the single judge's decision refusing leave to appeal. In that regard, it was submitted that the applicant should be offered a year's discount on his sentence to take account of the delay.

[25] Crown Counsel conceded that there had been inordinate delay between the applicant's sentencing and the hearing of the appeal, which amounts to approximately 10 years. The delay was attributed to the transcript of the proceedings in the court below not becoming available until 11 November 2020.

Discussion

[26] Sections 16(1) and (7) of the Charter of Fundamental Rights and Freedom provide as follows:

> "16. -(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded

> a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> …
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> (7) An accused person who is tried for a criminal offence or any person authorized by him in that behalf shall be entitled, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, to be given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court."

[27] In this matter, there is no disputing that there was a delay of some eight years between the applicant's filing of his application and the hearing thereof. That delay has been laid at the feet of the State, due to the late provision of the transcript of the arraignment and sentencing proceedings in the court below.

[28] It has been accepted that the right to a fair hearing within a reasonable time (as per section 16 of the Constitution) includes the hearing of an appeal. In the case of **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26, the issue of what amounts to unreasonable delay was considered. At the time of the hearing of that appeal, what is now section 16(1) was then section 20(1) of the Constitution. The Privy Council was of the view at para. 28, that:

> "The Board would affirm that the law as stated in the *Attorney General's Reference* case, [2004] 2 AC 72 and as summarised in *Boolell*, represents also the law of Jamaica. Although those judgments were not directed specifically at the effect of delay pending appeal, the same approach applies."

[29] So far as relevant, the reference to the approach to be taken in keeping with the **Attorney General's Reference** case might be seen in para. 24 of that judgment, per Lord Bingham, as follows:

> "If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted

> defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction."

[30] We agreed that there has been inordinate delay between the time when the applicant filed his application for permission to appeal and the time when it came before the single judge for hearing. That delay is regrettable. The case of **Techla Simpson v R** [2019] JMCA Crim 37, among others, (adopting the learning in the **Attorney General's Reference** case) notes that the usual remedies provided by this court include a public acknowledgment of the breach or a reduction in the sentence which was imposed. As such, we took the view that the best way of addressing the breach of the applicant's constitutional right in this case, was by way of a deduction of one year from his sentence.

[31] It was for the foregoing reasons that we made the orders set out at para. [1] herein.