C.A. Criminal — Manslaughter — Sentence — 12 years imprisonment at hard labour — whether judge imposed sentence on erroneous conclusion of facts — whether judge applied wrong principles in sentencing — whether sentence manifestly excessive: Application for leave to appeal refused

Case referred to JAMAICA § 12(2nd) Comp

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 25/92 Criminal Practice

COR: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (Ag.)

R. v. AINSLEY STEWART

Winston Spaulding, Q.C. for appellant

Deborah Martin for Crown

May 26 & 27 and June 28, 1993

GORDON, J.A.:

On the night of the 27th October, 1969 a 'Fish Fry' was in progress at the car park at Boone Hall, St. Andrew. Miss Sharon Clarke, in attendance, was sitting on a wall. Two explosions were heard followed by a third coming from a gun held by the applicant. Miss Clarke ran from the car park bleeding, and collapsed; she was taken to hospital where she was pronounced dead on arrival. The bullet which was recovered from her liver entered Miss Clarke's body above the left breast, "travelled obliquely downwards to the right, through both chest cavities, both lungs, the heart and the right lobe of the liver." It was flattened from contact with a hard object externally, prior to entry in her body.

On arraignment on January 29, 1992, the applicant pleaded guilty to manslaughter and the facts stated above were recited in court. They were extracted from the depositions which were held by the Crown, the defence and the trial judge. Sentence was postponed to the 7th of February, 1992, and further postponements were given to 21st, 26th and

27th February, 1992, when a sentence of imprisonment at hard labour for four years was imposed.

The applicant sought leave to appeal from the sentence imposed and at the conclusion of the hearing we reserved our decision.

Mr. Spaulding's submissions condensed to three grounds are:

(a) that the learned trial judge imposed sentence on an erroneous conclusion on the facts;

(b) that he applied the wrong principles in sentencing; and

(c) that the sentence was manifestly excessive, having regard to all the circumstances.

Before dealing with the submissions of Counsel it is necessary to state what transpired on January 29, 1992 after Crown Counsel had stated the facts to the court. The records indicate this dialogue:

> "HIS LORDSHIP: Is there anything on the deposition to suggest the circumstances under which the firearm was discharged?
>
> MISS HARRISON: No motive was given.
>
> HIS LORDSHIP: Not motive.
>
> MISS HARRISON: Music was playing. He was standing nearby, sitting close to where the music was being played, the boxes were, and I gather that he just started to fire the weapon. There is no suggestion whatsoever, m'Lord, on the deposition as to why the gun was fired.
>
> HIS LORDSHIP: Any of the witnesses that you intended to call ...
>
> MISS HARRISON: Yes, m'Lord?
>
> HIS LORDSHIP: ... speak of any disturbance that would warrant a discharge of the firearm?
>
> MISS HARRISON: There is nothing in the deposition to suggest that, m'Lord. There was no disturbance. One witness said soul music was playing.

"HIS LORDSHIP: Just a minute. One witness said what?

MISS HARRISON: Soul music was playing and it was at that time that the fire-arm went off.

HIS LORDSHIP: Thank you. Yes, Mr. Cruickshank?

MR. CRUICKSHANK: May it so please you, m'Lord ...

HIS LORDSHIP: Antecedents are ready?

OFFICER IN COURT: No, m'Lord.

HIS LORDSHIP: Yes?

MR. CRUICKSHANK: We, for the Defence, would crave the Court's indulgence to allow us to call two witnesses as to character, maybe a third, but definitely two witnesses as to character and, m'Lord, these witnesses are not available today."

On February 21, 1992 a report prepared by Mrs. Phillipa Douglas, a Probation Officer, was read in Court. Here for the first time appeared the applicant's version of the events:

"On the night of the fatal incident, defendant states, he was attending a 'Fish Fry' organized and put on by the residents of Block B where he had lived. He was a member of the Planning Committee and was responsible for the bar. While the event was in progress, he states that a number of men, who appeared to have been under the influence of drugs or alcohol, came to the location using indecent language. He reportedly spoke to them explaining that children were around and they should desist behaving in that manner. The situation did not improve and he fired three shots in the air as a form of warning. He was later made aware that a resident had been shot."

In his plea in mitigation on February 26, 1992, Mr. Cruickshank said that the applicant had pleaded guilty "to the offence of manslaughter in circumstances where, on the Crown's case, what appeared to have transpired was an act done by the accused man which was fraught with negligence and brought about the death of the deceased."

The bullet he said, "must have hit something before it hit the deceased for it to be flattened." "... It was not a direct firing ..." "... something had transpired and that he foolishly pulled his gun and let off a volley of shots."

In imposing sentence the learned trial judge made certain observations on the facts. It is against these remarks that the first ground of appeal as condensed above is directed.

The judge said:

> "I am not saying that you discharged it by way of salute at a dance because there is no evidence; but you have said that there were some elements at the dance which were indulging in rowdyism and you had to fire your gun in the air. But there were other police officers there who didn't fire their guns in the air and I cannot see how you could have fired your gun in the air and it results in the type of injuries to the lady because the injuries to the lady was on the left anterior chest above the left breast and the track of the wound travelled obliquely downwards to the right, through both chest cavities, both lungs, the heart, the right lobe of the liver from which a flattened lead bullet was recovered. So the injury which the lady received strongly disputes what you told me or what your lawyer urged on your behalf. This is, for me, a painful experience but as painful as it is I think I must do it. It cannot be said that in today's Jamaica a man who is a member of our security forces can use a fire-arm so recklessly and then be not given a custodial sentence."

Mr. Spaulding submitted that the above remarks indicate that the learned trial judge formed a view of the facts which differed significantly from that put forward by the prosecution, was adverse to the defence and in so doing he imposed sentence on an erroneous basis. The applicant, he said, should have been afforded the opportunity to call evidence

on the issue. The view expressed by the learned trial judge was that the applicant could not have fired the gun "in the air" as he told it to the Probation Officer. Mr. Spaulding quoted from Archbold: 1992 Edition, Chapter 5, p. 672, para. 5-41, as under:

> 5-41 "Where the accused person pleads Guilty to the charge in the indictment, but puts forward a version of the facts of the offence which differs significantly from the version put forward by the prosecution, the sentencer must resolve the issue before passing sentence: he should not pass sentence without determining which version of the facts he accepts (see R.v. Brown (1981) 3 Cr. App. R.(S.) 250, CSP L2.2(a); R.v. Costley (1989) 11 Cr. App. R.(S.) 357, CSP L2.2(e). Where the sentencer is inclined to form a view of the facts which is adverse to the defendant, on the basis of his own inferences from the evidence, where that view has not been put forward by the prosecution, the sentencer should indicate to counsel what is in his mind, point out the basis for the proposed inference, and offer the opportunity for counsel to call evidence on the issue (see R.v. Lester (1975) 63 Cr. App. R. 144, CSP L2.2(b).
>
> The procedure to be followed where conflicting versions of the facts of the offence are put forward by the prosecution and by the defence was considered by Lord Lane C.J. in R. v. Newton (1982) 4 Cr. App. R.(S.) 388, (1983) 77 Cr. App. R. 13, CSP L2.2(e). Lord Lane C.J., said that there were three ways in which a judge in these circumstances can approach his difficult task of sentencing. In some cases it was possible to obtain an answer from a jury, where the different versions could be reflected in different charges in the indictment. The second method is for the judge "himself to hear the evidence on one side and another, and come to his own conclusion, acting so to speak as his own jury on the issue which is the root of the problem." The third possibility is for the judge to hear no evidence, but to listen to the submissions of counsel; but if this course is adopted, "if there is a substantial conflict between the two sides, he must come

> "down on the side of the defendant ... the version of the defendant must so far as possible be accepted."

Continuing his submissions he said, there was substantial conflict between the prosecution version of an irresponsible reckless discharge of the firearm without reason and the defence version of a discharge because there was a disturbance. The version of the defence should have been accepted, he submitted, and this would have ameliorated the sentence imposed. This is the third approach approved by Lord Lane in R.v. Newton (supra).

The prosecution outlined the facts on the 29th January, 1992, and the defence was in possession of those facts on the depositions. The facts as given were never challenged then by the defence and it was on the probation report that there was an indication that the defence's version differed from the prosecution's. If the defence intended to make an issue of it, it behoved the defence to invite the judge to hear evidence in a "Newton hearing." In R. James Henry Sargeant 60 Cr. App. R.(S.) p.74 at p.79 Lawton L.J. held that "Defending counsel should read the antecedent report and, if there is anything in it which is disputed by his client, he should bring that matter at once to the attention of prosecuting counsel. Prosecuting counsel will then have to make up his mind whether to call admissible evidence to prove the disputed facts or to omit them from the evidence." We are of the view that this applies "a fortiori" to facts on which the prosecution relies.

One has to determine whether there was a "substantial conflict" on the facts. On the prosecution's case there was a grossly negligent and reckless discharge of the firearm which resulted in the death of Miss Clarke. On the defence the

applicant "pulled his gun and let off a volley of shots... in circumstances fraught with negligence and brought about the death of the deceased." Certainly there was no conflict in these facts. Even accepting the applicant's version per the probation report as true the reported disturbances described did not warrant the discharge of a firearm. The Crown did not say how or where the gun was aimed but the evidence accepted by Crown and defence shows that the bullet that struck the deceased ricocheted from some object. The learned trial judge therefore found that the ricochet bullet strongly disputed a firing of the gun in the air. All car parks, as distinct from parking garages, in Jamaica are open air places and a gun fired in the air in a car park would have no object up there from which a bullet could ricochet. All the learned trial judge was saying was that the gun was fired not vertically in the air but at some other angle.

The learned trial judge must have had in mind the guidance given in Archbold: 1992 Edition, Chapter 5, at p.674.

> 5-44 "The cases establish three situations where although there is a dispute as to the facts of the case, the court is not obliged to hear evidence under the principles laid down in Newton. The first is where the difference in the two versions of the facts is immaterial to the sentence, and the same sentence would be passed however the question was determined. "It is for the judge to consider whether there is a substantial divergence or conflict of fact which might materially affect his sentence" (per Anthony Lincoln J. in R.v. Hall (1984) 6 Cr. App. R. (S.) 321 CSP L2.2(c))."

> 5-45 "The second exception to the principles set out in Newton is the case where the version put forward by the defence can be described as "manifestly false" or "wholly implausible," R.v. Hawkins (1985) 7 Cr. App. R.(S.) 351.

> 5-46 "The third exception to the principles set out in Newton which appears to be recognised in the decisions of the Court of Appeal is the case where the matters put forward by the defendant do not amount to a contradiction of the prosecution case, but rather to extraneous mitigation explaining the background of the offence or other circumstances which may lessen the sentence... R.v. Connell (1983) 5 Cr. App. R.(S.) 360."

Counsel for the applicant had indicated that Dr. Clifford was in attendance to give evidence if the court so directed consequent on an application which he intended to make. We directed that we would not hear Dr. Clifford as it did not appear to us that the import of his deposition was misconstrued or misunderstood by the learned trial judge. We find that the learned trial judge did not fall in error in his conclusion on the facts and the first ground of appeal as condensed failed.

In submitting on the second ground (supra) Mr. Spaulding had recourse to many cases on sentencing reported in the Criminal Appeal Reports (Sentencing) and some decisions of this court. We do not find it necessary to mention all but we are indeed indebted to counsel for the research he made in this most difficult area of criminal law. It was submitted that in approaching sentencing the learned trial judge applied the wrong principles. He did not bear in mind that each case must be considered on its own merits (see R.v. Errol Campbell (1974) 12 J.L.R. 1317).

The case of James Henry Sargeant was one of the many cases referred to by Mr. Spaulding in support of his submission. It must be said at the outset that this case and the principles stated therein were fully quoted and relied on by the learned trial judge in his remarks on sentencing: retribution, deterrence, prevention and rehabilitation. The court considered the character of the applicant and the nature of the offence. The learned trial judge stated that the reckless use of the firearm by the applicant was a betrayal of trust as he was

entrusted with same to be used when absolutely necessary and not wantonly. He was mindful of the image the public have of the use made of guns by the police. This was an oblique reference to the number of policemen who have been convicted of crimes involving the use of guns and in particular off-duty policemen who retain and use the firearms entrusted to them to assist in the performance of their duties. This practice was adversely commented on by this court in R.v Maurice Bent, S.C.C.A 45/92 delivered March 22, 1993.

Mr. Spaulding urged that the circumstances of the applicant call for the court to have taken and to take a humane view in sentencing. The circumstances he urged are the domestic repercussions and dislocation his incarceration has had on his family, his contrition and his physical and mental suffering. It was submitted that the principles of R. v. Egbert Stewart (1972) 12 J.L.R. 865 should be applied. The headnote of that case reads:

> "The Court of Appeal of Jamaica will, like the Court of Appeal (Criminal Division) in England, reduce a custodial sentence imposed on conviction on indictment although it is of the view that such sentence is not, in principle, excessive. It will do so in a case where the circumstances surrounding the event giving rise to the charge have changed materially so as to render unlikely a recurrence of the event, and where the personal circumstances of the appellant point to a reduction in the sentence imposed on him as being desirable."

The appellant was a tenant farmer who held over for a very long time. He killed a trespassing pig belonging to the complainant who had leased the land the appellant occupied and was waiting to get possession. In an altercation the appellant wounded the complainant who was hospitalised for

four days. On conviction on an indictment for wounding the appellant was sentenced to be imprisoned for three months at hard labour. The appellant had injuries inflicted by the complainant.

This court (Fox, Smith, JJ.A. and Robinson, J.A. (Ag.)), took into consideration the circumstances that existed at the time of the hearing, namely:

(a) That the appellant had removed from the land;

(b) The complainant had surrendered his lease and removed from the area; and

(c) There was no likelihood of a recurrence of conflict between the parties.

The court decided:

> "In these circumstances we find it possible, as the Court of Appeal did in the case of Pauline Margaret Jones, on humane considerations to reduce (the) sentence."

The case of Pauline Jones, (1971), 56 Cr. App. R. 212 was one in which there was public outcry. Jones was imprisoned for three years for child stealing and on appeal the Court of Appeal (Criminal Division) said:

> "We have considered this matter with care, and we have come to the conclusion that the sentence of three years for this kind of offence, when supported by such deliberate intention to retain the child, is not in principle an excessive sentence. We are not prepared to say that the learned trial judge was wrong in this assessment that he made of this matter. But we are moved by Mr. Comyn's address to us, that this is perhaps a case in which this court, now that matters have cooled down a little, might show a measure of mercy which the trial judge found it impossible to show ... we do find it possible, as a matter of mercy and nothing else, to reduce the sentence."

The above show that the courts were moved by particular circumstances to be merciful and reduce the sentences imposed. The sentence in Jones Case was reduced from three years to twenty-one months. The circumstances urged by Mr. Spaulding are not unusual nor are they special. The learned trial judge, in our view, applied the correct principles and appreciated that this case had to be dealt with on its own merits. He could not, however, divorce from his consideration the state of affairs that existed and still exists in Jamaica where policemen are charged before the courts for serious offences committed involving the use (abuse) of firearms. With the merits of this case in mind the trial judge said in imposing sentence:

> "A message has to be sent out to let you and other police officers know that when you are entrusted with a firearm by the Government of this country, that firearm is only to be discharged where it is absolutely necessary. ... it cannot be said that in today's Jamaica a man who is a member of the security forces can use a firearm so recklessly and be not given a custodial sentence."

In R. v. Clarence Campbell, S.C.C.A. 108/89 delivered June 4, 1990, it was urged upon the court that the range of sentence in cases based on negligence particularly in Motor Manslaughter cases was three to five years. This view was not rejected by the court but in that case, as in this, manslaughter arose from the negligent use of a firearm. The court there held that it was a case of the grossest negligence and the sentence was reduced from nine years to five years imprisonment. We hold that on an overview of all the related matters and for the reasons given this ground of appeal cannot be entertained, it also fails.

The final ground urged the sentence is manifestly excessive having regard to all the circumstances of this case and having regard to the character and antecedents of the applicant and other circumstances relating to the applicant.

The learned trial judge heard the evidence of Detective Sergeant Arnold Hemmings, Acting Assistant Commissioner of Police Adolphus Tracey and Dr. Garth Rattray of the character of the applicant and his conduct subsequent to the incident. It was submitted that he applied the wrong principles in sentencing as complained of in ground 1, and in so doing imposed a sentence that was manifestly excessive.

A sentence of imprisonment for three years is accepted as the minimum sentence for manslaughter. We find that a sentence of four years at hard labour is not excessive, let alone manifestly excessive for the crime committed in this case. The circumstances relied on as special do not in our view qualify to be so classified as to affect the sentence justly imposed.

The learned trial judge said:

> "I have agonised over this, what is the proper sentence to impose on you and I have concluded that the sentence must necessarily be a custodial one. Why? Because, as a police officer, you were entrusted with this firearm to protect the society against criminal attack ... you used this firearm and discharged it in a reckless manner..."

The facts and circumstances including the antecedents of the applicant were carefully considered and an appropriate sentence imposed. This third ground also fails. The result is that the application is refused and we direct the sentence to commence on May 27, 1992.

Cases referred to
(1) R v Newton (1982) Cr App R (S) 388
(2) R v James Henry Sargeant 60 Cr App R (S) 74
(3) R v Maurice Brent SCCA 147/92 - 22/3/93
(4) R v Egbert Stewart (1972) 12 JLR 865
(5) Pauline Jones (1975) 66 Cr App R 202
(6) R v Clarence Cornwall SCCA 109/89 - 4/4/90