[2010] JMCA Crim 93

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 28/2009

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE M^{C}INTOSH JA

ESMIE LEE RICHARDS v R

Mr Robert Fletcher for the appellant

Mr Vaughn Smith and Miss Kelly-Ann Boyne for the Crown

15 and 17 November 2010

ORAL JUDGMENT

MORRISON JA

[1] This an appeal effectively against sentence only, the learned single judge having granted leave to appeal on this issue and learned counsel for the appellant, Mr Fletcher, having indicated to the court that he did not propose to advance anything on behalf of the appellant as regards to conviction.

[2] The appellant was indicted in the Home Circuit Court for the offence of murder. to which she entered a plea of not guilty. After a trial before Beswick J and a jury, she was on 24 February 2009 found guilty of murder and on that same day sentenced

by the learned judge to life imprisonment, with a stipulation that she should serve a period of 20 years before becoming eligible for parole.

[3] The facts of the case may be shortly stated. The appellant and the deceased, Miss Kathlene Beverley Arnold, were neighbours. It is not in dispute that on 22 September 2005, the death of the deceased was caused by the acts of the appellant, as a result of a dispute between them concerning the building of a fence between their respective premises.

[4] The chief witness for the prosecution was the deceased's son Andre Mills, also known as "Wally", who was 19 years old at the time of the trial in 2009 and had therefore been 15 years at the time of the incident which resulted in his mother's death. The fuss between his mother and the appellant over the fence started from the evening of 21 September and at about 7:00 a.m. on 22 September, "Wally" resumed the work on the fence which he had started from the evening before. It appears that the appellant had laid a foundation for work on her house which according to "Wally", was actually "in the fence line" between the two adjoining properties. Hence, "Wally" was engaged in taking out the steel from the foundation from the appellant's house to thereafter, in own his words, "mash them up". In short order both the deceased and the appellant arrived on the scene and the war of words that had started on the evening before erupted anew. In the result, the deceased was fatally wounded by stab wounds inflicted by the appellant using a knife described in evidence as being "12 inches long".

[5] In her defence, the appellant asserted that she had acted in self defence. The trial judge gave full and careful directions to the jury on self defence, as also on provocation, which, though not relied on by the appellant, plainly arose on the evidence. By its verdict, the jury rejected both self defence and provocation and found the appellant guilty of murder with the result already indicated.

[6] In passing sentence on the appellant, the learned trial judge said this:

> "Miss Richards I have considered everything that your lawyer has urged on me including the fact that before this incident you were not a violent person. I have considered that you have no previous convictions and that the community reports concerning you are good. At the same time I considered that Kathlene Arnold has been killed in her own home. She had a right to live and you choose to take that life away from her in her relative young days. As a result of your actions, you have two sets of children who are without mothers, yours and hers. However, your children will one day be able to see you again. Her children never see her in this life because of your actions.
>
> I bear in mind also that you have expressed regret according to the reports about your actions. So that in the circumstances the sentence that I regard as appropriate is the one I impose now life imprisonment and that you must serve 20 years before you become eligible for parole. When you come out you will still be relatively young close to age of the lady whose life you took away."

[7] Mr Fletcher's single ground of appeal was as follows:

> "That the learned trial judge may not have given enough consideration to all the important and relevant factors in arriving at that part of the sentence which set the amount of years to be served before parole."

[8] In his written submission, Mr Fletcher submitted that more weight could have been placed by the judge on the following factors. Firstly, the social enquiry report, which speaks repeatedly of the appellant as a hard working person who had never been known to be violent, making the response which led to her conviction totally out of character and to this may be added the fact that both the appellant and the deceased were seen as non-violent persons who seemed to get along with each other.

[9] Secondly, these facts make the circumstances of the killing a critical factor for the judge to consider in deciding on sentence and while the extent of the appellant's response and the timing might have made the legal elements of provocation in-applicable to the facts, it is also clear that there was in the classic Jamaican sense, "extreme aggravation" instigated by the son of the deceased and actively encouraged by the deceased. This factor ought to be considered, Mr Fletcher submitted, as it places her previous character, behaviour and the possibility for rehabilitation in a different light.

[10] Thirdly, Mr Fletcher submitted that the appellant's expression of regret and remorse was not a mere ruse, but was consistent with the reports of the type of person she was, and this includes the fact that she has some meaningful academic credentials and has consistently worked. In taking all of these matters into consideration therefore, Mr Fletcher submitted that the sentence handed down was manifestly excessive. Further, that notwithstanding the jury's rejection of the defences

of self-defence and provocation, the court should look to the facts upon which the plea was based and, if it saw it fit, give effect to them in sentencing.

[11] We think it is fair to say that the court was fairly luke-warm towards this last submission during the argument, considering that to ask the judge to take into account at the sentencing stage that which had been rejected by the jury by their verdict could produce an incongruity. However, since hearing the argument on the matter, the judgment of this court differently constituted in the matter of ***Byron Edwards v R*** (SCCA No 15/2007, judgment delivered on 6 November 2009) was brought to our attention and in that case it appears from the judgment of our sister, Phillips JA that the court accepted a submission that:

> "The authorities suggest that if the facts are borderline in respect of recognized defences such as provocation, the defendant can utilize such elements of the facts of the case in mitigation whether the specific defence had been advanced or it had been done unsuccessfully at the trial itself."

In the result in that case, the court found that there was no reason to disturb the sentence which had been imposed by the learned trial judge.

[12] The statement made by Phillips JA in that case was based upon an extract from a work entitled: "A Guide to Sentencing in Capital Cases", authored by Messrs Edward Fitzgerald QC and Keir Starmer QC and the statement which is to be found at para. 47 of that work is based on some decisions of the Eastern Caribbean Supreme Court which we have not had an opportunity to see. While we naturally accept that the obviously considered view of the panel that heard that appeal should ordinarily command respect,

and even obedience, we are content in this matter to approach the issue of sentence on the basis of ordinary and well established criteria, given that ***Edwards v R*** was not cited to us, or discussed during the argument. Although one is always entitled to take into account the circumstances in which the particular offence was committed, which may arguably lead one back to the same point that Mr Fletcher makes, we prefer to rest our judgment on the established criteria and we hope that one day Mr Fletcher will have the opportunity of arguing the point arising out of ***Edwards v R*** before us. In applying those criteria and taking into account the appellant's previously unblemished record, her good reputation in her community and her obvious remorse at what can only be described as a totally un-guarded and disproportionate response in the circumstances, we have come to the clear view that the sentence imposed by the learned trial judge was manifestly excessive given all the circumstances.

[13] We therefore substitute for the stipulation that the appellant should serve 20 years before becoming eligible for parole a stipulation that she should serve a minimum period of 15 years instead and this is in fact the minimum period that the court is empowered to prescribe in these circumstances (pursuant to section 3(1)(d) of the Offences Against the Person Act). Sentence is to commence as of the date of conviction, that is, 24 February 2009.

[14] The result is that the appeal against sentence is allowed. Sentence of life imprisonment is affirmed save to say that it is ordered that the appellant is to serve a minimum period of 15 years imprisonment before becoming eligible for parole.