JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE D FRASER JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00058

RICHARD SALMON v R

Russell Stewart for the applicant

Miss Natallie Malcolm for the Crown

10 and 12 July 2023

ORAL JUDGMENT

SIMMONS JA

[1] This is a renewed application for permission to appeal against sentence. The applicant, Richard Salmon, pleaded guilty to the offences of murder and causing grievous bodily harm with intent on 4 March 2019 in the Home Circuit Court before Wint-Blair J ('the learned judge'). On 6 May 2019, he was sentenced to imprisonment for life with the stipulation that he serves 26 years before being eligible for parole in respect of the offence of murder and nine years' imprisonment for the offence of causing grievous bodily harm with intent.

[2] On 5 November 2021, his application for leave to appeal sentence was considered by a single judge of this court and was refused. The applicant renewed his application before this court as is his right. At the hearing, counsel for the applicant sought and was granted leave to abandon the original grounds of appeal and to argue one supplementary ground, which is as follows:

> "The sentence imposed by the Learned Sentencing Judge is manifestly excessive in the circumstances."

[3] The learned judge was said to have committed the following three errors in the sentencing exercise:

1. Using a starting point of 40 years imprisonment rather than 30 years imprisonment which is the maximum when calculating a reduction on an account of a guilty plea pursuant to section 42F of the Criminal Justice (Administration) (Amendment) Act.
2. By not considering the applicant's positive social enquiry report as a mitigating factor.
3. By not adopting a balanced approach by placing more emphasis on retribution and deterrence rather than rehabilitation.

[4] Mr Stewart, at the outset, indicated that issue was only being taken in respect of the sentence imposed for the offence of murder. Counsel submitted that whilst the sentence may not appear *prima facie* to be manifestly excessive, the fact that it was arrived at without sufficient adherence to the relevant principles resulted in a sentence that is higher than that which would have been given. He submitted that the learned sentencing judge erred when she used a starting point of 40 years, as by virtue of section 42F of the Criminal Justice (Administration) (Amendment) Act, a term of life imprisonment is deemed to be 30 years for the purpose of calculating a reduction of sentence, when a defendant pleads guilty. Reference was made to **Troy Smith v R** [2021] JMCA Crim 9 in support of that submission.

[5] Counsel also submitted that the usual range for eligibility for parole for the offence of murder is between 25 years and 45 years' imprisonment and that a greater period is reserved for the more egregious cases. Reference was made to **Paul Brown v R** [2019] JMCA Crim 3.

[6] Miss Malcom, on behalf of the Crown, submitted that whilst the learned sentencing judge had erred in principle, the sentence imposed was not manifestly excessive and ought not to be disturbed. In this regard reliance was placed on **Demar Shortridge v R** [2018] JMCA Crim 30 and **Cornelius Robinson v R** [2022] JMCA Crim 16.

Discussion and analysis

[7] Section 14(3) of the Judicature (Appellate Jurisdiction) Act provides:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case, shall dismiss the appeal."

[8] However, as indicated by Hilbery J in **R v Ball** (1952) 35 Cr App Rep 164 at page 165:

> "…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 as to character he may have chosen to call. **It is only when a sentence appears to err in principle that the 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**". (Emphasis added)

[9] The above statement of principle by Hilbery J in **R v Ball** was adopted by this court in **Alpha Green v R**, **Meisha Clement v R** [2016] JMCA Crim 26 and, more recently, in **Patrick Green v R** [2020] JMCA Crim 17.

[10] The central issue for consideration is whether the learned judge failed to follow the principles of sentencing and thereby imposed a sentence that was manifestly excessive.

[11] Counsel for the Crown conceded that the learned judge erred in principle when she used a starting point of 40 years' imprisonment. Having reviewed the transcript of the sentencing hearing, we believe that the concession by counsel for the Crown is warranted. It is also clear from the learned judge's sentencing remarks that she did not employ a methodical approach as prescribed by this court in **R v Evrald Dunkley** and more recently **Meisha Clement v R** [2016] JMCA Crim 26 and **Daniel Roulston v R** [2018] JMCA Crim 20. In this regard, we have noted that although the learned sentencing judge indicated that she was taking into account the two years that the applicant had spent in custody, there is no clear indication that she did so.

[12] We have also noted that the learned judge, in her sentencing remarks, did not place much emphasis on the rehabilitation of the applicant. The learned judge, in addressing rehabilitation, stated at page 25 lines 11-14 of the transcript:

> "You are a candidate for rehabilitation because of your age and so it means that you will have some time to consider what useful purpose you can make in society."

At page 29 lines 8-10 she further stated:

> "Your age means that you are young enough to be rehabilitated but you are also old enough to know better".

[13] In **Patrick Green v R** at para. [21] Morrison P, who delivered the judgment of the court, stated:

> "We begin with three general observations. Firstly, it is beyond controversy that the four 'classical principles of sentencing', as this court described them in **R v Beckford & Lewis** (1980) 17 JLR 202 at 202-203, are retribution, deterrence, prevention and rehabilitation. Thus, the possibility of rehabilitation, even in a case calling for condign punishment, must always be considered by the sentencing judge. Accordingly, in **R v Errol Brown** (1988) 25 JLR 400, the court considered that, in imposing a well-deserved deterrent sentence, the sentencing judge ought to have kept in mind 'a possible rehabilitation of the prisoner'. And similarly, in **Michael Evans v R**, [2015]

JMCA Crim 33, the court found that counsel's criticism that the sentencing judge, whose primary focus appeared to have been on the principle of deterrence, had failed to demonstrate that he had also taken into account the need to rehabilitate the offender, was 'not at all unjustified'."

[14] In **Patrick Green**, the judge's sentencing remarks under review are as follows:

> "Having said all of this, I don't really think that you are beyond redemption. Nobody, I believe, so far in my experience is. However, you might have a difficulty in terms of social adaptation. I believe as you have rightly said that you are not ready to go out there, that a changing environment is likely to bring about probably a change in your behavior [sic].
>
> You know you have to go away for a period and it will not be a short period. And it is for you to say to yourself and to appreciate that violence is never the answer to any issue at all, that the gun is not the answer to issues. It is so prevalent nowadays, gun-related offence I'm talking, and then you have to sit down and determine the way forward how you are going to manage yourself, how you are going to manage your actions and then maybe, just maybe, you might decide to change your behavior [sic] and you may well become a better member of society and not a threat to women and others."

This court at para. [24] found that:

> "…the possibility of rehabilitation featured hardly at all in her consideration of the appropriate sentence to be imposed on the appellant. While it is true that the judge did make a passing reference to redemption ('I don't really think you are beyond redemption'), it is clear that her primary focus was on the public interest and what she described as 'the protection of society' ('I must tell you also that in arriving at a just and appropriate sentence, the Court must look at the interest of society and strike a balance when considering what sentence the Court has to impose ... in some cases, the protection of society is an overwhelming consideration.'). Given the views expressed in the social enquiry report, the appellant's age, his remorse and his own frank self-assessment that he was 'not yet ready to return to society', he may in fact have been a good candidate for a structured programme of rehabilitation.

> We therefore think that, **by appearing to leave the possibility of rehabilitation out of the equation altogether, or to marginalise its impact, the judge erred in principle**." (Emphasis supplied)

[15] In the instant case, the learned sentencing judge spoke primarily of deterrence and punishment and, therefore, erred in principle by not paying sufficient regard to rehabilitation.

[16] In light of the learned sentencing judge's errors as detailed above, this court, in accordance with the established practice, would be permitted to consider the question of sentence afresh (see **Patrick Green v R** and **David Gray v R** [2021] JMCA Crim 4).

[17] By virtue of section 3 of the Offences Against the Person Act ('the Act'), a person who is convicted of murder may be imprisoned for life or for a term of years. It has not been suggested that the sentence of life imprisonment, imposed on the applicant, was not appropriate. Issue has only been taken with the period for eligibility for parole. Section 3 of the Act states:

> "3.-(1) Every person who is convicted of murder falling within –
>
> (a) section 2(1)(a) to (f) or to whom subsection (1A) applies, shall be sentenced to death or to imprisonment for life;
>
> (b) section 2(2), shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years…"

Section 2(2) states:

> "(2) Subject to subsection (3), every person convicted of murder other than a person – (a) convicted of murder in the circumstances specified in subsection (1)(a) to (f); or
>
> (b) to whom section 3(1A) applies,
>
> shall be sentenced in accordance with section 3(1)(b).

Section 3(1C) states:

> "(1C) In the case of a person convicted of murder, the following provisions shall have effect with regard to that person's eligibility for parole, as if those provisions had been substituted for section 6(1) to (4) of the Parole Act-
>
> (a) where a court imposes a sentence of imprisonment for life pursuant to subsection (1)(a), the court shall specify a period, being not less than twenty years, which that person should serve before becoming eligible for parole; or
>
> (b) where, pursuant to subsection (1)(b), a court imposes-
>
> (i) a sentence of imprisonment for life, the court shall specify a period, being not less than fifteen years; or
>
> (ii) any other sentence of imprisonment, the court shall specify a period, being not less than ten years, which that person should serve before becoming eligible for parole."

[18] This is a murder to which section 3(1)(b) applies and in respect of which a life sentence was imposed; with the result that the minimum period which could be stipulated for eligibility for parole is 15 years. In **Cornelius Robinson**, which was relied on by the Crown, the court referred to **Gawayne Thomas v R**, **Demar Shortridge** and **Troy Smith** in which the range of sentences of imprisonment before eligibility for parole where a guilty plea was entered was considered by this court. The range is from 18 years to 45 years.

[19] In keeping with the methodology prescribed in **Meisha Clement v R** and **Daniel Roulston v R** an appropriate starting point must be identified. In doing so, the seriousness of the offence must be taken into account. We are of the view that a starting point of 28 years imprisonment would be appropriate in the circumstances of this case where a corrosive substance was used to inflict injury on the deceased which ultimately led to her death. The aggravating features are as follows:

(1) The prevalence of domestic violence in Jamaica.

(2) The offence was premeditated.

(3) The offence was committed at night when the deceased was asleep.

(4) The attack was done in the presence of the child of the deceased and the applicant.

(5) The deceased was burnt on 53% of her body and suffered immense pain before she died, approximately two weeks later.

(6) The applicant's previous conviction for an offence involving violence.

(7) The applicant fled the scene.

The mitigating factors are:

(1) The applicant is remorseful.

(2) The applicant's favourable social enquiry report.

(3) The applicant was gainfully employed and has two dependents.

[20] The aggravating factors would increase the sentence by six years and the mitigating factors would reduce that period by two years, resulting in a pre-parole period of 32 years.

[21] The applicant, having pleaded guilty, was clearly eligible for a discount. The extent of that discount is, however, a matter for the discretion of the court and is directly related to the circumstances of each case. It is our view that in light of the circumstances of this case where the deceased had given a statement naming her attacker and the offence was witnessed by their child, as submitted by counsel for the Crown, a discount of 10% is appropriate. This would reduce the pre-parole period to 28 years and 10 months. A larger discount in our view would be disproportionate to the seriousness of the offence,

inappropriate for this applicant and would shock the public conscience (see section 42H(a) of the Criminal Justice (Administration) Act).

[22] With respect to the time spent in custody, it is settled that full credit must be given. This was made clear by the Judicial Committee of the Privy Council in **Callachand & Anor v The State** ([2008] UKPC 49 and applied by this court in **Meisha Clement v R** and other cases. In the case at bar, the applicant spent two years in custody. He was, therefore, in accordance with the principles in the above cases entitled to receive full credit for that period. When the two years that the applicant spent in custody is deducted, the period before which the applicant would be eligible for parole would be 26 years and 10 months.

[23] In the circumstances, we have therefore concluded that the sentence imposed was not manifestly excessive. It fell within the range of sentences imposed for the offence of murder where there has been an admission of guilt and was appropriate given the very serious facts of this case. Although we have in the resentencing exercise arrived at a higher sentence than the learned sentencing judge, in fairness to the applicant we will not disturb the sentence that was imposed by her.

Order

[24] The order of the court is as follows:

(1) The application for permission to appeal sentence is refused.

(2) The sentence of life imprisonment with the stipulation that the applicant serves 26 years before being eligible for parole for the offence of murder and the sentence of nine years' imprisonment for the offence of causing grievous bodily harm with intent are affirmed.

(3) The sentences are reckoned as having commenced on 6 May 2019, the date on which they were imposed and are to run concurrently.