[2021] JMCA Crim 39

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

SUPREME COURT CRIMINAL APPEAL CA 68/2017

JULIAN WILLIAMS v R

Leroy Equiano for the appellant

Miss Natallie Malcolm for the Crown

20, 21 September and 21 October 2021

V HARRIS JA

[1] On 23 March 2017, the appellant, Mr Julian Williams, pleaded guilty before George J ('the learned judge') in the Portland Circuit Court to the offences of manslaughter and robbery with aggravation, on counts 1 and 2 of the indictment, respectively. On 16 July 2017, he was sentenced on count 1 of the indictment to life imprisonment with the stipulation that he should serve a period of seven and a half years' imprisonment before being eligible for parole. On count 2 of the indictment he was sentenced to six and a half years' imprisonment at hard labour. The sentences were ordered to run concurrently.

[2] On 21 July 2017, the appellant applied to this court for leave to appeal his sentence. A single judge of this court, on 13 April 2021, considered his application and granted permission. This was on the basis that, while the sentence imposed for robbery with aggravation was not manifestly excessive; the term of life imprisonment imposed for the offence of manslaughter appeared to be so.

Background

[3] The evidence against the appellant came mainly from a caution statement given by him. In that statement, he indicated that between 6 September and 9 September 2013, he took another man by the name of "Dilly" to the home of the deceased, CM, a lecturer at College of Agriculture, Science and Education ('CASE') with whom he had an intimate relationship. On arrival at CM's residence, the appellant participated in restraining the deceased in an effort to rob him. Dilly declared that they had to get rid of the deceased (which the appellant admitted that he understood to mean to kill the deceased). The appellant stated that he did not know what to do and felt confused. He left the deceased's residence and went outside. He later returned to the deceased's home, after receiving a call from Dilly, and saw him lying on the floor bleeding with a knife in his neck. He along with Dilly then loaded a number of items including a laptop, cellular phone, televisions and alcoholic beverages into the deceased's Honda CRV motorcar and drove back to Kingston.

The appeal against sentence

[4] The solitary ground of appeal advanced by the appellant in this matter was:

> "UNFAIR TRIAL: THAT BASED ON THE FACTS PRESENTED THE SENTENCE [sic] ARE HARSH AND MANIFESTLY EXCESSIVE AND CANNOT BE JUSTIFIED WHEN TAKEN INTO CONSIDERATION THAT THE LEARNED TRIAL JUDGE DID NOT TEMPER JUSTICE WITH MERCY AS MY GUILTY PLEAD [sic] WAS NOT TAKEN INTO CONSIDERATION."

Discussion

[5] On 20 September 2021, when this appeal came on for hearing, we observed that the appellant was unrepresented and, as he is serving his sentence and did not apply for permission to attend the hearing, he was not present in person. The court, in the interests of justice, enquired of learned counsel, Mr Equiano (who was in court for another matter), if he would be prepared to assist the appellant on a legal aid assignment. Counsel, in the finest traditions of the Bar, graciously consented to do so. The matter was then adjourned to the following day, so that Mr Equiano could review

the transcript and the Crown's written submissions. After hearing submissions from both counsel on 21 September 2021, we again adjourned the matter to 20 October 2021 (further adjourned to 21 October 2021), to allow Mr Equiano to speak with the appellant and take any necessary instructions, which we have been advised by counsel was done. The court wishes to register its gratitude to Mr Equiano for his assistance in this matter.

[6] Turning now to the hearing of the appeal, the crux of Mr Equiano's argument, on behalf of the appellant, is that the sentence imposed for manslaughter by the learned judge was manifestly excessive and a determinative period would have been more appropriate. Crown Counsel, on the other hand, contended that the sentence imposed was in keeping with offences of this nature in which guilty pleas are offered.

[7] The learned judge, upon the appellant pleading guilty, had the benefit of antecedent and social enquiry reports which she utilised during the sentencing hearing. The antecedent report indicated that the appellant was married and had no children. He was gainfully employed as a theatre company usher and had no previous convictions recorded against his name in Jamaica.

[8] The appellant's social enquiry report stated that he was 32 years old and had been gainfully employed since he was 14 years old. The court was also informed that the appellant had been deported from the United Kingdom in 2012 after serving eight years' imprisonment for rape and robbery. The community report was favourable as the appellant was regarded as an active member of his community, who was a kind-hearted individual and protective of women.

[9] In her plea of mitigation at the sentencing hearing, counsel for the appellant emphasised that the appellant entered an early guilty plea and accepted responsibility for the offences. She also reiterated that the appellant's intention was to rob the deceased, not to kill him. Furthermore, he was genuinely remorseful about the killing of

the deceased. The court was also informed that the appellant had spent three years on pre-sentence remand.

[10] Mr Equiano, quite sensibly, in our judgment, did not argue that the sentence of six and a half years' imprisonment, imposed for the offence of robbery with aggravation, was manifestly excessive. He was correct in doing so, as the sentence was well within the range of sentences normally imposed for this offence committed in similar circumstances. We, therefore, agree with the finding of the single judge of this court that that sentence is appropriate. As a result, we will focus our discussion on the sentence imposed for the manslaughter conviction.

[11] The learned judge in sentencing the appellant began by correctly identifying the usual starting point for the offence of manslaughter as being seven years. Upon examining the aggravating features, she expressed that they were "quite disturbing". The appellant befriended the deceased, entered into a relationship with him, earned his trust, then colluded with Dilly to rob him, which resulted in his death. Although he did not physically harm the deceased, the appellant was well aware of Dilly's intention while he stood outside and waited. He made no effort to seek assistance or prevent Dilly from killing the deceased. The learned judge pointed out that the appellant played a pivotal role since the deceased would not have been killed had the appellant not facilitated the unlawful scheme. For those reasons, she increased the starting point from seven years' imprisonment to the maximum of life imprisonment with a minimum period of 22 years to be served before being eligible for parole.

[12] It was her opinion that there were no mitigating factors regarding the offence itself. She, however, acknowledged that the appellant had a troubled past. Nevertheless, the community referred to him as a kind-hearted individual and an active member. The minimum period of 22 years before eligibility for parole was consequently reduced by one year to 21 years.

[13] The learned judge made certain enquiries and was duly informed that the appellant pleaded guilty at the first available opportunity. For that reason, she, as entitled by law, discounted the 21 years by 50%, which reduced it to 10 and a half years. She then took into account the three years the appellant spent in custody, and further reduced the term to a period of seven and a half years before eligibility for parole.

Is the sentence manifestly excessive?

[14] This court will not interfere with a sentence imposed by a trial or sentencing judge who has had the benefit of hearing and observing the accused and witnesses (including character witnesses), unless in arriving at that sentence, the judge erred in principle or the sentence is found to be manifestly excessive (see **R v Ball**[1] and **R v Alpha Green**[2]). Counsel Mr Equiano has not sought to argue that the learned judge erred in her application of the sentencing principles outlined in **Meisha Clement v R**[3], as well as the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'). However, we invited both counsel to address us on the question of whether a judge has the jurisdiction to stipulate a minimum period for parole when an offender has been convicted of manslaughter and sentenced to life imprisonment, in light of section 9 of the Offences against the Person Act ('OAPA') and section 6 of the Parole Act.

[15] Section 9 of the OAPA gives the court the jurisdiction to impose a sentence of life imprisonment, however, it does not provide for the court to stipulate a minimum parole period; it states:

> "9. Whosoever shall be convicted of manslaughter shall be liable to be imprisoned for life, with or without hard labour, or to pay such

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[1] (1952) 35 Cr App Rep 164
[2] (1969) 11 JLR 283
[3] [2016] JMCA Crim 26

> fine as the court shall award in addition to or without any such other discretionary punishment as aforesaid."

[16] It is section 6 of the Parole Act, which would prescribe the period which ought to be served before eligibility for parole. It provides:

> "6.- (1) Subject to the provisions of this section, every inmate serving a sentence of more than twelve months shall be eligible for parole after having served a period of one-third of such sentence or twelve months, whichever is the greater.
>
> (2) Where concurrent sentences have been imposed on an inmate, such inmate shall be eligible for parole in respect of the longest of such sentences, after having served one-third of the period of that sentence or twelve months, whichever is the greater.
>
> (3) ...
>
> (4) Subject to subsections (4A) and (5), an inmate -
>
> (a) who has been sentenced to imprisonment for life; or '
>
> (b) ...
>
> shall be eligible for parole after having served a period of not less than seven years.
>
> ..."

[17] Mr Equiano contended that once a life imprisonment sentence is imposed for the offence of manslaughter, the period for parole is a given. Crown Counsel conceded that it is not stipulated in section 9 of the OAPA that there is a minimum period to be served before becoming eligible for parole. The learned judge, she submitted, appeared to not have jurisdiction in this matter to stipulate a minimum parole period and so she may have erred in that regard.

[18] Whereas the OAPA specifically prescribes the minimum parole period for the offence of murder (see section 3), it is silent as to the minimum period before an

offender becomes eligible for parole when convicted for manslaughter. Similarly, in the case of **Junior Maxwell et al v R**[4], Straw JA found that a trial judge had erred when he stipulated a minimum period for parole for the offence of rape under section 44(1) of the OAPA (which has since been repealed). The wording of that section likewise did not prescribe a minimum parole period. It was affirmed that in such circumstances, section 6 of the Parole Act is the relevant provision with respect to eligibility for parole.

[19] For the purposes of determining parole in relation to the offence of manslaughter section 6 of the Parole Act would be the relevant statute. Having imposed a sentence of life imprisonment, by virtue of section 6(4)(a) of the Parole Act, the appellant ought to serve a minimum of seven years' imprisonment before becoming eligible for parole. Consequently, we find that the learned judge erred in principle when she stipulated that the appellant should serve seven and a half years before being eligible for parole. Therefore, having found that the learned judge has erred as a matter of law, the intervention of this court would be merited. However, there is another factor to be considered.

[20] The nub of the appellant's complaint is that the sentence of life imprisonment imposed for his conviction for manslaughter is manifestly excessive. The words of Hilbery J in **R v Ball** at page 165 are useful in understanding the term "manifestly excessive". He said:

> "If a sentence is excessive … to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then the Court will intervene."

[21] In our assessment, therefore, we are entitled to utilise the procedure delineated in **Meisha Clement v R** and the Sentencing Guidelines in order to assess whether the learned judge in imposing the maximum sentence, failed in her application of the relevant principles. In **Meisha Clement v R**, Morrison P stated at para. [43]:

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[4] [2019] JMCA Crim 24

> "[43] On an appeal against sentence, therefore, this Court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing exercise of his or her discretion."

[22] In imposing the sentence, the learned judge embraced the usual, known and accepted principles of sentencing, but it cannot be said that they were correctly applied in all respects. As already established, she imposed the maximum sentence and although not empowered to do so, stipulated that the appellant was to serve a period of 22 years before becoming eligible for parole. She then erred in her application of those principles when she sought to reduce the pre-parole period of 22 years on account of the mitigating factors, guilty plea and credit for pre-trial remand, instead of imposing a determinative sentence and reducing that sentence itself. The sentence, as imposed is, therefore, flawed.

[23] Notwithstanding that judges are empowered to prescribe the maximum sentence of life imprisonment for the offence of manslaughter, the Sentencing Guidelines indicate that the normal range of sentences for this offence is three to 15 years. We note, however, that in **Shirley Ruddock v R**[5] (the facts of which bear some similarity with the present case), Brooks JA (as he then was) had this to say at para. [40]:

> "[40] On the matter of sentence, a review of sentences for the offence of manslaughter, involving personal violence, reveals that the most frequent sentence for that offence in recent years was one of 15 years. Those cases were, in the main, cases that involved some domestic connection and in some instances, a guilty plea. Where an unlawful act, such as robbery, was contemplated, the sentence was increased. …"

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[5] [2017] JMCA Crim 6

[24] It is beyond dispute that the offence in the instant case was committed in the furtherance of an unlawful act, that being robbery with aggravation, which justifies the sentence exceeding 15 years. The Crown referred the court to a few cases which had similarities to the case at bar, in order to provide guidance on the appropriate sentence, which we now will consider.

[25] In **Raphael Russell v R**[6], the applicant was charged with murder in the course or furtherance of burglary. He pleaded guilty to manslaughter during the trial. This court upheld the sentence of 21 years. In **Daniel Robinson v R**[7], the applicant strangled a woman he was intimately involved with. He was charged with the offence of manslaughter and pleaded guilty. He had no previous history of violence. Having been sentenced to 20 years' imprisonment, he appealed to this court and that sentence was set aside and substituted with a sentence of 15 years. It is important to note that the statute relating to guilty plea discounts (the Criminal Justice (Administration) (Amendment) Act ('CJAAA'), 2015, in particular section 42D) was not in effect in 2010 when the appeals in **Raphael Russell v R** and **Daniel Robinson v R** were considered.

[26] In the recent case of **Micheston Burke v R**[8], the appellant pleaded guilty to the offence of manslaughter and was sentenced to 22 years' imprisonment with a stipulation that he should serve 18 years before becoming eligible for parole. This court found that, had he gone to trial, a sentence of 20 years would be appropriate. Since his guilty plea was offered before the commencement of the trial, he was entitled to a maximum discount of 35%. However, considering the seriousness of the offence, the high risk of reoffending, and the fact that the commission of this offence was shortly after a previous conviction for a similar offence, a 20% discount was given. This

[6] [2010] JMCA Crim 85
[7] [2010] JMCA Crim 75
[8] [2020] JMCA Crim 29

reduced the sentence to 16 years. Time served further reduced the sentence to 13 years and six months' imprisonment.

[27] We have had due regard for the cases as well as counsel's submissions and are of the view that the imposition of the maximum sentence of life imprisonment is indeed manifestly excessive. We take this opportunity to again remind judges that this court has repeatedly said that maximum sentences ought to be reserved for the most egregious cases (**Ian Wilson v R**[9] at para. [20]; **Neville Barnes v R**[10] at para. [87]; and **Meisha Clement v R** at para. [27]).

[28] In light of the above, Crown Counsel recommended a starting point of 22 years inclusive of the aggravating factors. We have taken into account the aggravating features considered by the learned judge (at page 37 of the transcript) such as the level of deceit that was involved in the scheme culminating in the appalling breach of trust and that the deceased was killed in the course and furtherance of a robbery. While we are cognisant that the appellant intended only to rob the deceased, and did not actively participate in his actual killing, he nonetheless facilitated it. The robbery of the deceased was premeditated. Tellingly, the appellant assisted Dilly in restraining the deceased (which would have made it easier for him to kill the deceased); and although being fully aware of Dilly's intention, he did absolutely nothing to prevent the gruesome murder of the deceased, with whom he had shared an intimate relationship. Additionally, in conjunction with those aggravating features, is also the fact that the appellant was released from prison in 2012 for committing another violent offence and robbery, albeit in a different jurisdiction.

[29] We are, therefore, in agreement with counsel for the Crown that a starting point above that recommended by the Sentencing Guidelines and a sentence at the higher end of the range of sentences for offences of this nature, are justified. We find that the

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[9] [2021] JMCA Crim 29
[10] [2019] JMCA Crim 12

appropriate starting point would be 20 years. Taking into account the aggravating factors, the sentence should be increased to 25 years.

[30] We are also in agreement with the learned judge that there were hardly any mitigating features, other than that the appellant was described as kind-hearted and a protector of women. For that reason, we would also reduce the sentence by one year to 24 years.

[31] In respect of the discount for the guilty plea, section 42H of the CJAAA sets out the factors for consideration when discounting a sentence further to a guilty plea, which are:

> "42H. …
>
> (a) whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;
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> (b) the circumstances of the offence, including its impact on the victims;
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> (c) any factors that are relevant to the defendant;
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> (d) the circumstances surrounding the plea;
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> (e) where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;
>
> (f) whether the defendant has any previous convictions;
>
> (g) any other factors or principles the Court considers relevant."

[32] Since the plea was entered on the first relevant date, the learned judge applied the maximum discount of 50%. Having had due regard for all the above considerations (which includes the callous manner in which the deceased met his demise in his own home, the appellant's life of crime and pattern of re-offending (as observed by the probation officer in the social enquiry report)), in our judgment, the maximum discount

of 50% would "be disproportionate to the seriousness of the offence" and "inappropriate for this appellant" (see **Micheston Burke v R** at para. [61]).We also conclude that the maximum discount of 50% would "shock [and outrage] the public conscience". In the circumstances, we are of the view that the sentence should be discounted by 30%. That discount would reduce the term of 24 years to 16 years and eight months. The appellant should also receive full credit for the three years he spent in custody, which would further reduce the sentence to 13 years and eight months.

Conclusion

[33] The sentence imposed by the learned judge for the offence of manslaughter is not only manifestly excessive but also wrong in law, since the OAPA does not confer on the judge, the jurisdiction to stipulate a minimum period to be served before being eligible for parole. The parole period for manslaughter is determined in accordance with section 6 of the Parole Act. As a result, it is open to this court to interfere with the sentence imposed by the learned judge and to determine the appropriate sentence by applying the relevant principles. This we have done.

[34] For the reasons stated above, the appeal against sentence is allowed in part. The sentence of six and a half years' imprisonment at hard labour for the offence of robbery with aggravation is affirmed. The sentence of life imprisonment with the stipulation that the appellant serves seven and a half years' before being eligible for parole for the offence of manslaughter is set aside. Substituted therefor, is a sentence of 13 years and eight months' imprisonment at hard labour (with three years already credited for pre-sentence remand). The sentences are to run concurrently and to be reckoned as having commenced on 16 July 2017.

Order

(1) The appeal against sentence is allowed in part.

(2) The sentence of six and a half years' imprisonment at hard labour for the offence of robbery with aggravation is affirmed.

(3) The sentence of life imprisonment with the stipulation that the appellant serves seven and a half years before being eligible for parole for the offence of manslaughter is set aside and a sentence of 13 years and eight months' imprisonment at hard labour (with three years on pre-sentence remand having been credited) is substituted therefor.

(4) The sentences are to run concurrently and to be reckoned as having commenced on 16 July 2017.