[2018] JMCA Crim 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 50/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE PUSEY JA (AG)

A v R

Linton Gordon and Obika Gordon instructed by Frater Ennis and Gordon for the appellant

Joel Brown for the Crown

7, 8 May and 25 June 2018

BROOKS JA

[1] The appellant's name has not been used in this judgment as she was under the age of 18 years at all relevant times leading to this appeal. She was under 16 years old when she stabbed her six year old half-brother to death. She was charged for murder as a result. When the case came on for trial on 24 April 2013 she pleaded guilty to manslaughter. The prosecution accepted her plea.

[2] She was 17 years old when, on 7 June 2013, she was sentenced to serve 18 years imprisonment at hard labour. She was granted leave by a single judge of this

court to appeal against the sentence, on the basis that it could be argued that it was manifestly excessive.

[3] We heard the appeal on 7 May 2018 and on 8 May 2018 we handed down the following ruling:

1. The appeal is allowed.
2. The sentence imposed by the learned sentencing judge is set aside and a sentence of eight years' imprisonment is substituted therefor.
3. The sentence is to be reckoned as having been commenced on 7 June 2013.

At that time we promised to put our reasons in writing and we now fulfil that promise.

The circumstances of the killing

[4] The outline of the prosecution's case against the appellant was that on 2 August 2011, while she was at home with her brother, she stabbed him in the chest and neck. He died as a result of a haemopneumothorax (blood and air in the chest cavity) and external bleeding. On the same day, she gave a statement to the police, in the presence of an attorney-at-law. In that statement she ascribed her motive to be revenge for the way in which the boy's mother (the appellant's stepmother) treated her. It does not appear that the stepmother was present at the premises at the time of the killing.

[5] It is not clear why the prosecution accepted the plea, but after the plea had been entered, defence counsel on the appellant's behalf proffered a different reason for the killing. It was that the boy had discovered that the appellant's father had been sexually abusing her and he taunted her about it. In this version, it was said that it was as a reaction to the taunting that she stabbed him. Yet another version was given to the probation officer, who included it in his social enquiry report. The latter version included both allegations of abuse by the stepmother as well as an accusation that the child had a habit of hitting her.

[6] The learned sentencing judge identified the differences in the respective accounts proffered by the defence, but, in addition, gave some consideration to the version contained in the prosecution's account. He is recorded as having said at pages 27-29 of the transcript:

> "Without a doubt [the appellant] has had some very unfortunate occurrences in her life. The matter of allegation against her father the Court will consider that, although that apparently is a matter that is yet to be resolved in Court….
>
> There is also reference of [sic] her attending a particular high school and that something might have happened to her there as well. The Court will bear in mind all the contents of the Social Enquiry Report and take most of it as something that is in her favour.
>
> In relation to this explanation that has been put forward…the Court has to bear in mind and consider to the extent possible, what the offender – the account that the offender is putting forward here….
>
> …So there is a little bit of difficulty there [as a result of the differences in the respective cases] but the Court has to

bear in mind all the circumstances when trying to consider the various aspects, and see how best to deal with it [sic].

…**And if one really were to look at the first explanation that was put forward to the Court about the hostility toward the stepmother, then it almost seemed as though the deceased would have been perhaps a relatively easy target. The Court recalls what is outlined about the child having been inside and having been called outside around the back and there the injury was inflicted**." (Emphasis supplied)

The appeal

[7] The appellant filed two grounds of appeal, namely:

> "(a) That the sentence of imprisonment at hard labour for 18 years imposed on the Appellant by the Learned Judge is excessive given all the circumstances of the case & should therefore be reduced.
>
> (b) That circumstances under which the offence was committed the conduct of the [appellant] in committing the offence do not justify a period of 18 years imprisonment of Hard Labour, that the period 18 years is in excess of the usual sentence given for manslaughter in these circumstances and should be reduced."

[8] These grounds may be considered together as parts of the single issue of whether the sentence was manifestly excessive.

The submissions

[9] Mr Gordon, on behalf of the appellant, submitted that it was not clear whether the learned sentencing judge accepted the appellant's version, as proffered by defence counsel, as to what prompted the appellant to act as she did. He argued that the

learned sentencing judge should have given consideration to the things that she said that her father did and what the deceased did, rather than what was contained in the outline of the prosecution's case. He relied on the cases of **R v Newton** (1982) 4 Cr App R (S) 388 and **Daniel Robinson v R** [2010] JMCA Crim 75 for those submissions.

[10] Learned counsel also argued that the sentence imposed upon the appellant was improperly at the higher end of the typical range of sentences for manslaughter. He submitted that the appellant's peculiar circumstances, her age, the abuse that she suffered and the fact that this was a killing in domestic circumstances, warranted a much lower sentence. Mr Gordon submitted that the appropriate sentence was one of eight years imprisonment. In submitting that the sentence imposed was excessive in all the circumstances, he relied on the cases of **Dennis Beagle v R** [2013] JMCA Crim 50, **Daniel Robinson v R** and **Rolle v The Attorney General** [2012] 2 BHS J No 42; [2012] 2 BLR 1.

[11] Mr Brown, for the Crown, submitted that the extract cited above shows that the learned sentencing judge did take into account the appellant's account, as related by defence counsel. He accepted, however, that the learned sentencing judge still mentioned the prosecution's version. Learned counsel submitted that it was clear that the learned sentencing judge conducted a thorough analysis of the case and that there was no prejudice to the appellant as a result.

[12] Learned counsel, after examining sentences in other cases decided by this court, submitted that the appropriate range for sentencing, in circumstances such as in the present case, was 13–15 years imprisonment. Mr Brown accepted that this range did not take into account the circumstances of a young offender. He cited, during the course of his submissions, **R v Icilda Brown** (1990) 27 JLR 321, **Bertell Myers v R** [2013] JMCA Crim 58, **Franklyn Chong v R** [2013] JMCA Crim 67 and **Meisha Clement v R** [2016] Crim 26.

The analysis

[13] This was a difficult case. The learned sentencing judge's angst, in discharging his duty, was palpable from the transcript. In his anxiety, the learned sentencing judge addressed all the relevant issues raised by the case. He considered, among other things:

1. the appellant's guilty plea;
2. her youth;
3. the likelihood of rehabilitation;
4. the principal objects of sentencing, particularly, retribution, deterrence and rehabilitation;
5. the prevalence of the offence, particularly the abuse of children;
6. the two years that the appellant had spent in custody awaiting trial; and
7. the fact that she was not a threat to society.

[14] On the issue of the account of the facts, which was to have been used in this case, it is noted that where there is a divergence in the accounts given by the prosecution and the defence, a sentencing judge may adopt one of three approaches that are available to him or her at the time of sentencing. Lane CJ, in **R v Newton** set them out at pages 390-391 of the report. He said:

> "There are three ways in which a judge in these circumstances can approach his difficult task of sentencing. It is in certain circumstances possible to obtain the answer to the problem from a jury....
>
> The second method which could be adopted by the judge...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 and then come to a conclusion. But if he does that, then,...where there has been a substantial conflict, the version of the defendant must so far as possible be accepted."

[15] Mr Gordon is correct that the learned sentencing judge did not expressly state that he was using, for the purposes of passing sentence, the version of the events given after the guilty plea was entered. Although all three versions, given to the court, were the appellant's, the one proffered as part of the prosecution's case should, where it differed from the other versions, have been rejected, based on the **R v Newton** principle. This is because the learned sentencing judge did not conduct a formal hearing to decide which version he should accept.

[16] On the issue of the sentence imposed, although Mr Gordon submitted that this court should consider this case as being different from the typical manslaughter case, this court will not interfere with a sentence imposed at first instance merely because the judges of this court would have passed a different sentence. This point was reinforced at paragraph [42] of the important case of **Meisha Clement v R**. It is only if the sentencing judge appears to have erred in principle, that this court will alter the sentence imposed at first instance.

[17] Despite the learned sentencing judge's careful assessment of the relevant issues in this case, it does appear that he did err in respect of the appropriate starting point in deciding the sentence that he should impose. A starting point for sentencing was one of the steps stipulated in **Meisha Clement v R**. It is accepted that this case predated the decision in **Meisha Clement v R**, but that does not prevent the application of the sentencing procedure so lucidly set out in that case. It must also be said that the failure to use a starting point, by itself, will not necessarily result in a sentence being set aside. The procedure is set out at paragraph [41] of the judgment in **Meisha Clement v R**:

> "…it seems to us that the following sequence of decisions to be taken in each case, which we have adapted from the [Sentencing Guidelines Council of England's] definitive guidelines, derives clear support from the authorities to which we have referred:
>
> (i) identify the appropriate starting point;
> (ii) consider any relevant aggravating features;
> (ii) consider any relevant mitigating features (including personal mitigation);
> (iv) consider, where appropriate, any reduction for a guilty plea; and

(v) decide on the appropriate sentence (giving reasons)"

[18] The apparent error in the learned sentencing judge's approach may be said to be seen at pages 24-25 of the transcript. Although it was not specifically stated, he seemed to make reference to the sentence of life imprisonment as his starting point. He said:

> "The Court must bear in mind that [the appellant] has entered a plea of guilt to this particular offence charged originally with one of murder but she has entered a plea of guilt to the lesser offence which is that of manslaughter. And I suppose that the Crown – although the Crown might now realise – did not indicate earlier, what would be the basis for recommending to the Court that the lesser plea be accepted based on what learned Defence Counsel has indicated to me, and the contents of the Social Enquiry Report, I suppose among other things, is the consideration that this could not in any way be regarded as the worst of the worst and that would cause the death penalty to be evoked, **and at the end of the day, what the Court will have to consider whether it was a murder or manslaughter, it is the same ultimate sentence that of life imprisonment** must bear in mind the other factors that learned Counsel has advised." (Emphasis supplied)

[19] The learned sentencing judge did not make mention of any specific periods for the consideration of a sentence until he imposed the sentence of 18 years imprisonment. He did not demonstrate, therefore, by any mathematical process, how he had arrived at that figure.

[20] Finally, the learned sentencing judge does not seem to have appreciated that the appellant had not yet reached 18 years of age and was therefore, still a child for the

purposes of Jamaican law (section 2(1) of the Child Care and Protection Act (the Act)). As will become evident below, this latter aspect may not have had any practical effect on the sentence that was imposed.

[21] The learned sentencing judge's error allows this court to take a fresh look at the circumstances of the case. Fortunately, due to previous reviews done of similar cases, it may be said that the concluding point for sentences for manslaughter in so called "domestic circumstances", could be said to be 15 years, although a range of between seven and 21 years had been identified from a review done in **Shirley Ruddock v R** [2017] JMCA Crim 6. In **Shirley Ruddock v R**, after such a review, this court said, in part, at paragraph [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**…." (Emphasis supplied)

[22] In **Dennis Beagle v R**, Mr Beagle, during a domestic dispute with the victim, used a bottle to hit the victim on the head, fatally injuring him. He pleaded guilty to manslaugter. After a review of a number of cases this court set aside the sentence of 18 years that had been imposed at first instance, and substituted a sentence of 15 years therefor.

[23] These cases do not, however, consider the circumstances of the young offender. Author D A Thomas, in his work, Principles of Sentencing, opined, at page 20, that

"youth is one of the most important mitigating factors". He went on to also suggest that the decided cases indicate that the "young offender...is usually treated less severely than an older man in similar circumstances".

[24] A similar view was expressed by authors Richard Edney and Mirko Bagaric in their work Australian Sentencing. They expressed that view at paragraph 7.41 of that work:

> "The relative youth of an offender may in certain circumstances be a mitigating factor in sentencing. Youth here does not mean children – who require their own separate and discrete consideration – but those offenders who have just reached adulthood when they are to be sentenced for criminal offences. The authorities disclose that when considered as a mitigating factor youth will generally be given significant weight. In particular it will compel the parsimonious use of criminal sanctions which do not have the primary aim of rehabilitation.
>
> The underlying justification for such a policy position is the idea that the immaturity of a youthful offender may lead to such offenders not being able to appreciate the extent and nature of criminality involved in their conduct...."

The learned authors do recognize, however, that certain offences will require more emphasis on deterrence and just punishment.

[25] Those views are consistent with the decision in the case of **Rolle v The Attorney General**, cited by Mr Gordon. The judgment in that case, suggests that special consideration should be given to the sentencing of a young offender. In that case, a 17 year old who had battered an infant, causing her to die from blunt force injuries, had a sentence of 25 years imprisonment reduced to 10 years. This was done

by The Bahamas Court of Appeal. That court stressed the rehabilitative aspect of a sentence bearing in mind that the offender would be returning to society.

[26] That view of rehabilitation is consistent with that of Lawton LJ in **R v Sargeant** (1975) 60 Cr App Rep 74, in which, speaking about sentencing a young offender, he said, at page 78:

> "Finally, there is the principle of rehabilitation. Some 20 to 25 years ago there was a view abroad, held by many people in executive authority, that short sentences were of little value, because there was not enough time to give in prison the benefit of training. That view is no longer held as firmly as it was. **This young man does not want prison training. It is not going to do him any good. It is his memory of the clanging of prison gates which is likely to keep him from crime in the future**."

[27] In England there are sentencing guidelines which particularly address the issues affecting young offenders. Paragraph 3.7 of those guidelines was cited in **R v Imara Gillings** [2018] EWCA Crim 832. The English Court of Appeal said, at paragraph 12:

> "...Paragraph 3.7 [of the Sentencing Guidelines of 2009] sets out a number of factors which may affect the sentence imposed in an individual case. The relevant factors are these:
>
> - offending by a young person is frequently a phase which passes fairly rapidly and therefore the reaction to it needs to be kept well balanced in order to avoid alienating the young person from society;
> - a criminal conviction at this stage of a person's life may have a disproportionate impact on the ability of the young person to gain meaningful employment and play a worthwhile role in society;
> - the impact of punishment is felt more heavily by young people in the sense that any sentence will

seem to be far longer in comparison with their relative age compared with adult offenders;

- young people may be more receptive to changing the way they conduct himself [sic] and be able to respond more quickly to interventions;
- young people should be given greater opportunity to learn from their mistakes;
- young people will be no less vulnerable than adults to the contaminating influences that can be expected within a custodial context and probably more so."

[28] In this jurisdiction, there is also legislative provision for the sentencing of a child offender. A court, before which a child is convicted for an offence, other than murder, may either remit the case to a Children's Court (section 75 of the Act) or sentence the child itself. In the latter case the court will be possessed of all the powers of a Children's Court (section 74 of the Act).

[29] It is section 76 of the Act that sets out the various sentencing options open to a Children's Court, which is treating with a child offender.

> "76.–(1) Where a child has been found guilty of any offence before a Children's Court, that court may, subject to the provisions of this Act, make an order–
>
> *(a)* dismissing the case;
>
> *(b)* for probation under the Probation of Offenders Act;
>
> (*c*) placing the child, either in addition to or without making any other order under this section for a specified period not exceeding three years, under the supervision of a probation and after-care officer or some other person to be selected for the purpose by the Minister;

(*d*) committing the child to the care of any fit person, whether a relative or not, who is willing to undertake the care of the child;

(*e)* in accordance with subsection (7), if the child's parent or guardian consents to the making of the order;

(*f*) sending the child to a juvenile correctional centre;

(*g*) ordering the parent or guardian of the child to pay a fine, damages or costs;

(*h*) ordering the parent or guardian of the child to enter into a recognizance for the good behaviour of such offender.

(2) An order under this section, other than an order under subsection (7), may be made against a parent or guardian who, having been required to attend, has failed to do so, but, save as aforesaid, no such order shall be made without giving the parent or guardian an opportunity of being heard.

(3) Any sums ordered under this section to be paid by a parent or guardian may be recovered by distress or imprisonment, and, in default of such recovery, such parent or guardian may be imprisoned with or without hard labour as if he had been convicted of the offence in respect of which the child was charged:

Provided that in determining the sentence to be imposed under this subsection, the Court shall take into account the impact of such sentence on any child of the person to be sentenced.

(4) ...

(5) The provisions of subsection (6) shall apply in any case where–

(*a*) an order has been made under subsection (1)(*f*) in respect of a child who has attained the age of fourteen years; and

(*b*) the Minister at any time during the period of the child's detention at a juvenile correctional centre, establishes to the satisfaction of a Children's Court that the child is of so recalcitrant a character that it is not expedient that he should continue his detention at such centre.

(6) The court may, notwithstanding anything to the contrary, direct that the child be detained in such place (including an adult correctional centre) and for such time, not exceeding the unexpired portion of the period during which he could have been detained in the juvenile correctional centre under the authority of that order, and on such conditions as the court may think fit.

(7) An order under this subsection may–

(*a*) require the child to remain at a place specified in the order for a period of time so specified (hereinafter called a curfew order);

(*b*) refer the matter for mediation by an approved mediator (hereinafter referred to as a mediation order);

(*c*) require the child to perform unpaid work for such number of hours (being in the aggregate not less than forty nor more than three hundred and sixty) as may be specified in the order (hereinafter referred to as a community service order).

(8) The following provisions of the Criminal Justice (Reform) Act shall apply, with the necessary modifications, to an order under subsection (7)–

(*a*) in the case of a curfew order, sections 13(2) to (6) and 14;

(*b*) in the case of a mediation order, section 16(2) to (7), so, however, that the child's parent or guardian shall be the participating party in the mediation on behalf of the child;

(*c*) in the case of a community service order, section 10(2) to (5) and the proviso to section 10(1).

(9) ..."

[30] There seems to be a lacuna in the legislation in respect of the sentencing of persons between the ages of 14 and 18 in respect of the offence of manslaughter, indeed in respect of any offence. Section 78(5) of the Act allows the court to sentence a child, who is under the age of 14 years, to a custodial sentence of up to 25 years imprisonment. The subsection states:

> "Where a child under the age of fourteen years is convicted of an offence specified in the Fourth Schedule and the court is of opinion that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the child to be detained for such period, not exceeding twenty-five years, as the court may determine."

The Fourth Schedule to the Act refers to several offences, the most serious of which are murder and manslaughter. Section 78(5) does not, however, speak to a child, who is over the age of 14 years.

[31] The Criminal Justice (Reform) Act speaks to offenders who are over the age of 18 years. Where the offender is above that age, section 3 of The Criminal Justice (Reform) Act stipulates a restriction to the sentencing of such offenders. In particular, a sentence of imprisonment should be one of last resort and the sentencing judge, if imposing that method of sentence, should state the reason for so doing. The section states:

"3.–(1) Subject to the provisions of subsection (2), where a person who has attained the age of eighteen years is convicted in any court for any offence, the court, instead of sentencing such person to imprisonment, shall deal with him in any other manner prescribed by law.

(2) The provisions of subsection (1) shall not apply Where–

(*a*) the court is of the opinion that no other method of dealing with the offender is appropriate; or
(*b*) the offence is murder; or

(c) ...

(*d*) the person at the time of commission of the offence, was in illegal possession of a weapon referred to in First Schedule the First Schedule, a firearm or imitation firearm.

(3) **Where a court is of opinion that no other method of dealing with an offender mentioned in subsection (1) is appropriate, and passes a sentence of imprisonment on the offender, the court shall state the reason for so doing**; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall take into account the nature of the offence and shall obtain and consider information relating to the character, home surroundings and physical and mental condition of the offender.

(4) Where for the purposes of subsection (1) it is necessary to determine the age of any person the court shall make due enquiry as to the age of that person, and shall take such evidence as may be forthcoming at the hearing of the case, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court; and the age presumed or declared by the court to be the age of that person shall, for the purposes of this Act, be deemed to be the true age of that person. (Emphasis supplied)

[32] There are two sections of the Act that stipulate that the sentencing court should seek to advance the best interest of the child offender, which includes a child between the ages of 14 and 18. They are sections 65 and 71(10). The former provides, among other things: "Every court, in dealing with a child who is brought before it either as being in need of care or protection or as an offender or otherwise, shall have regard to the best interests of the child". The latter section states:

> "Where a child is charged with any offence and admits the offence, or the court is satisfied that the offence has been proved, the court shall record a finding to that effect and, before sentencing the child, shall obtain such information as to the child's general conduct, home surroundings, school record, and medical history, as may enable it to deal with the case in the best interests of the child."

[33] It appears, therefore, that, apart from the provisions of sections 65 and 71(10) of the Act, the learned sentencing judge was not restricted, in considering the appropriate sentence, by either the Act or the Criminal Justice (Reform) Act. He would have been at liberty to consider the length of a sentence of imprisonment according to the provisions of section 9 of the Offences Against the Person Act, dealing with the punishment for manslaughter. He should also have been guided by the normal sentencing guidelines as have been issued by this court from time to time. Those guidelines, as mentioned above, were succinctly set out in **Meisha Clement v R**.

[34] In applying those guidelines it is to be remembered that the appellant was just shy of 16 years old at the time of the killing. She was still a child, although two months short of her 18th birthday, when she was sentenced.

[35] Although using as the overarching principle, "the best interests of the child", it may, nonetheless, be said that a non-custodial sentence would not be appropriate. A killing in circumstances such as these demands a custodial sentence. The gruesome manner in which the killing was carried out and the youth of the victim, factors which seemed to very much affect the learned sentencing judge, would be considered as aggravating factors. In addition, the appellant's life up to the point of sentencing requires that she be placed in a controlled environment. In those circumstances, it would not be inappropriate to use a starting point of 17 years. That figure could be reduced to 15 years after balancing the aggravating and mitigating factors. Mitigating factors would include the appellant's age, taking into account the approach used in **Rolle v The Attorney General**, the positive social enquiry report and her susceptibilty to rehabilitation.

[36] A deduction of a third, which would have been the usual portion for the guilty plea at that time, would then be appropriate. That would result in a sentence of 10 years. A further deduction of two years, to account for the time that the appellant spent in custody awaiting trial, would then be applied. The result would be a sentence of eight years.

[37] When considered in the round, a sentence of eight years' imprisonment would not be a sentence that would incense right-thinking members of the public. It is the appropriate sentence in the appellant's case.

Summary and conclusion

[38] Although the learned sentencing judge carefully and anxiously took into account all the factors involved in the appellant's case, it does appear that he did take into account some aspects of the prosecution's case. He ought not to have done so. It also does not appear that he used an appropriate starting point at which to ascertain the appropriate sentence. As a result he arrived at the figure of 18 years without demonstrating how it was that he had arrived at it. In that regard, he erred.

[39] The error allowed this court to reconsider the sentence, and applying the principles in **Meisha Clement v R**, determine what it considered the appropriate sentence, namely, eight years' imprisonment.

[40] It is for those reasons that we made the ruling set out at paragraph [3] above.