[2019] JMCA Crim 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 8/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

PAUL BROWN v R

Linton Gordon and Obiko Gordon for the applicant

Miss Patrice Hickson for the Crown

14, 17, 21 January and 8 February 2019

F WILLIAMS JA

Background

[1] This is a renewed application for leave to appeal against sentence only. The application for leave to appeal against both conviction and sentence was refused by the single judge on 14 December 2014. The applicant was convicted of the offence of murder on 8 November 2013 and, on 14 November 2013, sentenced to life imprisonment with a stipulation that he serve 35 years' imprisonment before becoming eligible for parole.

Summary of the Crown's case

[2] The Crown's case, shortly stated, was to the effect that, on 25 December 2006, around 4:00 o'clock in the afternoon, the applicant opened gunfire at one Linval Murray who ran but was chased by the applicant who continued to fire shots at him, resulting in Mr Murray's death from gunshot wounds. Evidence was given by an eyewitness, a brother of the deceased.

[3] The issues on which the jury had to deliberate were those of identification and credibility. The guilty verdict was unanimous.

[4] Before us, Mr Linton Gordon, on behalf of the applicant, candidly conceded that, having combed through the transcript, there was nothing that he could usefully advance on the applicant's behalf in relation to the conviction, the learned judge's summation having sufficiently and fairly addressed the central issues. Having perused the transcript ourselves, we find that the concession was quite properly made.

The challenge to the sentence

[5] The main submission and ground argued on the applicant's behalf was that the sentence is manifestly excessive. Mr Gordon sought to emphasize that the applicant, who was 43 years old at the time of the commission of the offence and 49 years old at the time of sentencing, (having been born on 28 November 1963), had had, up to then, an unblemished record, with no previous convictions and was gainfully employed.

[6] Not enough consideration had been given, he submitted, to the sentencing object of rehabilitation.

[7] In an attempt at illustrating the correctness of his submission that the sentence is manifestly excessive and outside the normal range, Mr Gordon provided a summary of cases in which murder convicts were sentenced to various periods of imprisonment. Those cases indicate as follows:

Name of Case	Summary of Facts	Sentence imposed
1. **Massinissa Adams et al v R** [2013] JMCA Crim 59	The appellant was convicted of the murder of an assistant commissioner of police.	Life imprisonment -30 years before eligibility for parole.
2. **David Russell v R** [2013] JMCA Crim 42	The appellant was convicted of two counts of murder.	Count 1: 30 years' imprisonment at hard labour. Count 2: Life imprisonment-40 years before eligibility for parole
3. **Patrick Taylor v Regina** (unreported) Court of Appeal, Jamaica,	The appellant was convicted for four counts of non-capital murder. Death	Life imprisonment – 35 years before eligibility for parole

Supreme Court Criminal Appeal No 85/1994, judgment delivered 24 October 2008	sentence commuted.	
4. **Alton Health, Desmond Kennedy, Marlon Duncan and Chadrick Gordon v R** [2012] JMCA Crim 61	The accused men were convicted of two counts of murder in furtherance of abduction or rape or indecent assault.	Life imprisonment – 35 years before eligibility for parole; and for the alleged ringleader (Chadrick Gordon) re-sentenced some time after – 27 years before eligibility for parole.
5. **Jeffrey Perry v R** [2012] JMCA Crim 17	The appellant was convicted of three counts of murder of children. Death sentence commuted.	Life imprisonment – 45 years before eligibility for parole.
6. **Ian Gordon v R** [2012] JMCA Crim 11	The appellant was convicted of two counts of murder. Death sentence commuted.	Life imprisonment – 30 years before eligibility for parole.

7. **Calvin Powell and Lennox Swaby v R** [2013] JMCA Crim 28	The appellants were convicted of two counts of murder.	Count 1: life imprisonment. Count 2: life imprisonment – 35 years before eligibility for parole.
8. **Roderick Fisher v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal- No 49/2006, judgment delivered 21 November 2008	The appellant was convicted of three counts of murder. Death sentence commuted.	Life imprisonment – 40 years before eligibility for parole.
9. **Jason Palmer v R** [2018] JMCA Crim 6	The applicant was convicted of one count of murder.	Life imprisonment–25 years before eligibility for parole (reduced on appeal from 30 before eligibility for parole).

[8] These cases show a range of sentencing of between 45 years' and 25 years' imprisonment before eligibility for parole, with the higher figures in the range being stipulated in cases involving multiple counts of murder.

[9] Counsel's ultimate submission was that the range that the learned trial judge should properly have considered was between 20 and 25 years' imprisonment before eligibility for parole; and that he should have given credit for the four years or so that the applicant had spent in pre-trial custody.

The Crown's position

[10] On behalf of the Crown, Miss Hickson indicated that she could see no basis on which to oppose the application; and that she would leave the ultimate sentence to the discretion of the panel (that is, if the court were minded to grant the application and allow the appeal).

Discussion

[11] A reading of the sentencing remarks discloses that not much was said to reflect the court's thinking in arriving at the sentence and the stipulated period of imprisonment before consideration of the applicant's eligibility for parole. The focus of such things as were said in the summation was on the brazen nature of the murder.

[12] Whilst we entertain no difficulty with the imposition of the sentence of life imprisonment (neither was any submission advanced to challenge it), we have a concern about the period stipulated to be served before eligibility for parole, which we will now explore.

The time spent on pre-trial remand

[13] At pages 113 to 114 of the transcript is recorded a somewhat-lengthy discussion between the court and defence counsel concerning the time that the applicant spent in custody before the commencement of the trial. The following is what was recorded:

> "…I ask, m'Lord, that Mr. Brown, who has actually been in custody on this particular case since 2009.
>
> HIS LORDSHIP: Since when?
>
> MRS. ATKINSON-FLOWERS: In 2009?
>
> HIS LORDSHIP: When in 2009?
>
> MRS. ATKINSON-FLOWERS: M'Lord, the matter was committed to – initially he was in custody from the 8th of October, 2007, and he was offered bail, which he took up, on the 25th of March, 2009, that bail was revoked on 5th of October, 2009, when the matter ended.
>
> Apparently…
>
> HIS LORDSHIP: So from the time he said he was offered bail on the 8th of October '07?
>
> MRS. ATKINSON-FLOWERS: And did take up said bail 2009, and when the preliminary enquiry ended, the bail was revoked and he was committed to circuit.
>
> HIS LORDSHIP: In custody?
>
> MRS. ATKINSON-FLOWERS: Yes, m'Lord.
>
> HIS LORDSHIP: So that was from the 25th of March '09?
>
> MRS. ATKINSON-FLOWERS: No, m'Lord, that is when he actually took up the bail that was offered.
>
> HIS LORDSHIP: Oh, I see.
>
> MRS. ATKINSON-FLOWERS: So, we ask and we know that the honourable court will take that into consideration.

> HIS LORDSHIP: But what I am interested to find out, how long has he been – has he been in custody since '09?
>
> MRS. ATKINSON-FLOWERS: Yes, m'Lord.
>
> HIS LORDSHIP: And from which date that is?
>
> MRS. ATKINSON-FLOWERS: On or about October, in October, 2009, m'Lord.
>
> HIS LORDSHIP: Yes."

[14] In **Meisha Clement v R** [2016] JMCA Crim 26, Morrison P, at paragraph [56], made the following observation in relation to a sentencing court's duty in considering time spent in custody before trial:

> "...As is now clear from the authorities, the allowance to be given by the sentencing judge under this head should reflect the actual time spent in custody pending trial."

[15] Additionally, at paragraph [26] of **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ), the following observation was made:

> "...The judge should state with emphasis and clarity what he or she considers to be the appropriate sentence taking into account the gravity of the offence and all mitigating and aggravating factors, that being the sentence he would have passed but for the time spent by the prisoner on remand. <u>The primary rule is that the judge should grant substantially full credit for time spent on remand in terms of years or months and must state his or her reasons for not granting a full deduction or no deduction at all</u>." (Emphasis added)

[16] It concerns this court that, despite the fairly-lengthy dialogue between the court and defence counsel about the time the applicant spent in custody on remand, there is nothing in the sentencing remarks to show that the period of years that this applicant spent in custody before trial, was considered; or that, if, in the learned judge's view, it

was not to have been deducted, there were any reasons informing that view. Our concern is compounded by the consideration outlined in Mr Gordon's submission that a reasonable inference is that, if the time spent on remand, of, say, four years, was subtracted from the sentence as it otherwise would have been, the sentence originally contemplated would have been 39 years before eligibility for parole. In Mr Gordon's helpful summary of cases, the only case with a similar sentence is that of **Roderick Fisher v R** in which the time to have been spent in prison before eligibility for parole was 40 years. That appellant had been convicted of three murders. We do not consider that a sentence of 39 years' imprisonment for this offence would have been appropriate. It seems to us that it would be clearly excessive in the circumstances of this case, entitling this court to quash it and set it aside (see **R v Ball** (1951) 35 Cr App Rep 164, per Hilbery J).

[17] However, as a result of enquiries by the court as to the exact duration of the applicant's time in custody before trial, it emerged that it was more than four years. There were in fact two periods: (i) from October 2009, when the preliminary enquiry ended to November 2013, when the trial commenced; (that is, four years and one month); and, before that: (ii) from 30 October 2007, when he was taken into custody, to 25 March 2009, when he apparently took up his bail: a year and five months. He was therefore in custody for a total of some five years and six months.

[18] We are concerned, as well, by the fact that, whilst the learned judge clearly paid attention to the principle of deterrence or retribution, he failed to demonstrate that he gave any consideration to the object of rehabilitation, which is equally important. For

example, there was no demonstrated consideration of the fact that this was the applicant's first recorded offence at age 43, which could indicate the possibility of rehabilitation. The principle of rehabilitation was described by Graham-Perkins JA in **R v Cecil Gibson** (1975) 13 JLR 207, 211-212 as: "an essential consideration in the purpose of punishment..."

[19] It has often been said that sentencing is the most difficult part of a criminal trial. It is often similarly a most difficult exercise for a court of review. Whilst trying to see whether the sentencing court arrived at a sentence that was suitable for the offence and the offender, this court will review cases that might be similar in facts and circumstances; but, as each case and each offender involves its own peculiarities, the cases canvassed will never be the same as the one under review. They must therefore be used only as a general guide.

[20] In fairness to the learned trial judge, the helpful judgment of **Meisha Clement v R** was not available at the time of sentencing in this matter. However, some guidance existed in such cases as **Regina v Evrald Dunkley**, (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered on 5 July 2002. That judgment sets out the importance of a sentencing court bearing in mind the objects of sentencing and adopting a structured approach in passing sentence on a convict. For example, at page 4 of the judgment, this court (per Harrison JA) offered the following guidance:

> "If therefore the sentencer considers that the "best possible sentence" is a term of imprisonment, he should again make

> a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise."

[21] In **Meisha Clement v R**, Morrison P, at paragraph [41] made the following recommendation in relation to principles of sentencing:

> "[41] As far as we are aware, there is no decision of this court explicitly prescribing the order in which the various considerations identified in the foregoing paragraphs of this judgment should be addressed by sentencing judges. However, it seems to us that the following sequence of decisions to be taken in each case, which we have adapted from the SGC's definitive guidelines[42], derives clear support from the authorities to which we have referred:
>
> (i) identify the appropriate starting point;
>
> (ii) consider any relevant aggravating features;
>
> (iii) 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)".

[22] Adopting that approach, we observe that in the sentencing guidelines (which, admittedly, like the case of **Meisha Clement v R** were not available to the sentencing judge in this case), the usual range for the offence of murder is between 15 years and life imprisonment. There is no stated usual starting point, giving a sentencing judge a somewhat wide discretion.

[23] In the case of **Kevin Young v R** [2015] JMCA Crim 12, this court reduced from 30 years to 20 years the stipulated period to be served before parole on that applicant's

application for leave to appeal against his sentence for murder. At his trial, he had put forward an alibi. However, he belatedly (after conviction and before sentencing) made a full confession to the murder. The murder involved a shooting at 3:00 o'clock in the afternoon, with the applicant allegedly standing over the deceased when he fell after being shot and firing several more shots into his body. The deceased was shot six times. The facts of the instant appeal involve a daylight shooting as well. However, in the trial giving rise to this appeal, no confession was made at any stage. Using **Kevin Young v R** as a general guide, it would not be appropriate to use a starting point of less than 20 years. We would suggest a starting point of 26 years as appropriate.

[24] Considering that in the circumstances of this case, the deceased had been unarmed, ran and was pursued and shot to death by the applicant, those aggravating factors could warrant an increase to some 30 years.

[25] By way of mitigation or in respect of a matter that should be given favourable consideration, we accept Mr Gordon's submission that the applicant's unblemished record up to age 43 should count for something and be regarded as indicative of the possibility of rehabilitation. That could result in a discount of, say, a year – making an appropriate sentence one of 29 years.

[26] It seems to us, therefore, having reviewed the circumstances of the offence, the available background of the particular offender and the mitigating and aggravating features of this case, that an appropriate sentence would be one of life imprisonment with a stipulation that the applicant serve 29 years' imprisonment before eligibility for

parole. However, in keeping with the authorities, from this figure must be deducted the five years and six months that the applicant spent in custody prior to his trial. That would bring the effective pre-parole period to 23½ years. In the result, these are the orders that we make:

1. The application for leave to appeal against sentence is granted.
2. The hearing of the application is treated as the hearing of the appeal in respect of sentence.
3. The appeal against sentence is allowed.
4. The sentence imposed of life imprisonment is affirmed. The stipulation that the appellant should serve 35 years before becoming eligible for parole is set aside and substituted therefor is the stipulation that the appellant is to serve 23½ years' imprisonment before becoming eligible for parole.
5. The sentence is to be reckoned as having commenced on 14 November 2013.