[2018] JMCA Crim 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 62/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

FRANKLYN WILLIAMS v R

Linton Gordon for the applicant

Ms Keisha Prince for the Crown

6 March and 23 April 2018

BROOKS JA

[1] The applicant, Mr Franklyn Williams, was tried in the Circuit Court held in the parish of Saint Elizabeth for the offence of murder. The person killed was the applicant's brother, Mr Mark Williams. On 27 June 2013, the jury found the applicant guilty of the offence and he was sentenced, on 19 July 2013, to 18 years' imprisonment at hard labour. The learned trial judge ordered that he should serve 10 years before becoming eligible for parole. The applicant is dissatisfied with conviction and sentence, and applied for leave to appeal against them.

[2] In his initial application, the applicant contended that he was not given proper representation by defence counsel, Mr Beaverbrook Lloyd Wiggan. He asserted that he

had wished to plead guilty but that Mr Wiggan dissuaded him from doing so. The applicant also complains about the severity of the sentence passed on him.

[3] A single judge of this court refused the applicant leave to appeal, but granted him legal aid in the event that he wished for his complaint about the conduct of defence counsel to be investigated. The applicant has renewed his application for leave to appeal. Learned counsel, Mr Linton Gordon, represented him in the investigation of his complaint and in the renewal of his application before the court. In conducting his investigations learned counsel recorded a statement from the applicant and also secured a response from Mr Wiggan to the complaint.

[4] Before assessing that issue, it would be helpful to outline the circumstances of the killing for which the applicant was convicted. Mr Mark Williams will be referred to below by his first name. No disrespect is intended. Mr Franklyn Williams will continue to be referred to as "the applicant". They will be jointly referred to as "the brothers".

The evidence

[5] The case for the prosecution was that, on 4 August 2011, the brothers had a quarrel over the picking of ackees from a tree that was in the yard, in which they both lived. The quarrel escalated, and the brothers moved from behind the house on the premises, to a point in front of it. One of Mark's daughters, Malika, was inside their house. She heard the quarrel. She said that the applicant sounded very angry at the time.

[6] Another of Mark's daughters was across the street, at a neighbour's yard, at the time of that quarrel. She saw when Mark went outside of the premises, somewhere to the front, and stood by a wall there. The applicant, she said, went inside his house and came out with a machete. He bent over the wall, by which Mark was standing, and chopped the unarmed Mark on the head. Mark fell.

[7] Malika came out of the house and tended to him. She sought transportation and took him to the hospital. The applicant went straightway to the police station and made a report there. Mark was admitted to hospital, where he died. The cause of death was a chop to the head that damaged the brain.

[8] The applicant made an unsworn statement at the trial. In that statement, he did not give any details of what had occurred on the day of the killing. He spoke of an ongoing conflict with Mark about the ackee tree and its fruit, and about the premises in general. He did, however, in a cautioned statement, which he had made to the police, say what had happened. Detective Corporal Sheldon Dobson is recorded at page 131 of the transcript as saying:

> "When I cautioned [the applicant], at that moment he said…'A just swing mi swing the machete, mi never mean fi kill him'."

The summation

[9] The learned trial judge, in her summation, did not leave the issue of self defence to the jury, but she did give the jury directions on the issues of provocation and the absence of intent. In those directions, the learned trial judge gave the jury the option of

finding the applicant not guilty of murder but guilty of manslaughter, or, if they were not satisfied with the prosecution's case, not guilty of any offence, whatsoever.

[10] The jury obviously rejected the possibility that the applicant either lacked the requisite intent for murder or was provoked. They found him guilty of murder.

The appeal

[11] In his original notice of application for leave to appeal, the applicant filed two grounds for his application. They are:

> "(1)(A) Unfair Trial – That the prosecution failed during the Trial to advance [rebut?] the Argument of provocation and Self Defence on my part.
>
> (B) That I was under-represented and Mis-directed by my Attorney not to plea [sic] guilty to the lesser Offence of Manslaughter.
>
> (C) That when the true facts of the case is [sic] presented the act of Self Defence was not advance by my Attorney at Law. This resulted in the harshness and excessiveness Nature of the Sentence.
>
> (2) Mis-carriage [sic] of Justice:- That base on the evidence as presented I should not have [sic] convicted on the offence of murder but the Lesser offence of manslaughter."

[12] It may fairly be said that the complaint concerning provocation and self-defence would have had no merit given what the applicant said, and did not say, in his unsworn statement. Mr Gordon, in attempting to advance the applicant's complaint about the misconduct of defence counsel, secured, at the request of the court, an affidavit setting out the applicant's assertions. Mr Gordon also secured an affidavit from Mr Wiggan.

[13] The applicant deposed that he believed that when he was pleaded in court, he pleaded "Guilty with Explanation". He said that in preparation for the trial he had told Mr Wiggan that that was his desire. He said at paragraph 9 of his affidavit filed on 12 April 2018:

> "That about two (2) times I told Mr Wiggan MY Attorney that I wanted to plead Guilty with Explanation during the Trial, I think I told him this before the trial started. I believe I said in Court 'Guilty with Explanation['] when I was pleading in Court. I am not sure."

[14] Importantly, the applicant deposed that Mr Wiggan did state that a plea of guilty would result in a lower sentence. The applicant stated, however, that it was not clear to him to what it was that he would be pleading guilty. He stated at paragraphs 11 and 12 of his affidavit:

> "11. Mr Wiggan did tell me that if I plead Guilty I would get a lesser sentence but it was not clear to me what I was pleading guilty to.
>
> 12. I know that they would find me guilty because I already admit it. It must have been a mistake that I pleaded not guilty."

[15] In response to the applicant's assertions, Mr Wiggan, in an affidavit filed on 12 April 2018, deposed to his efforts to assist the applicant in preparation for the trial. In particular, he stated that he discussed the matter with counsel, who appeared for the Crown, who indicated that he would have accepted a plea of guilty to manslaughter.

[16] Mr Wiggan stated in his affidavit that he communicated the prosecution's position to the applicant and explained the significance to him. Mr Wiggan stated, at paragraph 8 of his affidavit, that which he says he explained to the applicant:

> "That I outlined to the [applicant] that it would be in his favour to enter a plea of guilty to Manslaughter, and explained to him the differences in the sentencing powers of the Judge if he were to have entered such a plea and if he were found guilty of Murder by a jury after a trial; making it clear to him that the sentence in the former case would definitely be less, in terms of the time to be spent in prison."

[17] Mr Wiggan deposed that the applicant refused his advice. He stated that he would not plead guilty and that he wanted to go to trial.

[18] Based on those affidavits, it appears that there is a dispute as to fact concerning the advice which Mr Wiggan gave to the applicant in respect of his plea to the charge of murder. The applicant's position is however, somewhat less definitive than his proposed ground of appeal had indicated.

Submissions

[19] Mr Gordon conceded that the applicant's position was not definitive enough to justify a complaint about Mr Wiggan's conduct of the case. Learned counsel also submitted that the sentence that was imposed on the applicant was within the usual range for sentences for murder. He is justified in taking that stance.

[20] Ms Prince, for the Crown, submitted that the learned trial judge's summation on the issue of lack of intention was correct. She pointed out that the applicant did not

raise the issue at all during the presentation of his case at the trial. The only factor which caused the issue to be raised at all, learned counsel submitted, is the statement made to the police under caution. Ms Prince submitted that there was no basis to disturb the conviction.

[21] She adopted Mr Gordon's stance concerning the complaint about the misconduct of defence counsel.

Analysis

[22] In making its request to Mr Gordon, to acquire affidavits from both the applicant and Mr Wiggan, the court was acting in accordance with the guidance of their Lordships of the Privy Council, in **Leslie McLeod v R** [2017] UKPC 1. Mr Gordon commendably carried out the exercise, for which the court is grateful to him. In **Leslie McLeod v R**, their Lordships dealt with the issue of conflicts in accounts between convicted persons and defence counsel, who represented them, as to whether there was misconduct or negligence on the part of counsel during the trial.

[23] Their Lordships noted that where the dispute concerns tactical decisions taken during the course of a trial, it is unlikely that the appellate court will find that there has been a miscarriage of justice. They said at paragraph 13:

> "Allegations against advocates are easy to make and all too common. Frequently the question which they raise will be whether there is any more than a complaint about a finely balanced decision upon trial tactics, very often one which had to be made without any opportunity for reflection. In such circumstances, as the English Court of Appeal observed in *R v Clinton* [1993] 1 WLR 1181, 1187, it will no

> doubt be 'wholly exceptional' for it to follow, even if with the benefit of hindsight the decision turns out to have been wrong, that there has been any miscarriage of justice. On the contrary, such decisions, right or wrong, are an inevitable part of the trial process. The decision whether to give evidence or to make an unsworn statement, or to do neither, is one such decision, important as it certainly is in most trials…."

[24] Although there is no sharp dispute between the applicant and Mr Wiggan, it may be said that a conflict arose as to the clarity of the advice concerning the plea to be entered. Along that line it may be said that the issue involves, undoubtedly, a tactical decision as to the approach to the prosecution's case and therefore one which would be unlikely to result in a miscarriage of justice. It would therefore, on that argument, not be one which the court would be easily inclined to review on appeal.

[25] It may, however, also be said that the decision concerning the plea is not one taken during the course of the trial, and that there would have been an opportunity for reflection. The advice in that regard could, therefore, be properly reviewed on appeal to determine if it rendered the conviction unsafe. This is especially so where there is a disagreement between the convicted person and the advocate who represented him at the trial, as to how that decision came to have been made. On the latter assessment, there is further advice from their Lordships.

[26] Such conflicts, their Lordships opined, ought to be resolved by this court by taking oral evidence from the appellant and from counsel. They stated at paragraph 18:

> "There may or may not be a plain conclusion to be drawn one way or the other on the factual dispute....the

> only proper course is for...the Court of Appeal [to determine] the factual issue between the appellant and counsel. How that court goes about its resolution must be for it to decide....The Court of Appeal must decide whether it needs to hear the appellant, if he wishes to give evidence, and, if it does, whether it is also necessary to hear [defence counsel]. The latter decision no doubt falls to be made after hearing the appellant, if that is what occurs. It is not the law that merely by making a complaint an appellant can require counsel to be cross examined, but this may in a particular case be the correct course for the court to take. For the present, the opportunity to deal with the case in any way the court thinks fit should be preserved by a direction that both the appellant and [defence counsel] attend the further hearing in the Court of Appeal, unless in the meantime that court makes some different order."

[27] In the present case, Mr Gordon has informed the court that Mr Wiggan has left the jurisdiction and now resides in England. Mr Wiggan did, however, swear to the affidavit while on a visit to Jamaica. His absence from the island made it impractical to attempt to resolve the conflict with the assistance of oral testimony.

[28] It is however unnecessary to have oral testimony from either the applicant or Mr Wiggan. This is a case where a plain conclusion may be drawn without such testimony. An examination of the transcript shows that the applicant displayed no hesitation in his plea to the charge of murder. His answer to the question of whether he was guilty or not, was an unequivocal "Not guilty" (pages 1-2 of the transcript). His assertion, in his affidavit, that he thought that he may have said "Guilty with explanation" is therefore incorrect. Mr Wiggan's recounting of the circumstances is therefore more credible and should be relied upon in resolving this issue.

[29] Based on that assessment the applicant's ground concerning the advice on the plea is without merit.

[30] Similarly, there is no merit in the applicant's complaint about the length of the sentence. Sentences in situations where there has been a killing in the context of a domestic dispute were addressed in **Bertell Myers v R** [2013] JMCA Crim 58, and guidance given therein. The Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 also provides assistance on this issue. In relation to a conviction for murder in circumstance such as the present, guideline 5.15 states:

> "Section 3(1)(b) [of the Offences against the Person Act] provides that, in all other cases of murder not falling within section 2(1)(a)-(f), or (1A) [of that Act], the offender must be sentenced to life imprisonment, or to such other term, being not less than 15 years, as the sentencing judge considers appropriate."

[31] If imprisonment for life was not chosen, the minimum sentence that could have been imposed was 15 years. Guideline 5.16 addresses the minimum time to be served before parole may be considered for an offender, who is sentenced pursuant to section 3(1)(b) of the Offences Against the Person Act. It states:

> "If the sentencing judge imposes a sentence of life imprisonment, or any other sentence of imprisonment under section 3(1)(b), he or she should [in accordance with section 3(1C)(b)(i) of the Offences Against the Person Act] specify a period of not less than 15 or 10 years respectively which the offender must serve before becoming eligible for parole."

[32] The applicant's sentence was therefor within the statutory framework and the guidelines set out for sentencing judges. In any event, even if the applicant had pleaded guilty to manslaughter the sentence would still have been within the range of sentences which have been passed in cases with similar circumstances.

[33] Based on this assessment the application should be refused and the applicant's sentenced deemed to have commenced on 19 July 2013.

Order

1. The application for leave to appeal is dismissed.
2. The applicant's sentence is to be reckoned as having commenced on 19 July 2013.