



[2019] JMSC Crim 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CRIMINAL DIVISION

CASE NO. 2018 CR 00446

BETWEEN

REGINA

CROWN

AND

ROMARIO BROWN

DEFENDANT

Ms Tamara Merchant for the Crown

Mr Donald Bryan for the Defendant

Sentence – Manslaughter - Provocation - Larceny from the dwelling- Simple Larceny

Pleaded 10th April, 2019 and Sentenced 24th May, 2019

Shelly-Williams J

Facts

- [1] The Defendant on the 10th day of April 2019 pleaded guilty to the offences of Manslaughter, Larceny from the dwelling contrary to section 18(a) of the Larceny Act and Simple larceny contrary to section 5 of the Larceny Act. The accused man was charged originally for murder, but it was reduced to manslaughter due to provocation.
- [2] The Defendant on the 29th day of August, 2017 was at the home of the deceased Mr Dexter Pottinger. The Defendant was at Mr. Pottinger’s home cutting up “weed”

ie ganja with the now deceased. Mr. Pottinger left the room and returned undressed, in an aroused state, and was approaching Mr Romario Brown. The Defendant on seeing this used the said knife he had been using to cut up the “weed” and stabbed the deceased once. The deceased then turned and went into his bedroom. The Defendant followed him and continued to stab him. The post mortem report indicated that the deceased was stabbed a total of twenty-five (25) times. The Defendant then took a bath, removed the television from the house of the deceased along with his watch, loaded them into the Honda CRV belonging to the deceased, and then drove away.

- [3] The Defendant was arrested and charged for the offence of murder and after being cautioned, confessed the offences to the investigating officer. He then gave a caution statement which enhanced the details of the confession he had made to the investigating officer. The Defendant pleaded guilty to the offences listed above.
- [4] The court on the 10th day of April, 2019 made an order for the Honda CRV, the television and the watch that were recovered by the police during the course of their investigation to be released to the father of the deceased.

The Law

- [5] In approaching this sentence I will consider:
- a) previously decided cases,
 - b) the sentencing guidelines launched in January 2018.
 - c) legislation that provides for discounts to be awarded by the court under certain circumstances.

Case Law

- [6] In the case of **R v Lorde** (2006) 73 WIR 28 Barbados (Bds CA) the accused was charged for the offence of murder but he pleaded guilty to the offence of manslaughter. The plea was accepted due to the issue of provocation. The trial judge sentenced Mr Lorde to 20 years imprisonment. The Court of Appeal in that case reduced the sentence to 12 years and found that the trial judge did not properly balance the aggravating and mitigating matters.
- [7] The Court went on to give general guidance on sentencing for manslaughter which was later approved by the Caribbean Court of Jamaica (CCJ) in **Burton v R, Nurse v R - (2014) 84 WIR 84, CCJ**.
- [8] Per Simmons, CJ: starting at paragraph 13 of his judgment stated:-

AGGRAVATING AND MITGATING FACTORS RELEVANT TO MANSLAUGHTER

The offence of manslaughter may be committed in a wide variety of circumstances. We shall eschew the temptation to set out a list of the variety of such circumstances in this judgment but nothing that we say applies to 'motor manslaughter'. Our observations relate to cases where original charges of murder result in convictions for manslaughter. For example, three types of cases are commonplace.

- (1) On a charge of murder, the accused pleads not guilty but is found guilty of manslaughter by the jury.*
- (2) On a charge of murder, the accused pleads not guilty of murder and the prosecution accepts a plea of guilty of manslaughter.*
- (3) On a conviction for murder, the Court of Appeal substitutes a conviction for manslaughter because of judicial error in the summation.*

In deference to the submissions of both counsel and their generous citation of authority we now identify some of the aggravating and mitigating factors that ought to be considered by the court where they are relevant. They relate both to the offence and the offender.

Aggravating factors relating to the OFFENCE may include—

- (a) planning or premeditation;*
- (b) use of a firearm or dangerous weapon;*
- (c) being armed with a weapon in advance;*
- (d) excessive force in self-defence even though the issue of self-defence is rejected by the jury;*
- (e) in cases of domestic violence, the fact that the killing was the culmination of a history of violence by the offender.*

Aggravating factors relating to the OFFENDER may include—

- (a) previous convictions;*
- (b) indifference to the offence.*

Mitigating factors relating to the OFFENCE may include—

- (a) spontaneous action rather than premeditation;*
- (b) provocation (in the technical and non-technical sense);*
- (c) some evidence of self-defence even if rejected by a jury.*

Mitigating factors relating to the OFFENDER may include—

- (a) age;*
- (b) clear evidence of remorse or contrition;*
- (c) a timely plea of guilty.*

The court will always be required to balance the competing factors in deciding what is the appropriate length of a sentence.

[9] Simmons J, continue at para. 35.

1. *In a contested trial where death was caused by a firearm and the facts are on the borderline of murder with no mitigating features, the range of sentence should be 25 years and upwards, including, in a proper case, life imprisonment.*
2. *In a contested trial where death was caused by a firearm and the facts are grave but mitigating factors such as provocation exist, the range of sentence should be 18 to 22 years. However, an early plea of guilty in a non-contested case on similar facts will attract a lower sentence in the range of 14 to 18 years.*
3. *In a contested trial where no firearm was used and there are no mitigating circumstances, the range of sentence should be 16 to 20 years. An early plea of guilty in this type of case will reduce the range of sentence to 10 to 14 years.*
4. *In a contested trial where no intrinsically dangerous weapon was used and there are mitigating features, the range of sentence should be 8 to 12 years. An early plea of guilty in this type of case may attract a sentence of less than 8 years.”*

Sentencing Guidelines

[10] The court has promulgated sentencing guidelines that were launched in January 2018. These sentencing guidelines seek to promote, among other things, some consistency in the sentences that were handed down by Judges. In the sentencing guidelines as it relates to manslaughter the following terms are established:-

- (1) The statutory maximum is life.

(2) The usual starting point for manslaughter is five (5) years.

(3) The range of sentences for manslaughter is between three (3) to ten (10) years.

[11] In utilising the sentencing guidelines, I embrace the purpose of the guidelines, however, I am aware that it is not a fetter to the discretion of the court. This view was also advocated in the cases of **Burton v R, Nurse v R - (2014) 84 WIR 84, CCJ (from Bds CA)**

[12] Burton, was 15 years old whilst Nurse was 17 years old. The Accused, were schoolboys who had been engaged in a fight with another schoolboy, Wright. Burton stabbed Wright in his chest which caused his death. On arraignment both pleaded not guilty to murder but guilty of manslaughter. Their pleas were accepted.

[13] There were a number of mitigating factors including their age, unblemished records, remorse and their assistance to the police. They also had favourable pre-sentencing reports.

[14] The judge took into account the sentencing guidelines and mitigating factors and sentenced Burton to 7 years and Nurse to 5 years imprisonment. The judge indicated that he had taken into account the time spent on remand but it was not clear that the full discount had been given.

[15] It was argued, that judicial sentencing guidelines had not been followed. The CCJ ruled that guidelines were not intended to take away from the discretion of a judge.

Per Anderson, JA:

"[13] We agree that the exercise of judicial discretion is and must remain at the heart of the sentencing process. The guidelines cannot place the sentencing judge into a strait-jacket or in any way fetter that judicial discretion. ...

[14] As has been said repeatedly, the guidelines are only guidelines and not meant to be applied slavishly to every case. They provide assistance

*to the sentencing judge not rules from which departure is prohibited. No guidelines can ever cover the totality of circumstances in which criminal ingenuity and recklessness may be expressed. We accept the essence of the opinion offered by Sir David Simmons CJ in **Bend and Murray v R** when he said:*

'We have issued these guidelines on sentences for manslaughter merely to indicate the range or scale of sentences. Judges will still be free to tailor sentences according to the facts of a particular case. It must be remembered that, in our system, judicial discretion is at the heart of the sentencing process. That discretion will invite flexibility and, from time to time it will produce inconsistency. These guidelines are intended merely to assist judges and the legal profession, not to bind judges and fetter their discretion. At the end of the day sentencing is very much an art and not a science.'

[15] But this is much different from saying that the guidelines lack legal significance or may be disregarded without reason. The guidelines distil important aspects of sentencing principles. When pronounced by the Court of Appeal they constitute rules of practice. Lower courts must have regard to the guidelines. The sacrosanct nature of the discretion of the sentencing judge is preserved in two ways. Firstly, the guidelines indicate a range of sentences that may be appropriate for particular categories of offences and it is for the sentencing judge to decide where on the continuum of the tariff the specific sentence ought to be placed having regard to the peculiarities of the circumstances of the offence and the offender. Secondly, it is perfectly appropriate for the sentencing judge to not follow the guidelines in a particular case if he or she concludes that their application would not result in the appropriate sentence. Public confidence in the criminal justice system must be maintained by the imposition of suitable penalties taking into consideration the penological objectives of protection of the public, deterrence, and rehabilitation of the offender, and it is for the sentencing judge in his discretion to make the call as to the sentence that will come closest to achieving those objectives. However, if the sentencing judge decides to depart from the guidelines established by the superior court then he or she should explain his or her reasons for doing so.

The Criminal Justice (Administration) (Amendment) Act 2015

[16] The Criminal Justice (Administration) (Amendment) Act 2015 gives some guidance to the court as to the discount that may be awarded in the event that an accused person pleads guilty to an offence. Section 42 (D) and 42(H) are especially helpful.

Section 42(D) and 42 (H) states that:

- (1) *Subject to the provisions of this Part, where a defendant pleads guilty to an offence with which he has been charged, the Court may, in accordance with subsection (2), reduce the sentence that it would otherwise have imposed on the defendant, had the defendant been tried and convicted of the offence.*
- (2) *Pursuant to subsection (1), the Court may reduce the sentence that it would otherwise have imposed on the defendant in the following manner-*
- a) *Where the defendant indicates to the Court on the first relevant date that he wishes to plead guilty to the offence, the sentence may be reduced by up to fifty per cent,*
 - b) *Where the defendant indicates to the Court after the first relevant date but before the trial commences, that he wishes to plead guilty to the offence, the sentence may be reduced by up to thirty five per cent;*
 - c) *Where the defendant pleads guilty to the offence, after the trial has commenced but before the verdict is given, the sentence may be reduced by up to fifteen per cent.*
- (3) *Subject to section 42E, and notwithstanding the provisions of any law to the contrary, where the offence to which the defendant pleads guilty is punishable by a prescribed minimum penalty the Court may –*
- a) *reduce the sentence pursuant to the provisions of this section without regard to the prescribed minimum penalty; and*
 - b) *specify the period, not being less than two-thirds of the sentence imposed, which the defendant shall serve before becoming eligible for parole.*
- (4) *In determining the percentage by which the sentence for an offence is to be reduced pursuant to subsection (2), the Court shall have regard to the factors outlined under section 42H, as may be relevant.*

(42H) Pursuant to the provisions of this Part, in determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made by a defendant within a particular period referred to in 42D(2) and 42E(2), the Court shall have regard to the following factors namely-

- 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;*
- b) the circumstances of the offence, including its impact on the victims;*
- c) any factors that are relevant to the defendant.;*
- d) the circumstances surrounding the plea;*
- 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;*

The Sentence

[17] The sentencing guidelines do not differentiate between the different types of manslaughter. Due to the aggravating circumstances of this case I will not be abiding by the sentencing guidelines.

[18] These Aggravating circumstances are :-

- a. The number of stab wounds inflicted on the deceased. The post mortem report indicated the deceased was stabbed 25 times.*
- b. The fact that the evidence against the accused was overwhelming.*

- c. *The fact that after the accused had stabbed Mr. Pottinger he then stole his television, his watch and his motor vehicle.*
- d. *This could not be considered an early guilty plea as the matter was mentioned on several occasions after there had been full disclosure.*
- e. *The fact this is not Mr Romario Brown's first conviction. The first conviction, however, is for an unrelated offence and as such will not be taken into consideration.*

[19] The mitigating circumstances are that:

- a. The accused did plead guilty and will be awarded a discount. The law allows for up to a fifty percent discount, however due to the time in which the plea was given and the circumstances of this case, only a 25% discount will be granted.
- b. This a young man so I will give consideration to his age when handing down the sentence.
- c. The length of time that he has been in custody.
- d. He has a good social enquiry report and I will grant a discount due to this. I have especially taken into account his good community report.
- e. The accused did not arm himself with weapon before hand to kill the deceased.

[20] The maximum sentence allowed under the law for manslaughter is life. I would not be considering the maximum in this case. In keeping with the case, **Rv Lorde** and in light of the aggravating circumstances detailed above the starting point for the accused is 20 years. Mr Brown will be granted the following discounts:-

- a) 25% due to his guilty plea which reduces the 20 years to 15 years.
- b) The period he was in custody which is one (1) year and 8 months.
- c) One year and 4 months as he is a young man with a good social enquiry report and he has shown remorse.

Mr Brown is sentenced to 12 years for the offence of manslaughter.

[21] In relation to the Larceny of motor vehicle the maximum sentence allowed by law is ten (10) years. I would not be starting at the maximum sentence, as he pleaded guilty. The starting point for will be eight (8) years. It will be reduced by:-

- a) 25% due to his guilty plea which reduces the 8 years to 6 years.
- b) The period he was in custody which is one (1) year eight (8) months.
- c) 4 months due to his age, his good social enquiry report and the fact that he showed reduced.

He is sentenced to four (4) years for Larceny of motor vehicle.

[22] For the offence of Simple Larceny, the maximum sentence allowed by law is five (5) years. I would not be starting at the maximum sentence. I will start at 4 years which is reduced by:-

- a) 25% due to his guilty plea.
- b) The period he has been in custody which is one (1) year eight (8) months.
- c) 4 months due to his age, his good social enquiry report and the fact that he has shown remorse.

He is sentenced for one year for the Simple Larceny.

[23] The Accused is sentenced to:-

- a) 12 years for Manslaughter.
- b) 4 years for Larceny of motor vehicle.
- c) 1 year for Simple Larceny.

The sentences to run concurrently.