



[2021] JMSC Crim 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CRIMINAL DIVISION

CLAIM NO.CACT 2019 CR 00288

BETWEEN

REGINA

CROWN

AND

KAVON MINTO

DEFENDANT

Mr Andre Wedderburn Assistant Director of Public Prosecution for the Crown

Ms. Tamika Harris for the Defendant

Sentence: Plea – Guilty – Murder

Heard: 11th of February and 10th March 2021

Shelly-Williams J

Background

[1] On the 3rd of November 2018 at 3.15 pm, Corporal Richards who was in the downtown area when he heard gun shots in the vicinity of East Queen Street and Mark Lane. He saw the defendant hand a firearm to another man and then enter a bus. Corporal Richards boarded the bus and removed the defendant from the bus. On being apprehended the defendant said “a no me do it.” He was taken into custody at the Central Police Station where he eventually gave a caution statement to the police, in the presence of his attorney. In that caution statement the defendant confessed to killing the deceased.

- [2] The police visited the area of the Pearnel Charles Arcade which is located in the vicinity of East Queen Street and found the deceased slumped in a chair suffering from gunshot wounds.
- [3] At the time of the commission of the offence the defendant was seventeen years old.
- [4] In approaching the sentencing of the defendant I utilised the relevant statutes, the sentencing guidelines that were launched in January 2018, the sentencing principles, as well as case law.

Illegal Possession of Firearm

The Statute

- [1] The relevant statute in relation to this count on the indictment is the Firearms Act in particular Section 20. Section 20 states that:-

20.4 1) *A person shall not.*

(a) save as authorized by a licence which continues in force by virtue of any enactment, be in possession of a prohibited weapon; or

(b) subject to subsection (2), be in possession of any other firearm or ammunition except under and in accordance with the terms and conditions of a Firearm User's Licence.

(4) Every person who contravenes this section shall be guilty of an offence, and shall be liable-

(a) if the offence relates to the possession of a prohibited weapon

(i) on summary conviction before a Resident Magistrate to imprisonment with or without hard labour for a term not exceeding five years;

(ii) on conviction before a Circuit Court to imprisonment for life with or without hard labour;

Sentencing guidelines

- [2] The Sentencing Guidelines were launched in January 2018. It details the approach the court should adopt for the offence of illegal possession of firearm. In relation to this offence the guidelines show that the maximum sentence stipulated by the statute is life, however the normal range of sentences should be between seven and fifteen years with the usual starting point being ten years.

Case Law

- [3] There have been a number of decisions that gives guidance to the sentences that are usually handed down in relation to the offence of illegal possession of firearm. These ranged from a sentence of ten years as in the cases of **Joel Deer v R** [2014] JMCA 33, **Ian Wright v R** [2011] JMCA CRIM 11 and fifteen years in the case of **Paul Kennedy v R** [2015] JMCA Crim 5. In the case of **Mavrick Marshall v R** [2020] JMCA Crim 20 Phillips JA opined that a sentence of seven years placed the appellant at the lower end of the range as it related to the sentencing guidelines and as such could not be considered to be manifestly excessive.

Aggravating Circumstances

- [4] In sentencing the defendant for this offence I have to consider a number of aggravating circumstances which include :-
- a. That the firearm used to commit this offence was never recovered.
 - b. That the firearm was used to commit murder.
 - c. That there is prevalence of this type of crime in society.

Mitigating Circumstances

[5] I have to also consider the mitigating circumstances in the defendants favour which include :-

- a. That the defendant pleaded guilty.
- b. That the defendant has a good social enquiry report
- c. That the defendant has a good antecedent report.
- d. The age of the defendant.

The Sentence – Count 1

[6] I will be abiding by the Sentencing Guidelines which establishes a starting point of ten years. I will increase the sentence by six years based on the aggravating circumstances listed above.

[7] I will reduce the sentence by twenty percent only. This would reduce the sentence by three.

[8] I will further reduce the sentence by:-

- a. One year for good antecedent report.
- b. One year for good social enquiry report.
- c. The 2 years and four months that he has been in custody.

The defendant is sentenced to eight years and eight months on count one.

Murder

The Statutes

- [9] There are two statutes that give guidance as to the sentences that can be handed down in cases of murder. These are the Offences Against the Persons Act and the Criminal Justice Administration Amendment Act. The sentence for murder is life imprisonment. The issue to be decided is the number of years to be imposed before the possibility of parole. The starting point in deciding the years before parole is set out in Section 3 of the Offences Against the Persons Act which states that:-

3. (1C) In the case of a person convicted of murder, the following provisions shall have effect with regard to that person's life eligibility for parole, as if those provisions had been substituted 6(1) to (4) of the Parole Act-

a) where a court imposes a sentence of imprisonment for life pursuant to subsection (1)(a), the court shall specify a period, being not less than twenty years, which that person should serve before becoming eligible for parole; or

- [10] **What sentence can be imposed on a child in a case of murder?**

- [11] The defendant at the time of the commission of the offence was under the age of eighteen years, ie he was seventeen years old. He is currently nineteen years old. The fact that the defendant was seventeen years old at the time of the commission of the offence would have to be a factor to be taken into consideration when handing down the sentence.

- [12] Section 78 of the Child Care and Protection Act gives some guidance with regards to the sentencing of children. It states that :-

Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in place thereof such person shall be liable to be imprisoned for life.

(2) A person sentenced under subsection (1) shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place including, save in the case of a child who has not attained the age of fourteen years, an adult correctional centre, and under such conditions as the Minister may direct, and, while so detained, shall be deemed to be in legal custody.

(3) Notwithstanding the provisions of the Parole Act, on sentencing any child under subsection (1), the court may specify a period, which that child should serve before becoming eligible for parole.

(4) A child shall not be sentenced to imprisonment, whether with or without hard labour, for any offence, or be committed to an adult correctional centre in default of payment of any fine, damages or costs.

(5) 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.

(6) Where a sentence referred to in subsection (5) has been passed the child shall, during that period and notwithstanding anything in the other provisions of this Act, be liable to be detained in such place (including an adult correctional centre) and on such conditions as the Minister may direct and, while so detained, shall be deemed to be in legal custody.

There have been unsuccessful constitutional challenges to Section 78 of the Child Care and Protection Act one of which was the case of **Tafari Morrison v R** [2020] JMCA Crim 34. At paragraphs 83 and 96 of that judgement Hillary JA stated that

[83] Indeed, the most significant factor of the CCPA, for these purposes, is that it clearly defines numerous instances in which imprisonment or detention of children (even at adult correctional facilities) for extended periods of time may be appropriate. While the CRC makes a blanket consideration with respect to all persons under the age of 18, the CCPA recognises a distinction between children under the age of 14 years, and those 14 years and over. A child under the age of 14 years can be

imprisoned for up to 25 years. Children 14 years and older can be imprisoned for life, and it is within the court's discretion to specify a time period before the child would be eligible for parole, and the length of time before the child is so eligible. The CCPA accepts that children may be subject to different sentences than adults, and, where imprisoned, should be separated from adults, but it enables court's to detain children at adult correctional facilities. The CCPA has also removed from the jurisdiction of the Children's Court, offences specified in the Fourth Schedule that are committed by a child 14 years and older (see paragraph [78] herein), and murder, where it is committed by a child of any age (see section 75).

*[98] In our opinion, it is fair to say, in the light of all the statutory provisions, Jamaica's laws with regard to the sentencing of children may be described or criticised as being rather archaic, strict and not in conformity with modern pronouncements of children's rights, which have been accepted internationally. There may yet come a time when these laws have to be reviewed and changed. But, as the Privy Council stated in **Watson v R**, it is within Parliament's prerogative whether to make those changes, and it is not for the court to impose its own moral predilections.*

In light of this provision the defendant will be sentenced to life imprisonment with a defined number of years before the possibility of parole.

[13] Statutes

The starting point in sentencing with respect to murder must be Section 3 of the Offences Against the Persons Act which states that :-

- (1C) In the case of a person convicted of murder, the following provisions shall have effect with regard to that person's eligibility for parole, as if those provisions had been substituted 6(1) to (4) of the Parole Act-*
 - b) where a court imposes a sentence of imprisonment for life pursuant to subsection (1)(a), the court shall specify a period,*

being not less than twenty years, which that person should serve before becoming eligible for parole; or

c) where, pursuant to subsection (1)(b), a court imposes –

i. A sentence of imprisonment for life, the court shall specify a period being not less than fifteen years; or

ii. Any other sentence of imprisonment, the court shall specify a period, being not less than ten years,

which that person should serve before becoming eligible for parole.

[14] In deciding the number of years before the possibility of parole I first have to consider, the amount of discount, if any, to be granted to the defendant in light of the fact that he pleaded guilty. The discounts allowed are detailed in Section 42 (E) of the Criminal Justice Administration Act which states that:-

42(E) Subject to subsection (3), where a defendant pleads guilty to the offence of murder, falling within section 2 (2) of the Offences Against the Person Act, 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 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 thirty-three and one third 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 twenty-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) *Notwithstanding subsection (2) the Court shall not impose on the defendant a sentence that is less than the prescribed minimum penalty for the offence as provided for pursuant to section 3(1)(b) of the Offences Against the Person Act.*
- (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.*

[15] Although the Criminal Justice Administration Amendment Act (2015) allows for these discounts to be granted, the said act clearly gives discretion to the courts as to how and when these discounts may be awarded. Section 42 (H) details what the court should consider when awarding these discounts. It states that :-

- 42(H) *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 42 D(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;*

Sentencing guidelines

[16] The sentencing guidelines mirrors somewhat the Offences Against the Persons Act and as such merely indicates the minimum that the courts should consider in passing a sentence.

Case law

[17] In the case of **Paul Brown v R** [2019] JMCA crim 3 F Williams JA did an analysis of the sentences handed down in murder cases and concluded that they ranged between 25 to 45 years with the higher figures to be considered where there are instances of multiple murders. In the case of **Germaine Smith, Daniel Edwards, Andrew Thomas and Jimmy Ellis v R** [2020] JMCA Crim 1, the defendants shot and killed a fourteen- year old child. The court decided that a sentence of thirty- five years was the appropriate starting point for the defendants. The Court of Appeal reduced the sentence of Andrew Thomas to sixteen years and eight months. The thirty- five years was reduced by ten years on account of the age of the defendant, a further five years as he did not enter the house, and by three years and four months for the time he had been remanded in custody.

Aggravating circumstances

[18] In sentencing this defendant I will take into the following aggravating circumstances namely :-

- a. That there is a prevalence of this type of crime in society.
- b. That the firearm used to commit the offence has not been recovered.
- c. That this murder took place in the middle of the day in an arcade.

Mitigating circumstances

[19] There are a number of mitigating circumstances that would have to be taken into consideration that would cause the reduction of the sentence of the defendant. These include:-

- a. The age of the defendant.
- b. His good social enquiry report.

- c. His good antecedent report.

Time spent in custody.

- [20] It is now settled law that the time the defendant spent on custody prior to his sentence must be taken into consideration at the time he is being sentenced. This has been decided in a number of cases including the case of **Meisha Clement v R** [2016] JMCA Crim 26, where Morrison P, writing on behalf of the court, at paragraph [34] of the judgment, stated the following:

...in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial..."

The Sentence

- [21] The defendant in this case was seventeen years at the time when he committed the offence of murder. Taking into consideration the circumstances of this case my starting point would be twenty years. I would increase the sentence by ten years taking into consideration the aggravating circumstances detailed above. I would reduce the sentence by:-

- a. twenty percentage reduction due to his guilty plea.
- b. one year for the good antecedent report.
- c. one year for good social enquiry report.
- d. four years due to his age.
- e. two years and four months which is the time he spent in custody.

- [22] The defendant is sentenced to life imprisonment and he is serve seventeen years before the possibility of parole.

[23] The sentence of the court is

- a. On count one he is to serve eight years and eight months.
- b. Count two life imprisonment and he is to serve seventeen years.

The sentences are to run concurrently.