

BARBADOS

CRIMINAL DIVISION

Indictment No: 0079 of 2012

THE QUEEN V. EDWARD FITZPATRICK DACOSTA BAILEY

SENTENCING REMARKS

Edward Fitzpatrick DaCosta Bailey,

[1] **Background:** On Friday 24th of May, 2014 a jury found you “not guilty” of murdering Ricardo Small, but found you “guilty” instead of manslaughter.

[2] **Your Criminal Record:** Following your conviction, Police Constable Basil Hunte of the Criminal Records Office informed the Court that you have 20 previous convictions, which include the following:

- (i) 7 prior convictions for burglary;
- (ii) 3 for theft;
- (iii) 1 for attempted burglary;
- (iv) 2 for robbery
- (v) 1 for loitering with intent;
- (vi) 1 for criminal damage;
- (vii) 1 for stone throwing;
- (viii) 3 for assault; and
- (ix) 1 for inflicting serious bodily harm.

[3] It is evident from your past criminal record that while the current conviction may be your first for manslaughter, it is certainly not the first time you have been convicted of an offence under the *Offences Against the Person Act, Cap. 141* involving violence against others and 4 of your past convictions involve assault and inflicting serious bodily harm.

[4] **The Case for the Prosecution:** The case for the Crown at the trial was that on the afternoon of January 15, 2009, you approached the left front window of the route taxi registration number ZR 244 which had stopped in Gall Hill, Christ Church to pick up and let off passengers and you deliberately, and without provocation drew a gun and fired 2 shots at Ricardo Small who had been seated in the front passenger seat of the van.

- [5] The Crown's case also was that after you had shot at him, Ricardo Small scrambled out of the van after which you pursued him down the road and only gave up the chase when he finally ran into Johnno's Pizza to escape from you.
- [6] An ambulance was called to the scene and CPR was commenced, but Ricardo Small was pronounced dead on his arrival at the Queen Elizabeth Hospital.
- [7] To establish your guilt, the Crown called twenty-three witnesses who gave evidence at the trial. The Crown's case against you, was essentially founded on: the direct testimony of two eye-witnesses, namely: the driver of the ZR van, Dayne Harewood and a female passenger, Trisha Thomas, who had been seated next to the deceased in the van at the time you approached the van, but who had scrambled into the back of the van in fear after which two explosions were heard.
- [8] The Crown's case was also founded on the evidence of civilian witnesses who witnessed you pursue the deceased from the van into Johnno's Pizza immediately after the shooting.
- [9] The Crown's case was also founded on the alleged oral and written statements attributed to you by police witnesses in which you admitted shooting the deceased man who, according to you, had pulled a gun on you on the Falcon Crest block earlier in the day and had by words and gestures been threatening to gun you down all day.
- [10] In the written statement, you allegedly also told police that after the deceased had threatened to gun you down before the "*day done*", you retrieved a firearm that you had hidden in a stash in Vauxhall and returned to the Blue Bar block in Gall Hill with it.
- [11] According to your statement, later that day the deceased had then threatened you a second time from a passing mini-van by pointing his finger at you in a gun motion and telling you "*just now*".
- [12] According to your statement, still later in the evening, you again saw the deceased sitting in the front passenger seat of ZR 244 which had stopped not far from where you had been sitting under a dunks tree. According to you, you approached the deceased to confront him about what had occurred earlier in the day, and saw him "*reach like he going to pull out something out his pocket.*" Because you glimpsed what appeared to you to be the handle of the gun you had seen that morning, you pulled out your firearm, pointed it in his direction and shot at him "*to stop him from pulling out his firearm*". You also told police that you fired another shot at the deceased while he was in the van and had run behind him until he ran into Johnno's Pizza at which point you gave up the chase.

- [13] Finally, the Crown relied upon the evidence of Jamal Layne and Ricardo Francis who testified that earlier on January 15, 2009 some men had been on the block asking after you in a hostile manner. Mr. Layne testified that one of these men had been the deceased. Another witness, Shawn Yarde, a.k.a. Shawny Poo further testified that there was an ongoing feud between two different groups of men and that you had made threats within earshot of the deceased man.
- [14] **The Case for the Defence:** The case for the Defence, as disclosed in your unsworn evidence from the dock, was that earlier in the day on the 15th day of January, you and one Shawn Yarde had been involved in a quarrel and that the deceased, Ricardo Small and another man had thrown rocks at you. About 25 minutes after this altercation, Shawn Yarde and the deceased had come to the block in Falcon Crest where you had gone and all of them were carrying firearms. You also told the Court that the deceased's hand had been in his pocket and he had been shifting it and when it had come up you had been able to see the handle.
- [15] You told the Court that you had left the block and went to the Blue Bar block and had gone to the big house and while there a man had called you and told you that men were looking for you. After that, you received another call that men had been on the block looking for you and had threatened that when they see you it is "*shots pon sight*".
- [16] You told the Court that you had gone back to the Blue Bar block and whilst there breezing out, Ricardo Small had come up in a van and had pointed his hand at you through the van in a gun motion and had told you: "*before the day done he would gun you down*". You told the Court that the men on the block had told you to stop the van and take him off when the van came down.
- [17] You also told the Court that Ricardo Small had come up again on another van and had pointed his hand at you through the van window in a gun motion and had said "*Just now.*"
- [18] You also stated that a man had come by the block and given you a firearm and told you that men were looking for you and that you had to defend yourself.
- [19] In your unsworn statement you also told the Court that a van had stopped in front of the block and that you had taken up the firearm and had been on your way across the road going about your business and that on glancing into the van you had observed the deceased man lean to his right side and pull something out of his pocket with his left hand. According to you, you saw the handle of the firearm and that you had gotten vexed and pulled the firearm out of your pocket and had asked the deceased why he had been coming around you all the time and that you had done him nothing.
- [20] You told the Court that you had then heard an explosion and did not know where it had come from and that you saw the deceased in the middle seat where the girl had vacated raising a firearm at you and that the deceased had let go a shot and that you had let go a shot the same time.

- [21] It was thus clear from your evidence as a whole that you did not deny shooting at the deceased, but had claimed that you had done so in self-defence.
- [22] However, during the trial you firmly denied making any of the oral statements or dictating the written confession statement attributed to you by the police. You also alleged that you had signed the written statement after the police had coerced you into doing so with the use of physical violence.
- [23] **Basis of jury's verdict and Court's findings for sentencing purposes:** Given the state of the evidence and the respective cases for the prosecution and the defence at the trial, the issues of self-defence, provocation and the possibility of a manslaughter verdict were all left for the jury's consideration.
- [24] In considering the seriousness of the offence for sentencing purposes, this Court is satisfied and accepts that in returning its manslaughter verdict in this case, the jury very clearly rejected your claim to have acted in self-defence and found instead that you had been provoked and had lost your self-control whether by things done or said or both during the course of the day in question and further, that the provocation was enough to make a reasonable man do as you did.
- [25] **The Pre-Sentence Report:** As required by the *Penal System Reform Act, Cap. 139*, this Court ordered the preparation of a Pre-Sentence Report. The Report was prepared by Probation Officer, Mr. Nigel Newton and read into evidence on July 31st, 2013.
- [26] The Court has carefully reviewed the Report which provides valuable insight on your family, educational and social background, as well as your employment history and your current attitude to the offence. This Report also contains a brief Victim Impact Statement taken from the mother of the deceased man.
- [27] The Court notes that, according to the Report, you come from a large family of nine children and that you enjoyed "*a close and supportive relationship*" with your father until his death in 2008. Your mother was, however, absent for much of your childhood and in her absence you were raised by your aunt and grandmother.
- [28] The Report also revealed that although you benefited from primary education, you never sat your Common Entrance Examination and your attendance at secondary school was sporadic reportedly as a result of financial difficulties.
- [29] As to your employment history, although you assisted your father in his joiner shop and subsequently became self-employed by doing odd jobs, your employment has been consistently

interrupted by “*frequent periods of remand and incarceration at Her Majesty’s Prison*”. It is clear that as a consequence of your previous convictions, you have already spent a significant part of your life in prison and this is where you were between 1991 and 2008.

[30] Your family reported that after your release from prison in 2008 you made a concerted effort to change your life, obtaining a steady job to support yourself and family and readjusting into the community. This, they indicated, could have been partly as a result of the death of your father who you had viewed as a good man and your role model.

[31] Your family indicated that you have “a hot temper” and you have also admitted this to the Probation Officer. You also expressed to him your disappointment regarding your failure to accomplish anything in life of which you can be proud as well as regret about the length of time you have spent behind bars.

[32] As to your attitude towards this offence, the Report reveals that you have expressed remorse for your actions. Having not long ago experienced the loss of father, you have empathized with the suffering of the family of Ricardo Small, and have written a letter of apology to his mother and indicated an interest in assisting any children he left behind.

[33] The mother of the deceased man, Ms. Enid Rodriguez, confirmed that she received your letter of apology but questions its sincerity. She remains angry not only about the loss of her son, but also about the loss of her unborn grandson who died when the deceased’s girlfriend, suffered a miscarriage upon learning about his death.

[34] **Your Psychological Assessment:** At the request of the Court, a Psychological Assessment and Report was also ordered. The Assessment was conducted and the Report prepared by Mr. Sean Pilgrim, the Prison psychologist, who read the Report into evidence on October 18, 2013. The Report and the evidence of Mr. Pilgrim has also been accepted and considered by the Court.

[35] Mr. Pilgrim conducted a number of psychological tests that identified some specific areas of concern. The results indicate that you are chronically angry and have significant difficulty in moderating your anger. You are also prone to impulsiveness and recklessness and have a disregard for authority. According to his Report, you also appear to have limited personal insight into the causes of your actions and the challenges which you face. While you have some awareness of your challenges, you are also unable to articulate any means of addressing them.

[36] In particular, while you have demonstrated some understanding of the importance of laws and social expectations that govern how you should behave, Mr. Pilgrim reported that you have a simplistic and incomplete understanding of these issues and how they affect your life.

Additionally, you appear to have little understanding of how you can learn from mistakes and modify your behaviour.

[37] While Mr. Pilgrim is unclear as to whether you are motivated to obtain full benefit from any therapy you receive, he recommended that during your sentence you enter into any psychotherapeutic programmes offered, including an anger management programme, as well as any educational and vocational programmes that interest you.

[38] **Observations:** It is now for this Court to determine the appropriate sentence to be imposed upon you in this matter having regard to its judicial obligations under *sections 35 to 41* of the *Penal System Reform Act, Cap. 139*.

[39] **Reasons for imposing Custodial Sentence - Section 35(4):** As required by section 35(4) of the *Penal System Reform Act* and after considering the evidence adduced at the trial in relation to your role in this offence, together with the Pre-sentence and Psychological Reports the Court has formed the opinion that subsection (2)(a) applies and that this offence is so serious that only a custodial sentence should be passed in this case for the following reasons.

[40] The Court has determined the seriousness of this offence having regard to the following aggravating factors:

- a) You approached the front passenger seat of a public service vehicle where the deceased man had been sitting armed in advance with a firearm which witnesses said you had been carrying in full view;
- b) You deliberately, unlawfully and intentionally shot at the deceased who according to the Crown witnesses was unarmed. Clearly the force used was unreasonable and excessive in the circumstances;
- c) The medical evidence showed that the deceased died from a gunshot injury to his abdomen with haemorrhage and shock and that the deceased also suffered a second gunshot injury to the back of his left thigh;
- d) After shooting the deceased in the van you then pursued him down the road and away from the van, and only gave up the chase after he had sought refuge in Johnno's Pizza some distance away.

[41] In keeping with the *Suratan I*^[1] sentencing guidelines adopted by the Barbados Court of Appeal in the case of *Ricardo Deverne Griffith v. The Queen Criminal Appeal No: 6 of 2007; 2009-06-19*, I have also borne in mind that as this is a case where a jury found you not guilty of murder but guilty of manslaughter by reason of provocation, I am, as the sentencing judge, required to make a number of assumptions in your favour by way of mitigating the seriousness of the offence.

[42] Assumptions: Applying the *Suratan* guidelines, the Court has therefore assumed firstly, that the seriousness of this offence has been mitigated by the fact that at the time of the shooting, you were provoked and lost your self control.

[43] The Court has, secondly, assumed that you were caused to lose your self control by the following facts and circumstances disclosed on the record:

- a) the fact that earlier that day, according to your written statement, the deceased and another man, Shawn Yarde a.k.a. “Shawnie Poo” had approached you on your block “Falcon Crest” near Cane Vale New Road and had both pulled guns on you. On that occasion also, the deceased had also told you that you “*want shooting*” and that you were a “*pussy*”;
- b) According to your statement, this incident had made you vex and while you had been on the Blue Bar block in Gall Hill “cooling your head”, the deceased man had looked through the window of a passing mini-van in which he was sitting and told you that “*before the day was done he was going to gun you down*”;
- c) According to your statement immediately following the deceased man’s threat, you immediately got into a van and retrieved a firearm from the hiding place where you had stashed it in Vauxhall and returned to the Blue Bar block;
- d) Later that very evening, while you were still liming on the Blue Bar block, you again saw the deceased man in another van and, according to you, he had pointed his finger at you in a gun motion and told you “*Just now*”;
- e) According to you, later in the evening, you were under a dunks tree and saw the deceased man once again sitting in the front passenger seat of ZR 244 which had stopped and had gone over to the van to ask him what happen. According to you, the deceased had pulled in the van door and reached as if he was going to pull something out of his pocket and you had glimpsed the handle of a firearm which Shawnie Poo had been holding earlier that morning;

[1] *Attorney General’s Reference (Nos. 74, 95 and 118 of 2002) (Suratan and others) (2003) 2 Cr. App. R. (S) 42.*

f) According to your written statement, on seeing the handle and the deceased man's movementation, you pulled your firearm, pointed it and shot.

[44] Thirdly, the Court has assumed that your loss of self control in the several circumstances just outlined was reasonable in all the circumstances, even bearing in mind that persons are expected to exercise reasonable self control over their emotions and that as society advances it ought to expect higher measures of self control.

[45] Finally, the Court has assumed that the circumstances surrounding this killing were such as to make your loss of self control sufficiently excusable to reduce the gravity of your actions from murder to manslaughter.

[46] Ultimately, the Court is satisfied that this was an extremely serious case of manslaughter where death was caused by a firearm and where, notwithstanding the fact that you were provoked and lost your self-control, the aggravating circumstances surrounding the killing place the case on the borderline of murder and close to the top of the manslaughter scale.

[47] The Court finds that this case has all the hallmarks that place it near to murder. The facts and circumstances of the killing show that you came as close to the intent required for murder as is possible and displayed a reckless disregard for the possibility of death of serious bodily injury resulting from your deliberate and unlawful conduct.

[48] The Court is satisfied that this was a serious case of manslaughter high up on the manslaughter scale and close to the borderline of murder with numerous aggravating factors and where, except for the fact that you were provoked by the persistent threats of the deceased man, there were no other mitigating factors in relation to the offence.

[49] In summary, this was a case where you unlawfully and intentionally discharged two rounds of a loaded firearm at an unarmed and defenseless man sitting inside a public service vehicle in full view of terrified passengers helplessly trapped inside the van. In the Court's view, the fact that you shot into a public service vehicle in which unsuspecting passengers were going about their lawful business, makes this offence all the more reprehensible.

[50] The offence was aggravated also by the fact that still brandishing your weapon, you later pursued the injured man down the road away from the van, and only gave up the chase after he had taken refuge inside a Pizza establishment situated some distance away.

[51] Ultimately, the Court was satisfied that the seriousness of the offence took it beyond the threshold for non-custodial punishment and most decidedly into the realm of custodial punishment.

- [52] The Court adverted to section 6 of the *Offences Against the Persons Act, Cap. 144* which stipulates that the permitted maximum custodial sentence which may be imposed on any person convicted of manslaughter is imprisonment for life.
- [53] However, as is clear from the manslaughter guidelines established by the Barbados Court of Appeal in *Pierre Lorde (Criminal Appeal No: 11 of 2003, unreported decision of 24th February, 2006)*, the statutory penalty of imprisonment for life is to be reserved only for the most serious manslaughter offences.
- [54] Having regard to the decision of the Barbados Court in *Oral Andy Devine Cummins (Criminal Appeal No: 56 of 1995, unreported decision of 13th July, 2004)* the Court has borne in mind that where a life sentence is to be imposed, 3 criteria must be satisfied, one of which is that you are likely to pose a danger to the public for a period which cannot be reliably estimated. [See *Hodgson (1967)*, *Dempster (1987)* and *Chapman (2000)*. Also see *Oral Andy Devine Cummins (cited above)* where *Hodgson* was applied.]
- [55] The Court was satisfied that although someone died as a result of your actions, the imposition of a life sentence in this case is completely out of the question since there is no evidence that you pose a danger to the public. In the circumstances, life imprisonment as a punishment is unwarranted in this case and as a punishment, would be completely disproportionate to the gravity of this particular offence.
- [56] During the course of your mitigation on October 3rd, 2013, you submitted, *inter alia*, that the facts and circumstances of this offence fall outside the 4 *Pierre Lorde* guidelines. You urged the Court, in accordance with paragraph 36, to treat the case as one of the odd cases, envisaged in paragraph 36, whose special or exceptional facts fell outside the guidelines established in that case.
- [57] While you have accepted the seriousness of the offence involving the discharge of a firearm at a passenger sitting inside a public service vehicle, you urged the Court to accept that you had acted out of self-defence and that the shooting had not been planned or pre-meditated and that you were genuinely remorseful for your actions.
- [58] In his reply, the learned Crown prosecutor, Mr. Seale disagreed with your suggestion that the case fell outside the *Pierre Lorde* guidelines. Mr. Seale contended that the case was very close to murder and contained many aggravating factors both pertaining to the offence itself as well as the offender which placed the case at the upper end of guideline 2. After discussing the aggravating and mitigating factors, Mr. Seale urged the Court to start at no less than 22 years when

considering the sentence and to make the appropriate reductions in sentence taking into account the relevant mitigating factors.

[59] After considering the matter, the Court was satisfied that the facts and circumstances of this offence place it high up on the manslaughter scale and closer to the borderline of murder. Having regard to the seriousness of the offence and taking the foregoing guidelines and factors into account, the Court, in the exercise of its sentencing discretion, selected 23 years (a point between Guideline 1 and 2) as the appropriate *starting point* for determining your sentence.

[60] **Length of the Custodial Sentence- Section 36:** Having considered the gravity of the offence and established the appropriate starting point for determining your sentence, the Court was mindful of the general judicial guidelines set forth in *section 41(2)* of the Act, which require, *inter alia*, that the gravity of the punishment must be commensurate with the gravity of the offence. The Court next turned to *section 36* of the *Penal System Reform Act* and considered the issue of proportionality with a view to determining what length of sentence would be appropriate to do justice in this case.

[61] Focusing next on you as the offender, apart from your relatively young age, (you are only 40 years) the Court was hard pressed to find any other mitigating factors of you as the offender which could have reduced the seriousness of the offence or which suggest a level of personal mitigation of you as the offender. These were:

- a) the fact that you were provoked and lost your self control due to the threatening actions and threatening words and gestures made by the deceased man throughout the day;
- b) An appropriate discount was also allowed to take account of the fact that you cooperated with the police investigations, making oral admissions and giving a written statement admitting your involvement in the offence; and
- c) the remorse you have expressed for your actions.

[62] **Time spent on Remand:** According to Prison Officer, Bentley Boucher, you were admitted to prison on February 20, 2009 and as at the 18th of October, 2013 you have spent a total of 1,702 days on remand awaiting the trial and final disposition of this matter.

[63] To this period the Court had added the additional 56 days that have elapsed between October 18, 2013 and today's date.

[64] In keeping with the decision of the Caribbean Court of Justice in *Romeo Hall*, you will be given full credit for the now 1,758 days [i.e. 4 years 298 days] that you have to date spent on remand while awaiting the trial and final disposition of this matter.

- [65] **Order of the Court:** *Edward Fitzpatrick DaCosta Bailey*, you are hereby sentenced to a term of imprisonment of **20 years** for this offence to commence with immediate effect. From this sentence and in keeping with the decision of the Caribbean Court of Justice in **Romeo Hall**, there will be deducted, the full period of 1,758 days [i.e. 4 years 298 days] which you have to date spent on remand since awaiting final resolution of the matter. In the result, you will be required to serve the additional **15 years 67 days** in custody for this offence.
- [66] During your incarceration, and with the aim of your rehabilitation, you will undergo such psychological interventions, counseling and programs as may be recommended by the recommended by the Prison Psychologist, Mr. Sean Pilgrim to assist you in controlling your anger, managing your interpersonal relationships and addressing all of the areas of concern identified in his Psychological Report dated October 13, 2013. You are strongly urged to make participate fully in these programmes and make full use of the opportunity that they offer in dealing with your problems.
- [67] You are further strongly advised to enroll in any skill or vocational programs which may be available to you during your incarceration as this will enable you to acquire a skill or trade and should enhance your ability to obtain gainful employment upon your release from prison and attain an accomplishment of which you can be proud.
- [68] The Superintendent of Prisons is directed to make the necessary administrative and logistical arrangements to ensure that the order of this Court is put into effect.
- [69] This is the order of the Court.

MAUREEN CRANE-SCOTT

Judge of the High Court

2013-12-13