BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 14 of 2011

BETWEEN:

TROY ANDERSON MASCOLL **Appellant**

AND

THE QUEEN **Respondent**

BEFORE: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal.

2013: March 12

November 8

Mr. Ajamu Boardi and Ms. Safiya Moore for the Appellant.

Mr. Alliston Seale for the Respondent.

DECISION

Introduction

[1] **GOODRIDGE JA**: This is an appeal against sentence. On 28 September 2010 the appellant was arraigned on an indictment for the murder of Malcolm Hazzard. He pleaded not guilty of murder but guilty of manslaughter. This plea was accepted by the Crown. **Crane-Scott J** sentenced him to a term of 11 years imprisonment on 3 June 2011. On the same day the appellant filed an Application for Leave to Appeal against the sentence on the ground of

the “harshness of sentence imposed”.

The Facts

[2] The facts in relation to the offence were outlined to the court by Mr. Alliston Seale of the Department of Public Prosecutions. The deceased was a builder and on the night of 27 May 2006, he visited the residence of a client, Ms. Yvette Edghill, at Maynards, St. Peter, for whom he was constructing a house, to discuss issues concerning the construction.

[3] Upon leaving the residence, the deceased was attacked by the appellant and at least four other persons who had devised a plan to rob the deceased of his jewellery. The appellant was armed with a firearm. The firearm discharged and the deceased was shot in the area of his neck. He managed to stumble back to Ms. Edghill’s home for assistance. The police and emergency medical technicians were summoned. He was taken to the Queen Elizabeth Hospital where he underwent emergency surgery but subsequently succumbed to his injury.

[4] Investigations were conducted into the matter by the police and the appellant and others were arrested and charged. The appellant made a number of oral statements and gave a written statement in which he described what occurred on the night in question. That written statement is quoted in part:

“A Friday night in May, 2006, I was liming ‘pon the block in Maynards with “Paul Duckie”, Ken, a red fellow that looked like Ken, a slim dark fella and nuff other fellas. A car come up the block and parked next to the white old car. When the driver get out, I recognised Malcolm who walked to Terry’s place. He shout Terry and Terry tell he, he coming. “Paul Duckie” and me did standing together while Ken and the others was on the side of the road. Paul shout Ken who come to me. I was talking about Reggae saying I want to go but I ain’t got no lot of funds. Paul said that he would give us something to spend. Paul then looked in the direction of Terry place and said the Guyanese man got big gold, he want robbing. We could get something off the big gold.

Ken called across the two fellas and ease off Paul and me. Ken went back and talk to them, Ken then come back and tell Paul and me, the men ‘bout it. The men and me mash up. Paul gave Ken a gun, Ken went behind a paling and took up a pipe gun and give to the dark fella. I had a small automatic gun Paul gave me earlier about 3 o’clock, high in de day.

The red fella and the other dark fella went 'round Paul brother house and stand up by some hedges in the track. I was in the track close to Malcolm's car while Paul was behind me and Ken was to my right. The rain started to fall. Malcolm left by Terry and was coming back fuh he car. The black fella put the pipe gun in Malcolm's face. Malcolm tell he, tek it out my face. Me and Ken rushed up by Malcolm where he was standing, Paul followed we dey. I had the gun in my left hand but I could not get it operate. I changed it to my right, hurt hand, which had on a cast. I point the gun at Malcolm and took off the safety with my left hand. Paul tell Malcolm to pass the gold. The gun I had went off and shoot Malcolm. He hold he neck with both hands. Malcolm then said, "Tek them off now." He also said, "Troy what you do?" The red fella tek off all the gold, when he did finished tell off everything, Terry come out with a piece of pipe. I point the gun at he and tell he, "Get to fuck back in the house." He went back inside. We then run and went 'pon the gully hill. While running, Paul beat off three shots, Ken two and me, one."

The Grounds of Appeal

[5] Counsel for the appellant, Mr. Boardi, filed seven grounds of appeal with which we deal below.

Grounds 1 and 2

[6] These grounds were argued together. On ground 1 it is alleged that the trial judge erred in law by basing her sentence on a determination that the shooting was not accidental even though the facts read into the record stated the opposite. Ground 2 alleged that the judge erred in law by failing to hold a *Newton* hearing before determining whether or not the shooting was an accident.

[7] Mr. Boardi submitted that the facts which were put before the court indicated that the shooting was accidental, a fact which was not disputed by the prosecution. In his acceptance of the guilty plea, Mr. Seale acknowledged the unintentional nature of the shooting. However, during the mitigation phase, Mr. Watts, who then appeared for the prosecution, submitted that the shooting was not an accident and that the appellant had acted in a reckless rather than unintentional fashion. Counsel further submitted that the judge ought to have rejected those submissions as contrary to the facts already on the record.

[8] Alternatively, Mr. Boardi contended that, if the trial judge was of the view that there was a dispute as to the facts, she ought to have held a *Newton* hearing. No *Newton* hearing was held and the judge fell into error when she sentenced the appellant on a version of the facts which differed from those agreed between

the parties.

[9] In response, Mr. Seale argued that the facts did not suggest that the shooting was accidental. The appellant had pleaded guilty to manslaughter. This, he said, would be inconsistent with a defence of accident, which is a complete defence to a charge of murder. Furthermore, since there was no disparity or conflict between the facts advanced by the defence and prosecution, there was no need for a *Newton* hearing. See ***Collingwood Jackson (1988) 9 Cr. App. R (S) 480***.

[10] The record discloses that when the facts were placed before the court, there was no objection by counsel for the appellant to the contents of the written statement. However, on 20 May 2011, prior to counsel's mitigation on behalf of the appellant, the court was informed that the appellant had some objections to the facts. The following extracts from p 30 to p 33 of the record are pertinent:

"MR. BOARDI: Ma'am, there is one other preliminary issue, in terms of the facts.

THE COURT: At this stage?

MR. BOARDI: Yes, ma'am.

Ma'am, in my submission, the facts, we haven't passed the facts stage in this case because of the issue with the record.

I also had a discussion with my learned friend, Mr. Seale, subsequent to the first date, indicating to him some objections that my client had the facts as read.

THE COURT: Why is it coming so late in the day? Why is the Court being advised so late in the day, about objections regarding the outline of facts that were made? How long now? Since whenever.

MR.
BOARDI: Since the first day we were here. Since after that - -

MR.
WATTS: This appears to be 28th September 2010, My Lady.

THE
COURT: Since 28th September 2010. And it has been back before me several times. He's been unrepresented; sometimes you weren't there and that type of thing.

MR.
BOARDI: Yes, Ma'am.

THE
COURT: And only now the Court is being apprised as we are about to mitigate, about facts and disputes of facts.

…….

THE
COURT: This is the first time we're hearing about a dispute as to facts.

MR.
BOARDI: Yes, ma'am.

THE
COURT: Because you were there when the facts were read and there was no indication at that stage that there was any

difficulty, and I'm only now hearing it at the point of mitigation. So, is this a situation where we're going to have a Newton hearing or something?

MR.
BOARDI: No, ma'am. I don't believe so, based on my discussions, and that's why I didn't think it was a significant issue. I think it's something that, according to my discussion with Mr. Seale, would be dealt with quite quickly and we can move on to mitigation.

THE
COURT: So this is with agreement from the prosecutor?

MR.
BOARDI: Yes. Yes, My Lady.

THE
COURT: You have instructions, Mr. Watts?

MR.
WATTS: That is so, ma'am. I don't have any difficulty with the request of counsel.

THE
COURT: Okay. Well, very well. Let us move on because I was beginning to get a little worried here now.

MR.
BOARDI: No. Yes, My Lady, I understand your concern. This is something that can be dealt with quite quickly.

In
the facts, as read out by my learned friend.

MR.
WATTS: If I can assist you, ma'am, page
5, I believe he's going to, My Lady.

THE
COURT: Page 5 of the transcript?

MR.
WATTS: Yes, My Lady. Line 24.

MR.
BOARDI: Yes, My Lady, the part that
starts with, starting at line 23, "I point the gun at Malcolm --" and then it
goes on to say, "-- and took off the safety with my left hand."

The
last part of that sentence that reads: "--
and took off the safety with my left hand."

THE
COURT: You want it out?

MR.
BOARDI: Yes, My Lady.

THE
COURT: "I point the gun at Malcolm and
took off the safety with my left hand?"

MR.
BOARDI: Yes. "And took off the safety with my left hand."

THE
COURT: And the Crown is agreeing to

this?

MR.
WATTS: “And took off the --” All I understand I’m agreeing to is, “And took off the safety with my left hand.”

MR.
BOARDI: “And took off the safety with my left hand.”

MR.
WATTS: It doesn’t matter to me, ma’am.

THE
COURT: Well, I don’t know. I just want to know what’s going on ---

MR.
BOARDI: Yes.

THE
COURT: -- but anyway, no problem.”

[11] During her sentencing remarks the judge said “…the Court has accepted the facts of the offence as set out on pages 1 to 7 of the transcript as amended on 27 (sic) May 2011”. She later stated “…Furthermore, the court is satisfied that this was no accidental shooting and that there was nothing wrong with the gun”.

[12] We are of the view that it was wrong for counsel between themselves to have agreed an amendment to the written statement after the appellant had pleaded guilty and the statement had not been contested. The statement would then not have been the appellant’s statement.

[13] We hold that the judge’s characterisation of the incident did not amount to a rejection of the version of the facts agreed

by the parties. The evidence is that the appellant pointed the gun at the deceased. Clearly, in taking such an action, the appellant must have realised the danger of the gun going off. There was therefore no need for the judge to hold a *Newton* hearing. In our judgment grounds 1 and 2 are without merit.

Ground 3

[14] On ground 3 it is alleged that the trial judge erred in law by failing to consider or take into account the appellant's extremely poor socialisation as a mitigating factor.

[15] It was counsel's submission that, any reasonable review of the appellant's life history would have revealed that it was "tragic and painful and devoid of any real family life" and "provides an explanation for the appellant being influenced by an alternative family to carry out a criminal act".

[16] Mr. Boardi further submitted that, by ignoring the appellant's poor socialisation as a possible mitigating factor, the judge failed to apply the principle of individualised sentencing. If this had been done the judge might well have determined that the interests of society in the rehabilitation and deterrence of the appellant might not be best served by a lengthy prison sentence.

[17] Mr. Seale submitted that the judge fully complied with the procedural requirements for custodial sentences pursuant to ***sections 37 (1)*** and ***(5)*** of the ***Penal System Reform Act, Cap. 139*** (the ***Act***) and ordered that a pre-sentence report be prepared in respect of the appellant. The judge had the full benefit of the report and made reference to it in pronouncing sentence on the appellant.

[18] The pre-sentence report which was read into the record on 13 May 2011 dealt *inter alia*, with the appellant's home; his family; personal history; education; employment; attitude to the offence and previous offences. Further, counsel focused the judge's attention on the contents of the report, in particular, the appellant's socialisation.

[19] The judge made specific reference to the report during her sentencing remarks. At pp 76 and 77 of the record the judge stated:

"…the court ordered the preparation of a pre-sentence report, which was read into evidence…and has been reviewed by the court. The pre-sentence report has provided the court with insight into your family background, educational and employment history and your current attitude to the offence."

"...this court has in keeping with the guidance of ***Pierre Lorde,*** taken into account all the available information about the circumstances of the offence, including such aggravating and mitigating factors of the offence as well as of the offender, as well as information about the offender which has been obtained through the pre-sentence report."

[20] It is important to note at this point that counsel for the appellant did not specify which aspects of the appellant's "extremely poor socialisation" the judge failed to give consideration to and he advanced no legal authority for his submission that the sentencing judge was under an obligation to specify which aspects of the appellant's personal circumstances she had regard to in determining the sentence.

[21] We do not consider that there is any requirement for a judge to spell out in detail every aspect of the pre-sentence report which the judge considered in coming to her decision as to the appropriate sentence. The **Act** imposes an obligation on the judge to obtain and consider a pre-sentence report before the judge can impose a custodial sentence. The judge must also take into account all information relating to the circumstances of the case, including aggravating and mitigating factors, in order to arrive at a sentence proportionate to the seriousness of the offence. Furthermore, whilst the sentencing judge may take into account the personal mitigation of an accused, the circumstances and serious nature of the offence may well permit the judge to give less weight to those mitigating factors. See ***Blackstone's Criminal Practice 2011 Edition*** at **para E1.13**.

[22] We are of the opinion that the judge complied with the provisions of **section 37** of the **Act** and that there was no error of law. In our view, this ground of appeal cannot be sustained.

Ground 4

[23] On this ground, it is alleged that the trial judge erred when she determined that the robbery was premeditated or alternatively, gave that factor undue weight given the level of premeditation. Mr. Boardi submitted that the facts as read into the record revealed that one of the offenders noticed a man with gold and decided that they should rob him. This was a spur of the moment event. He referred to the case of ***R v Boyer (1981) 3 Cr. App. R(S) 35*** where Dunn LJ said at **p 37**:

"The offence of manslaughter attracts the widest band of sentences for any offence known to this court. The sentence can vary from life imprisonment to a conditional discharge. It depends on the precise circumstances of the case. It is impossible to subdivide the offence of manslaughter into different categories and say any particular sentence is appropriate to any particular category of offence. However, in view of the verdict

of the jury in this case, implying, as we think it did, that this was genuinely a spur of the moment action by the applicant, done in a moment of blind panic, we think that a sentence of seven years' imprisonment was unnecessarily severe in the circumstances of this case, although we understand why the learned judge took the course he did, having regard to the way the case had been concluded."

[24] The confessional statement of the appellant and his oral statement as given to Station Sergeant Crichlow on 12 February 2008 clearly showed that the appellant and others planned to rob the deceased of his "big gold" as they saw him going to his client's house. The appellant was armed with a loaded firearm; he and his accomplices "mask up" and waited until the deceased left the residence and was returning to his vehicle to attack him.

[25] The evidence clearly shows that there was a level of planning which cannot be reconciled with a spur of the moment action done in a moment of blind panic. As Lord Bingham stated in ***R v Howells [1999] 1 W.L.R 307*** at **p 312**:

"Other things being equal, an offence which is deliberate and premeditated will usually be more serious than one which is spontaneous and unpremeditated or which involves excessive response to provocation; an offence which inflicts personal injury or mental trauma, particularly if permanent, will usually be more serious than one which inflicts financial loss only."

[26] Having regard to the circumstances, we disagree with counsel's contention that the judge erred by determining that the robbery was premeditated. Nor do we accept that the judge gave that factor undue weight. There is no merit in this ground of appeal.

Ground 5

[27] Ground 5 alleged that the trial judge erred in law when she found as an aggravating factor that a co-accused of the appellant put a pipe gun in the victim's face. Counsel submitted that this finding offended against the principle of individualised sentencing which requires that the court focus on the level of culpability of each offender within the context of the criminal enterprise.

[28] In response, Mr. Seale cited the following extract from ***R v Ward (1987) 85 Cr.App.R 71, C.A.***, which is quoted in ***Archbold, 43rd Edition*** at **para 20-16d**:

"Where…two persons embark on an unlawful joint enterprise each one is liable for the acts of the other done in carrying out that joint enterprise even with unusual consequences, provided, of course, it is proved that the second man, whose act did not directly kill…contemplated and foresaw that the other man, number 1, that number one's act was a possible part of the planned joint enterprise."

[29] While we agree entirely with that statement of the law as regards joint enterprise, we must reiterate that the principle of individualised sentencing requires that the sentence imposed on an offender should be reflective of his conduct in any criminal case. Therefore, where there are a number of offenders involved in an incident, the sentencing judge must look at the part played by each offender and the sentences imposed must reflect the different degrees to which each offender was involved.

[30] Stated another way, while the sentencer must have regard to the entire background, an offender must only be sentenced for his part in the incident. It was therefore inappropriate for the trial judge to find that the actions of the appellant's co-accused constituted an aggravating factor in relation to the appellant. However, since it was the act of the appellant that caused the death we are of the opinion that the judge's remark would have had no impact on the case as a whole.

Ground 6

[31] Mr. Boardi contended that the judge fell into error by finding that the firing of a shot after the robbery and shooting had occurred was an aggravating factor or in the alternative gave that factor undue weight. He argued that the firing of the latter gunshots were "part and parcel of the whole transaction" and contended that the appellant was already penalised for his use of a firearm during the conduct of the robbery.

[32] Mr. Seale, however, contended that the conduct of the appellant and his co-accused after the shooting was indeed an aggravating factor as they sought to instill fear in the community and, in particular, any potential pursuers.

[33] As stated earlier, the trial judge was obligated to take into account all relevant information about the circumstances of the offence. It was therefore important for the judge to consider the behaviour of the appellant after the unintended serious injury had been inflicted. In

this case, the discharge of the firearm by the appellant after the commission of the robbery was, in our opinion, an act designed to deter persons from pursuing the appellant, was reckless behaviour and was properly determined to be an aggravating factor by the judge. This ground fails.

Ground 7

[34] It was the submission of counsel that the sentence was too severe in the circumstances. Counsel argued that the sentence was out of step with the jurisprudence in that it had the effect of giving the appellant a longer sentence than others guilty of more egregious conduct.

[35] Mr. Seale refuted this submission and contended that the sentence was proportionate to the offence committed and properly imposed in light of the judge's consideration of the relevant provisions of the **Act** and the application of ***R v Lorde (Pierre Alexander) (2006) 73 WIR 28 (Pierre Lorde***), and ***Romeo Hall v The Queen (2011) 77 WIR 66***.

[36] We agree with the judge's application of guideline two of ***Pierre Lorde*** to the circumstances of this case where death was caused by a firearm. In the case of ***Bolden and Cumberbatch v The Queen, Criminal Appeal Nos. 4 and 5 of 2007*** (date of decision 7 May 2010) this Court upheld the application of guideline two, where the accused were charged and convicted of manslaughter which arose from an attempted robbery.

[37] We are mindful that this incident occurred in a public setting and recall the words of **Williams JA** in ***Ryan Harewood v The Queen, Criminal Appeal No.18 of 2007*** (date of decision 16 September 2009) at **paragraph 21**:

"[21] The courts are conscious of the need to protect the public from serious harm from the offender in compliance with the Penal System Reform Act, Cap. 139. A paramount consideration of sentencing in cases involving the use of firearms or offensive weapons resulting in death should therefore be the protection of the public. High levels of crime that cause death are inimical to an orderly society and are to be discouraged. It follows that persons who unlawfully carry firearms or weapons that cause death are a danger to society and must inevitably expect long custodial sentences."

[38] We wish to stress that the loss of life,

however unintended, is a serious aggravating feature of dangerous and unlawful behaviour. Despite the inappropriate reference by the judge to the actions of the appellant's co-accused as an aggravating factor, we do not consider that this error was of such a degree to warrant a reduction in sentence. In our view the sentence imposed was proportionate to the seriousness of the offence. It was neither wrong in principle nor excessive and ought not to be disturbed.

[39] There is one final point for consideration. Mr. Boardi referred to certain recommendations made in the pre-sentence report in respect of the provision of counselling for the appellant and remedial education which were not addressed by the trial judge. We are satisfied that the appellant would benefit from such intervention.

Disposal

[40] The appeal is dismissed. The sentence of 11 years is affirmed and ordered to run from the date on which it was imposed. It is further ordered that the appellant undergo psychological counselling with particular reference to anger management and that he be exposed to a programme of remedial education.

Justice of Appeal

Justice of Appeal

Justice of Appeal