BARBADOS.

[Unreported]

IN THESUPREME COURT OF JUDICATURE

COURT OF APPEAL

D.P.P.'s Reference No. 1 of 2003

IN THEMATTER OF A REFERENCE No. 1 of 2003 by the Director of Public Prosecutionsunder Section 36B of the Criminal Appeal Act, Chapter 113A

AND IN THEMATTER OF R. v. Kurt Ricardo Skeete (the Respondent)

Before: The Hon. Sir DavidSimmons, K.A., B.C.H., Chief Justice, the Hon. Frederick Waterman, Justice ofAppeal and the Hon. Peter Williams, Justice of Appeal

2003: November 17

2004: January 16

Mr.C. Leacock, Q.C., Director of Public Prosecutions and Mrs. W. Blair for theApplicant

Mr.A. Pilgrim and Ms. Cheryl-Ann Glasgow for the Respondent

DECISION

[1] SIMMONS CJ: In this application, the Director of PublicProsecutions (DPP) has referred to the Court of Appeal for review a sentence of4 years' imprisonment imposed by **Kentish J** on the respondent on 5June 2003 for manslaughter. The DPPseeks a review on the ground that the sentence was unduly lenient, undersection 36B of the ***Criminal Appeal Act, Cap.113A***.

[2] The respondent hadoriginally been indicted with 3 other young men on a charge of murdering PhilipGraham, a taxi driver, on 16 June 2001. At the trial, on 15 May 2003, the respondent pleaded: "Not Guilty toMurder; Guilty to Manslaughter". Theother men pleaded "Not Guilty toMurder". Counsel for the Crown, on theinstructions of the DPP, accepted the respondent's plea of Guilty toManslaughter and offered no evidence against the other co-accused, who weredischarged.

The Facts

[3] The factual background tothis matter is not complicated. Theprosecution case rested principally upon uncontested oral and writtenstatements whose tenor and contents are summarized in paragraphs [4] to [8]hereof.

[4] The 4 young men set outin the evening of 15 June 2001 for Oistins. It was a Friday and, as is well-known, the town of Oistins hosts livelyentertainment and culinary delights on weekends and is a place of convivialresort for many persons, citizens and tourists alike. According to the respondent's writtenstatement, however, he and his companions did not only intend to enjoythemselves; they also intended to rob anyone who was wearing gold. They found no victim at Oistins and, aftersome hours, they went to Bridgetown in a route taxi.

ey decidedto take a taxi home to St. Joseph. Thefirst taxi driver they met charged a fare of $60.00. The respondent and his friends were unable topay the fare. They stopped a secondtaxi, Z 185, and asked the driver to take them to St. Joseph. The driver of this taxi, Philip Graham,quoted a fare identical to that of the first taxi driver. The respondent's written statement goes on:

> "He (the taxi driver) saidit would cost $60 to $70. We tell himthat we didn't have so much money, so he said he would break down theprice. He tell we to put up $10.00 eachand he would charge $40."

ceptingGraham's generosity of a reduced fare they boarded the taxi and set off for St.Joseph. The respondent sat in the rearseat behind Graham. The respondent had agun in the waist of his trousers. Whenthe taxi reached Dark Hole in St. Joseph the respondent told the driver "topull over"; he said that he was getting out the car. The respondent said that he started "to pullthe gun from his waist" and he could see the taxi driver watching him in therear view mirror. The car had not fullystopped. We let the respondent's writtenstatement speak as to the subsequent events.

> "I cocked the gun. I think he also heard the noise when the guncocked. The taxi man turned back suddento me and a little scuffle between me and the taxi man went on. The gun went off accidentally when the carwas still moving. The car run off theroad behind the bridge. When the carstopped, I realised that the taxi man was not moving. I don't even know where he get shoot. Somebody take out the man wallet out of hispocket, I don't know who it was, it was not me who took out the wallet….Weshare up the money in the track and I get close to a $100. All that timeI still had the gun in my hand. I wenthome,

> get a rest, bathe and come back outside. The evening of the next day I hear that the man dead. I don't even think the other men realisedwhat I was going to do."

e taxidriver, Philip Graham, had contusions on the chest and abrasions on the upperback. He died from a gunshot wound tothe back of his head.

ɔralstatements made to Sgt. 131 Catwell, the respondent said, *inter alia*:

> "I want to explain myself toyou now. Mr. Catwell, the taxi man getshoot by accident. We did just planningto get some "hobby class" money, but the gun went off by accident, due to thefact that the man start to scuffle when I pull out the gun. We did going robthe man."

en theallocutus was put to the respondent, he said that he was filled with greatremorse "for causing Mr. Graham's family a lot of hurting. It was a big mistake upon my part and I havelearnt from my mistake". The respondentaccepted total responsibility for the deceased's death and he did not wish hisco-accused to bear any responsibility with him. According to Mr. Pilgrim, he was instructed to approach the DPP andexplain that the respondent "did not want to ruin 3 other lives, as well as thelife of the deceased and his family.....I will bear this alone."

ɲe respondentwas aged 18 years at the time of the offence and he had no previousconvictions. The pre-sentence reportnoted his expression of remorse and stated that he used illicit narcoticsubstances.

'ubmissions

ɲe DPPsubmitted that the sentence was unduly lenient because the protection of thepublic necessitates a deterrent sentence. He also contended that the offence was pre-meditated and the respondentplanned to target vulnerable persons. Such conduct leading to death, he said, must be punished severely. In addition, the Director argued that thepublic has a right to expect the courts to impose a sentence commensurate withthe law, otherwise public confidence in the administration of justice would beundermined.

r. Pilgrim,on the other hand, did not classify this case as "grave" within the guidelinesin ***RomainBendand Rodney Murray v. R. (Criminal Appeals Nos. 19 and 20 of 2001 unreporteddecision of 27 March 2002)***. Counsel submitted that when one took into account the mitigatingfactors, the sentence of the trial judge was not unduly lenient.

[13] The DPP cited, *inter alia*, the recent English case ***Attorney- General's ReferencesNos.19, 20 and 21 of 2001 (R. v. Byrne, Field and Cuthbert [2002] 1 Cr.App.R. (S.) 33.*** In that case, the respondents, 3young men, set out to rob men in a street in Blackpool town centre. They robbed and beat one man who survivedtheir attack. About 90 minutes later,they found another victim, an elderly man. They robbed him of money and jewellery. He died of the severe beating which he received. Following pleas of guilty, two of therespondents were sentenced to 7 years' imprisonment for manslaughter and 5years' for robbery, the sentences to run concurrently.

[14] The English Court of Appeal upheld thecontention of the Attorney General that the sentences were unduly lenient andset out the relevant general considerations on sentencing in a case ofmanslaughter at paragraphs H6 to H9 as follows:

> "In considering any case ofmanslaughter, the court inevitably looked at a number of factors to determinethe appropriate sentence. First, thecourt would examine the context in which the death was caused. If it was particularly reprehensible conduct,or conduct which called for deterrence, the court was bound to impose a longersentence than otherwise might be the case… As in other settings in which death resulted, public concern and the needfor deterrence must be reflected in the sentences passed by the court. This inevitably would mean longer sentencesthan might have been considered appropriate some years ago. The next factor that inevitably had to beconsidered in a manslaughter case was whether violence of any kind was contemplatedor intended by the offender.
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> There would be manslaughtercases where the defendant never contemplated or intended any violence atall. When actual violence was clearlyintended, the sentence must inevitably reflect both the fact of that intentionand the extent of the violence contemplated… Having established the extent ofthe violence intended, the court must consider the risk inherent in what wasbeing done of really serious injury and of death, and the extent to which thismust have been apparent to those involved…
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> A further factor to consider was thebehaviour of the defendant after inflicting the unintended serious injury…
>
> Having considered thosefactors, the Court had to ask whether the sentences in this case were undulylenient…
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> The next matter to considerwas, what was the effect of the deceased having lost his life? … The offences demanded on any principledeterrent sentences. The public were entitled to expect thecourts to play their part in fighting the threat of robbery and violence…Theoffence of manslaughter called for sentences near the top of the range foroffences of this kind." (Our emphasis)

[15] TheCourt of Appeal was of opinion that taking into account the element of doublejeopardy the case merited a term of 9 years' imprisonment for manslaughter tobe followed by a consecutive sentence of 1 year for attempted robbery.

ɔns of the Trial Judge

reviewingthe transcript of the trial judge's remarks when passing sentence, there is nodoubt that she took into account relevant considerations in applying her mindto the sentence. Thus, she commented onthe nature of the offence, its gravity and its presumed impact upon the familyof the deceased. She then specificallyreferred to the respondent's otherwise clean record, his plea of guilty and hisacceptance of full responsibility for the death of the deceased. After considering the pre-sentence report andCounsel's plea in mitigation, the learned trial judge imposed the term of 4years.

sentence unduly lenient?

*DPP'sReferences Nos. 1 and 3 of 2002 (unreported decision of 12 December 2002)*this Court explained its approach when determining whether a sentence is undulylenient. We said:

> "[13] What is meant by 'unduly lenient'? There are two views of the true test, the onemore nebulous than the other but both are similar in effect.
> In **Attorney General's Reference (No.4 of1989)(1990) 90 Cr.App.R.366**, the English Court of Appeal, pronouncedupon section 36(1) of the **Criminal Justice Act, 1988** whoseterms are virtually *in* pari materia with section 36B(1) of **The Act of 2000.**
> *Lord Lane CJ* stated the test of undueleniency at page 371.
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> > "A sentence is undulylenient, we would hold, where it falls outside the range of sentences which thejudge, applying his mind to all the relevant factors, could reasonably considerappropriate. In that connection, regard must of course be had to reportedcases, and in particular to the guidance given by this Court from time to timein the so-called guideline cases. However, it must always be remembered that sentencing is an art ratherthan a science; that the trial judge is particularly well placed to assess theweight to be given to various competing considerations; and that leniency isnot in itself a vice. That mercy shouldseason justice is a proposition as soundly based in law as it is inliterature."
>
> [14] The Court of Appeal made two observations about the relevantsection. First, it is implicit in thesection that a Court of Appeal "may only increase a sentence where it concludesthat the sentence was *unduly*lenient." It is not the intention ofParliament to expose defendants to the risk of an increase in sentence merelybecause in the opinion of the Court of Appeal the sentence is less than theCourt of Appeal would have imposed. Secondly, "even where the Court of Appeal considers the sentence to beunduly lenient, the Court of Appeal still has a discretion as to whether toexercise its powers."
> Most importantly, the Lord Chief Justice was at pains toexplain that the Court of Appeal might refuse to increase an unduly lenientsentence "where, in the light of events since the trial it appears either thatthe sentence can be justified or that to increase it would be unfair to theoffender or detrimental to others for whose well-being the court ought to beconcerned."
> [15] In 1993 **Lord Taylor CJ** invoked a slightlydifferent test. He said at p.327 of *Attorney-General'sReference (No.15 of 1992) (19993) 14 Cr.App.R. (S.)* ***324***:
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> > "We bear in mind that judgeshave a discretion to pass sentences which they consider appropriate in thecircumstances of individual cases and one must not regard the sentences inother cases, even in guideline cases, as being rigidly and unvaryingly bound tobe followed.
> > However, in the present case, bearing that in mind, weask ourselves whether public confidence in criminal justice could be maintainedif the public were aware of the circumstances of this case and the sentencewhich was passed."

n 27 March2002, this Court issued guidelines in an appeal where two appellants,originally indicted for murder, had pleaded Guilty to manslaughter at thetrial. In that case, *RomainBend and Rodney Murray v. R. (supra)*,having discussed the cases of **Nicholas Scantlebury v. R. (Criminal AppealNo.14 of 1996 unreported)**, **Rodney Hinds v. R. (Criminal Appeal No.44 of1998 unreported)** and **Mark Savoury v. R. (Criminal Appeal No.62 of1995 unreported)**, the Court of Appeal concluded its guidance with thesewords:

> "[28] Thus, using **Scantlebury** and ***Hinds*** as indicative ofthe very top of the range and, having regard also to the fact that guns wereused in those cases, whereas in **Mark Savoury** the instrument was aknife, the range of imprisonment, as we conceive it, for a grave case of manslaughter,(without the use of a firearm), such as this appeal would normally be 16 to 20years. Use of a firearm will invariablybe an aggravating factor which would take a sentence towards the top of thescale. Similarly, any mitigating factorswould put the sentence nearer to the lower end of the scale.
> [29] In that regard, a plea of guilty is a factor to be taken intoaccount and for which a discount on the sentence should be given."

[19] Reverting to this Reference, in ouropinion, this was a very grave offence. The respondent and his friends set out on a mission on 15 June 2001 torob unsuspecting victims of their jewellery. Having been unsuccessful in that mission at Oistins, they thendetermined to have a free ride home. Counsel explained during argument that "hobby class" implies a"freeness", something for nothing. Completely unmoved by the taxi driver's generosity in reducing his fareby two-thirds, the respondent, heartlessly and callously, resolved to hold himup at gun point. It was a deliberatedecision on the part of the respondent. He drew the gun from the waist of his trousers and cocked it. For what purpose? Clearly, to use it if necessary.

[20] Having a gun that evening was bad enough,having regard to the prohibition in this Island against the possession offirearms without a valid licence. Carrying the gun was in itself an aggravation. If the respondent had not been carrying agun, this case would hardly have escalated to the level that it did. But to use it is a further aggravatingelement in this crime which takes the sentence beyond the top end of the rangementioned in ***Bend and Murray***.

[21] In this regard, section 36(2) of the *PenalSystem Reform Act, Cap. 139* is particularly relevant in thisReference. It provides:

> "(2) The custodial sentence shall be
>
> > (a) for such term (not exceeding the permittedmaximum) as in the opinion of the court is commensurate with the seriousness ofthe offence, or the combination of the offence and other offences associatedwith the offence; or
> > (b) where the offence is a violent or sexualoffence, for such longer term (not exceeding the permitted maximum) as isnecessary to protect the public from serious harm from the offender."

[22] This Court has frequently explained duringthe past two years that the effect of the **Penal System Reform Act** is tointroduce a new sentencing regime in Barbados based on the seriousness of theoffence and the ***Act*** incorporates in Part IV notions of proportionality insentencing. It gives effect to thepenological theory of just deserts.

[23] When faced with a serious offence, asentencer must first ask the question whether the conduct of the defendanttakes it beyond the threshold for non-custodial punishment and into the realmof custodial punishment. If thesentencer determines that the conduct merits a custodial sentence, theaggravating and mitigating factors must then be weighed and, thereafter, asentence fixed that is proportionate to the seriousness of the offence.

[24] In our opinion, it is incontrovertiblethat the respondent's conduct as set out in paragraphs 4 to 8 supra merited imprisonment. In fact, at p.19 of the record, Mr. Pilgrimduring his plea in mitigation, seemed to have in contemplation a sentencesubstantially higher than that which was ultimately imposed. Counsel said:

> "….I can only urge the Courtthat in order to genuinely assist in rehabilitation, a sentence above 10 years,cannot help. It can

only harm."

[25] Applying the guidelines of *Bendand Murray*, the top end for this crime would have been in excess of 20years, in so far as a firearm was used. The starting point for computation of the sentence in this case shouldhave been at least 20 years. Giving dueweight to the 3 mitigating factors identified by the trial judge, as well asthe fact that the respondent spent 2 years in custody pending trial, we wouldhave expected a sentence of at least 15 years' imprisonment. However, due allowance has to be made for thefact that the respondent has come back a second time to be sentenced and webear in mind the principle of double jeopardy that has to be taken into accountin these References. It is our judgmentthat the sentence was unduly lenient and that we should substitute anappropriate sentence. We think that thetrial judge fell into error in paying too little regard to the aggravatingfactors of this crime and giving too much weight to the mitigating factors.This was a case in which section 36(2)(b) of the ***Penal System Reform Act*** oughtto have been applied. In our view asubstantially longer sentence than 4 years was required to protect thepublic. This was a violent andaggravated killing with an unlicensed firearm.

[26] Before disposing of this case we wish tomake two observations. Firstly, taxi drivers and public service vehicle driversgenerally, are a class of persons who render important and valuable service inthis Island. They must be able to earntheir living in the transportation sector free from the fear of maraudingyouths bent on violence. This Court hasa duty to protect the public as far as it can from the wanton violenceperpetrated by some of our young people. Public concern about illegal firearms and violence and the need forgeneral deterrence must be reflected in the sentences passed by thecourts. The public are entitled toexpect the courts to play their part in fighting the proliferation of firearmsand violence. These courts serve thepublic interest.

[27] Secondly, there must be consistency insentencing practice if public confidence in the administration of justice is tobe maintained. Offenders and the publicmust know clearly what will happen if the law is broken. This is important in order to maximize thedeterrent effects of sentencing and to ensure fairness of treatment betweenoffenders. We do not believe that publicconfidence in the criminal justice process would be maintained by allowing thesentence of the trial judge to remain unaltered.

Disposal

[28] The sentence of 4 years imposed by thetrial judge is quashed. In its place wesubstitute a sentence of 13 years to run from 5 June 2003.

Chief Justice

Justice of Appeal Justice of Appeal