

BARBADOS.

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL

Criminal Appeal No.11 of 2003

BETWEEN:

PIERRE ALEXANDER LORDE *Appellant*

AND

THE QUEEN *Respondent*

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. Peter D.H. Williams, Justice of Appeal
and the Hon. John A. Connell, Justice of Appeal

2005: 26 September and 21 November

2006: 24 February

Mr. C.L. Bolden Q.C. and Mr. M. Gordon for the Appellant

Mrs. D. Babb-Agard for the Respondent

DECISION

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INTRODUCTION

SIMMONS CJ: This is an appeal against sentence. The appellant was originally charged with the murder of Curtis Gunning (the deceased) on 29 April 2001. When the trial began on 17 February 2003 the appellant pleaded not guilty. However, on 21 February 2003, he changed his plea to guilty of manslaughter. **Moore J** sentenced him to 20 years' imprisonment on 7 March 2003. The sole issue to be decided is whether that sentence was excessive. However, we take the opportunity afforded by this appeal to revisit the case of **Bend and Murray v. R. (Criminal Appeals Nos.19 and 20 of 2001, unreported decision of 27 March 2002)**, review similar cases over a 13 year period, and to list some of the aggravating and mitigating factors relevant to the offence of manslaughter.

The Facts

- [2] The evidence of the eyewitnesses for the prosecution did not unfold in a coherent manner but its material features can be stated shortly. On the morning of 29 April 2001, there was an altercation between the deceased and the appellant at Silver Hill Housing Area. For at least two years, according to the deceased's mother, there was a continuing feud between the deceased and the appellant. So serious was this feud that the deceased on one occasion stabbed the appellant and was charged for wounding. He spent some time in prison on remand pending trial.
- [3] The deceased and the appellant began throwing rocks and bottles at each other while running around the terraced units comprising a block in the Housing Area. There was a break in the hostilities. The deceased went towards his house while the appellant joined a group of youngsters sitting 'on the block'. The deceased emerged from his home with two ice-picks in his hand and looked in the direction of the appellant. The appellant, armed with a bottle and a rock, ran after the deceased. Both men then hid behind a housing unit. The appellant took up a garden fork and the two men ran towards each other. The appellant stabbed the deceased with the fork. He fell to the ground and, while he was on the ground the appellant stabbed him twice and then threw two bricks in his chest and face.
- [4] The appellant gave a written statement to the police on 30 April 2001 after he was taken to the police station by his father. This statement formed part of the evidence in the prosecution case. His version of the events was that, while he was on his way from a shop the deceased attacked him with knives. He had a garden fork and, when the deceased ran towards him, he took up a rock and struck the deceased in his chest with it. The deceased kept coming towards him with the knives and he stabbed him 'a couple times' with the fork. He ended his statement by saying that he went to the police because every time the deceased interfered with him, he went to the police. In an oral statement to Sgt. Patrick Barrow and adduced as part of the prosecution case, the appellant said that the deceased "bore me wid two knives and I defend myself wid a fork I had."

The Plea in Mitigation

- [5] Mr. Michael Lashley, attorney-at-law, mitigated on behalf of the appellant at his trial. He urged upon the trial judge: (i) the appellant's plea of guilty; (ii) provocation; (iii) the appellant's poor socialisation, having grown up in a family prone to criminality (according to the pre-sentence report of a Probation Officer); (iv) the employment history of the appellant; (v) his profound remorse; and (vi) his age.

Reasons for Sentence

- [6] The trial judge explained his reasons for imposing the sentence in these words at pp.111-112 of the record.

"Pierre Alexander Lorde, I have listened to all that Mr. Lashley has urged on your behalf. I also listened to the Probation Officer when she read the pre-sentence report yesterday, and I also studied it myself last night, but this offence is so serious, that only a sentence of imprisonment can be justified.

The pre-sentence report shows that you were wayward from school days. In that you preferred to walk out of school rather than accept discipline. I accept that the circumstances of your early life, did not contribute too much to your proper socialisation, but we cannot go around using things like that to excuse these significant acts of cruelty. You removed Curtis Gunning from this world with cruel efficiency. A chilling brutishness. You stabbed that man repeatedly with a garden fork, whilst he was lying on his back on the ground, and then, as if you were confirming your cruelty and brutishness, you dropped two bricks on his chest.

After a week of evidence, you saw the writing on the wall and you changed your plea, and even though I have taken into

consideration that change of plea, I must still impose a long sentence of imprisonment. Normally for this sort of cruelty, I would have sentenced you to 25 years of imprisonment. You have expressed a wish for skills training and I shall give you ample time for that and for your social and psychological regeneration.

You are sentenced to 20 years in prison. Remove him please.”

The Submissions on Appeal

- [7] Before this Court, Mr. Gordon submitted that the approach of the trial judge was wrong. Counsel said that there was a failure properly to apply sections 35 to 37 of the **Penal System Reform Act, Cap. 139** and, in particular, to identify and weigh the aggravating and mitigating factors. Secondly, in Counsel's submission, the trial judge paid no regard to the guideline judgment in **Bend and Murray** or other decisions in this jurisdiction. Counsel therefore contended that if the trial judge had properly approached his task as sentencer he could not reasonably have imposed a sentence for as long as 20 years.
- [8] Mrs. Babb-Agard, for the Crown, submitted that the sentence should be upheld because the trial judge took into account the seriousness of the offence, the excessive use of force by the appellant and the pre-sentence report. To the extent that the trial judge mentioned a term of 25 years but finally imposed a sentence of 20 years, it was to be assumed that he gave some discount for the appellant's plea of guilty and his age.

Discussion

- [9] We cannot stress too strongly that, in every case where a court considers that a custodial sentence is merited on the facts, the starting point must be a consideration of the **Penal System Reform Act**. The arrangement of sections 35 to 37 indicates the way in which a court should approach the imposition of a custodial sentence. Section 35 deals with the concept of offence-seriousness.

It is enacted as follows:

“35.(1) This section applies where a person is convicted of an offence punishable with a custodial sentence other than one fixed by law.

(2) Subject to subsection (3), the court shall not pass a custodial sentence on the offender unless it is of opinion

(a) that the offence, or a combination of the offence and one other offence associated with the offence, was so serious that only such a sentence can be justified for the offence; or

(b) where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from the offender.

(3)

(4) Where a court passes a custodial sentence it is the court's duty

(a) in a case not falling within subsection (3), to state in open court that it is of the opinion that either or both of

paragraphs (a) and (b) of subsection (2) apply and why it is of that opinion; and

(b) *in any case, to explain to the offender in open court and in ordinary language why it is passing a custodial sentence on the offender.*"

[10] Guidance as to the length of custodial sentences is provided in s.36(2):

"(2) The custodial sentence shall be

(a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with the offence; or

(b) where the offence is a violent or sexual offence, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender."

Where a court passes a custodial sentence for a term longer than is commensurate with the seriousness of the offence, it must state in open court that it is of opinion that subsection (2)(b) above applies and why it is of that opinion; and it must explain to the offender in open court, in ordinary language the reason for his being sentenced to that particular term – s.36(3).

[11] In ***Bend and Murray*** at para.[18] this Court explained the penological philosophy of just deserts that underpins sections 35 and 36. The key concepts are offence-seriousness and proportionality. Following the structure of the Act, the first question which the sentencer must ask is whether the conduct of the offender is so serious that only a custodial sentence is appropriate. In other words, does the conduct reach a threshold that only custody will be appropriate? If the court is of the opinion that custody is appropriate, it must then pass a sentence proportionate to the seriousness of the offence. In the case of a violent or sexual offence, the court must not impose a sentence for a term longer than is necessary to protect the public from harm from the offender.

[12] In forming its opinion as to the seriousness of an offence and the length of a custodial sentence, the court is mandated by s.37(3) to take into account all the available information concerning the circumstances of the offence, including any aggravating or mitigating factors as well as information about the offender through a pre-sentence report, where it is considered desirable.

Aggravating and Mitigating Factors relevant to Manslaughter

[13] 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.

[14] 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.

[15] 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.

[16] 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.

Review of Previous Decisions

[17] Counsel on both sides cited a number of recent decisions of this Court. In ***Bend and Murray***, the Court upheld a sentence of 12 years imposed on the two appellants who were part of a group that beat a young man to death with planks of wood in broad daylight in the presence of terrified bystanders. The appellants had pleaded guilty

at the start of the trial and there was some evidence that the deceased had thrown a missile from a minibus earlier in the day in the direction of the appellants. But there was also evidence that the appellants had planned a reprisal and journeyed from St. Peter to St. James to carry it out.

- [18] In ***Dwight Ovid Alleyne v. R. (Criminal Appeal No.17 of 2003, unreported decision of 5 March 2004)***, this Court allowed an appeal against conviction for murder and substituted a conviction for manslaughter with a sentence of 8 years' imprisonment. In this case, there was a brawl in a nightclub. The appellant reacted with almost impulsive and sudden violence to words and/or conduct by the deceased and stabbed him twice. Only one stab wound was fatal.
- [19] ***D.P.P.'s Reference No.1 of 2003, R. v. Kurt Ricardo Skeete (unreported decision of 16 January 2004)*** was a case where this Court increased a sentence of 4 years for manslaughter to 13 following a reference by the Director of Public Prosecutions for review of the sentence. The prisoner, Skeete, was a young man who set out with other friends from St. Joseph to Oistins on a mission of robbery. Having not succeeded in robbing persons of their jewelry, they took a taxi back to St. Joseph well-knowing that they had no money to pay the fare. Quite callously, Skeete tried to rob the driver at gunpoint. He shot the driver in his head. At the trial he pleaded guilty to manslaughter and this plea, his age and genuine contrition were taken into account by the trial judge. However, the Court of Appeal took the view that the sentence of 4 years was unduly lenient because the trial judge paid too little regard to the aggravating features of the crime.
- [20] ***Bend and Murray*** was a guideline judgment in respect of manslaughter. In the course of its judgment, the Court of Appeal examined cases where, on a charge of murder, there was a conviction for manslaughter. That examination showed that, where firearms were used in the commission of homicide the top end of the scale of punishment is imprisonment for life (***Nicholas Scantlebury v. R.***). In ***Rodney Hinds v. R.***, the appellant, brandishing a gun, ordered ambulance personnel and persons surrounding the entrance to an ambulance to move out of his way. He then shot a man who was lying on a stretcher in the ambulance. His conviction for murder was quashed because of judicial error and a sentence of 25 years was imposed for the substituted conviction of manslaughter.
- [21] Similarly, in ***Anderson Sandiford v. R. (Criminal Appeal No.33 of 2003, unreported decision of 22 May 2001)*** the Court of Appeal quashed a conviction for murder and substituted a conviction for manslaughter with a sentence of 30 years' imprisonment. In that case the fatal wound was inflicted by a knife but a gun was also used in the attempted robbery which preceded the fatality. In setting guidelines in ***Bend and Murray***, the Court of Appeal did not refer to ***Sandiford*** but said:

[28] Thus, using Scantlebury and Hinds as indicative of the very top of the range and, having regard also to the fact that guns were used in those cases, whereas in Mark Savoury the instrument was a knife, 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 20 years. Use of a firearm will invariably be an aggravating factor which would take a sentence towards the top of the scale. Similarly, any mitigating factors would 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 into account and for which a discount on the sentence should be given.

- [22] These paragraphs indicate that the bottom of the scale for a grave case of manslaughter without the use of a

firearm is 16 years and the top of the scale is 20 years. But then the court must consider all of the circumstances of the offence including the aggravating and mitigating factors in arriving at a sentence that is commensurate with the seriousness of the offence. In other words, having arrived at the starting point the judge should then take account of the aggravating and mitigating factors which will take the period of custody above or below the starting point.

General Comments

[23] Before coming to a determination on the issue before us, we feel obliged to make some general comments of which sentencers should always be conscious in these types of manslaughter. First, the Constitution of Barbados places the highest value on the sanctity of human life and, save in the most exceptional circumstances, the punishment for manslaughter will inevitably be one of immediate custody. In this regard, a court must carefully examine the context in which the death occurred. Secondly, since the consequence of the offender's act is death, culpability will be an issue to which sentencers must direct their minds. The conduct of the offender will be a critical factor in determining the length of a sentence and whether that sentence should reflect a deterrent objective and public concern about the offence. Thirdly, as *Watkins LJ* observed in *R. v. Hussey (1989) 11 Cr.App.R.(S) 460* at 462, "cases of manslaughter vary infinitely. Therefore, so does the punishment for it." Implicit in that observation is a requirement to consider the total circumstances of the offence. Fourthly, although the punishment should always match the circumstances of the offence, consideration should be given to the principle of individualised sentencing in passing a sentence that would be adequate to protect the public.

Conclusion

[24] We are not satisfied that the trial judge applied all of the relevant considerations in determining the length of sentence. There is merit in Mr. Gordon's submissions that the trial judge did not appear to weigh adequately or at all the aggravating and mitigating factors; did not take account of the total circumstances of the case or consider the previous decisions of this Court.

[25] In our opinion, there were a number of factors which were especially relevant to a determination of the length of sentence. We must take into consideration the events of the day. On the morning of the offence, the atmosphere at Silver Hill Housing Area was highly-charged. Two men, obviously in a rage, were throwing bottles and stones at each other and running towards each other with dangerous weapons. There was evidence of provocation and self-defence. And there was evidence of a history of bad blood between the two young men. The trial judge seemed to have been concerned mainly with the excessive force used by the appellant to cause the deceased's death; hence his description of the appellant's conduct as being "cruelly efficient" and done with "chilling brutishness". The excessive force used was clearly an aggravating feature of this offence and the trial judge properly took it into account. But to have considered initially a sentence of 25 years seems to us to suggest that the trial judge equated the circumstances of this case with the more heinous situation in *Rodney Hinds* which involved the deliberate and cold-blooded shooting of a defenceless person. The factual context of this case was far different from the case of *Rodney Hinds* and was on a lower scale of culpability. On the other hand, the trial judge appeared to consider only the appellant's poor socialisation and the plea of guilty as matters of mitigation.

- [26] There were other mitigating factors which ought to have been considered. For example, the long-standing feud between the deceased and the appellant and the appellant's sense of grievance towards the deceased; the deceased's propensity to violence as accepted by his mother; his provocative conduct; the possibility that the conduct of the deceased induced in the appellant a genuine belief that he should act in self-defence especially having regard to the fact that the deceased had previously stabbed the appellant; the appellant's age (20 years); the absence of any convictions for serious violence; the expression of remorse which was referred to in the pre-sentence report. The appellant told the Probation Officer, "I sorry he dead. I was avoiding Curtis long. I just feel he tripped that morning." Remorse is an emotion whose genuineness can often be elusive or difficult to measure. But where there is evidence of remorse before a court, some consideration must be given to it.
- [27] We should interject here that, generally, a guilty plea is a separate matter from aggravation and mitigation. In this case the guilty plea came late in the trial and the trial judge seems to have thought that it was entered only because a conviction for murder was inevitable. Upon our consideration of the record, we cannot be so dogmatic. The prosecution was required to negate both provocation and self-defence to secure a conviction and, to the extent that there was evidence of both 'defences' in the prosecution's case, the burden on the prosecution was not light. However, for the appellant, his problem would have been the excessive force which he used. Mr. Gordon readily conceded that the appellant "went too far" and, even if he did not initially create a dangerous situation, he did not disengage from it.
- [28] In our judgment, the aggravating and mitigating factors were not properly balanced by the trial judge, having regard to the totality of the information available to him.
- [29] In all the circumstances of this case, bearing in mind that no firearm was used but also taking account of the excessive force used by the appellant, we are of opinion that this was a grave case of manslaughter but the starting point should have been 16 years in prison. Having weighed the aggravating and mitigating factors, giving a small discount for the late guilty plea and taking into account the two years spent by the appellant in prison pending trial, we are of the view that the appropriate sentence in this case is 12 years. We should mention that in **Franciso Ariza v. R. (Criminal Appeal No.20 of 1998, unreported decision of 4 November 1998)** the Court of Appeal took into account the length of time spent in prison between arrest and conviction. In the circumstances, the sentence is varied by a reduction from 20 years to 12. To that extent this appeal will be allowed. Sentence will run from its original date.

Guidelines

- [30] At the close of the arguments on the appeal, we promised to re-examine the guidelines in **Bend and Murray** in the light of the passage of time since that decision. We are still concerned that too many deaths are caused in Barbados through the use of illegal firearms. This Court has a clear duty to ensure that public confidence in the criminal justice process is maintained by the imposition of appropriate penalties which take into account penal objectives of deterrence (individual and general), just deserts and the protection of the public. The guidelines which we now issue are not to be construed as putting sentencers in a kind of strait jacket or fettering in any way the judicial discretion which must remain at the heart of the sentencing process. As **Lord Lane CJ** said in **Bashir Begum Bibi (1980) 71 Cr.App.R. 361 at 362**: "We are not aiming at uniformity of sentence. That would be impossible. We are aiming at uniformity of approach." (Emphasis supplied).

- [31] In developing the guidelines we have been acutely aware that certain offences (other than manslaughter) which may be committed with firearms can result in serious physical harm and ought to carry heavy penalties. We refer to the offences of causing serious bodily harm and endangering life. And although there will be situations where penalties for such offences may overlap with penalties for manslaughter, a system of sentencing should try, as far as practicable, to recognise a hierarchy of offences and penalties.
- [32] **Peter Williams JA** examined 40 previous decisions of the Court of Appeal between 1992 and 2005 where the charge was originally for murder but, ultimately the convictions and sentences were for manslaughter. As is to be expected, the sentences vary from as low as 4 years (**Kemal Blades, Criminal Appeal No.12 of 2002**) to life imprisonment (**Nicholas Scantlebury, Criminal Appeal No.14 of 1996**).
- [33] But the clearly discernible principle to be elicited from a consideration of those decisions is that the punishment is heavier where death was caused by a firearm in contrast to the situation where a knife or similar sharp-edged weapon was used. Where such a weapon was used, and in the absence of any mitigating factors, following a contested trial the most severe punishment was 20 years' imprisonment – (**Jessie Norris, Criminal Appeal No.57 of 1994**). The general range of sentences where there were mitigating factors was between 10 and 15 years although there were a number of sentences in single digits including, **Kemal Blades (supra)**, **Carmen Matthews, (Criminal Appeal No.15 of 1991)**, 7 years, and **Dwight Ovid Alleyne, (Criminal Appeal No.17 of 2003)**, 8 years.
- [34] Excluding **Nicholas Scantlebury**, the general range of sentences where a firearm was used was between 13 years **Hayden Bostic, (Criminal Appeal No.42 of 1998)** and 30 years **Anderson Sandiford, (Criminal Appeal No.33 of 2000)**. There were 4 sentences in this category between 15 and 20 years.
- [35] Having re-considered **Bend and Murray** and analysed the decisions, we issue the following guidelines:
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.
- [36] We fully recognise that there may, from time to time, be the odd case whose special or exceptional facts fall outside these guidelines. Nothing that we have said above should be construed as fettering the discretion of judges to deal with those special or exceptional cases as the justice of the cases requires.

Chief Justice

Justice of Appeal

Justice of Appeal