BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 2 of 2011

BETWEEN:

JEFFREY ADOLPHUS GITTENS **Appellant**

AND

THE QUEEN **Respondent**

BEFORE: The Hon. Sherman R. Moore, CHB, The Hon. Sandra P. Mason and The Hon. Andrew D. Burgess, Justices of Appeal.

2013: November 5

2014: March 7

Mr. Ralph Thorne, Q.C. for Appellant.

Mr. Alliston Seale for the Respondent.

DECISION

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Introduction:

[1] **MOORE JA:** On 25 June 2007, the appellant was convicted of the offence of murder and sentenced to death. He appealed that conviction and sentence and on 3 April 2009, this Court allowed the appeal, quashed the conviction for murder, substituted a conviction for manslaughter and sentenced the appellant to 20 years imprisonment.

[2] The appellant then appealed to the Caribbean Court of Justice **(CCJ)** which on 2 December 2009 remitted the case to the Court of Appeal with directions that a pre-sentence report be obtained and the appellant be re-sentenced.

[3] On 25 January 2011, in the High Court, **Worrell J,** having considered the pre-sentence report, imposed a sentence of 10 years imprisonment on the appellant.

[4] It is from that sentence of 10 years imprisonment that the appellant has now appealed to this court on two grounds: (i) that "the sentence is excessive" and (ii) that "the sentence of 10 years imprisonment was imposed in breach of the law and that, in any event, the term of the appellant's imprisonment had expired and his continued incarceration is unlawful".

[5] In order to give the full picture of the circumstances of this appeal, it is necessary to set out the facts, the case for the prosecution and the case for the defence as they appear in the decision of this court, at paragraphs [2] to [8] of the decision in **Criminal Appeal No. 10 of 2007**. Those paragraphs follow:

"**The Facts in outline**

[2] Weekes was an ardent cricket fan. He played cricket for St. John Cultural Sports Club. On Saturday 9 October 2004, he was on his way to the Club as he was "not out" batsman from the game on the previous Saturday and was due to complete his innings. He had gone to "Boss Shop" at Four Roads, St. John, where he was awaiting a lift from Lewis Spooner, the captain of the cricket team. Spooner was sitting down on the shop step but did not realise until he looked up that Weekes was already there. Weekes had his cricket bag on his shoulder and his bat in his hand. At this point the appellant drove up to the gas station at Four Roads, alighted from his car and walked over to the shop. There followed an altercation between Weekes and the appellant that led to Weekes receiving a blow to the face from which he suffered brain damage. On 13 October 2001, he died.

The Prosecution Case

[3] In view of the issues that arise in this appeal it is necessary to set out the evidence in some detail and with some precision. The prosecution case was based primarily on the eyewitness accounts of the events given by two witnesses: (Lewis) Spooner and Keith Walcott. Walcott was inside the shop eating pudding and souse until he moved to the doorway to see better what was going on. Spooner was outside of the shop and admitted that at times he was so distressed by what was taking place that he was "looking away". Spooner and Walcott gave somewhat different accounts of what transpired between the two men.

[4] We have tried based on the two eyewitness accounts to piece together a chronology of the events which took place within a very quick sequence and to analyse the same. Where appropriate the initials of either Spooner (LS) or Walcott (KW) are placed after a statement of fact that formed part of their evidence, with a page reference to the record of appeal. The material events were as follows:

(i) The appellant walked from his car "around" the shop. He "went up in Weekes' face and start like arguing ... he pushed his hand in Weekes' face like to provoke him to anger ...like they were quarrelling ... it was an argument because you coulda see that tempers was flaring and the voices was kind of loud" (LS, 121 and 125).

Note: there was no evidence of what was said between the appellant and Weekes and there was no evidence from KW that he saw the above incident.

(ii) Weekes hit the appellant "one lash" with the bat in his chest (LS, 121). Worrell hit the appellant with the bat across the front of his leg and this was the first blow struck (KW, 254 and 255).

Note: KW gave the above evidence only in response to cross-examination.

(iii) After the appellant was struck with the bat he "like stumbled back inside the shop ... stumble in the same door and then he got up, he like scuffle it off and get up and took out his knife, not that he fall, but just like react like. When he was struck he get pushed back in the door. So what happened is he get up and took out his knife" (LS, 122 and 127). "They were clenched together ... it was blows, a knife out ... (the appellant) pulled the knife from his pocket." (KW, 226).

(iv) The appellant "draw a knife and the two of them start like fighting ... the argument continued and it started getting more aggressive ... After that there, somehow the two of them like catch hold ... the accused had a knife in his (hand) and Mr. Weekes like was trying to get this knife from him ... Mr. Weekes tried to hold his hand to take the knife away from his hand...All the time the accused was like punching all around (Weekes') belly and thing with this knife, but Mr. Weekes was trying to get this knife from him; but I only realised then that nuff blood started coming like from the deceased. **I don't know where he get punch or whatever... The blood was like all cross his shirt and body...**the accused still had him holding up to a point, like the two of them was still struggling up to a point, although he had all of this blood on him...he started loosing a lot of blood and then one of the chaps walk him over to the fire station...(Apart from the knife) the accused had a rock, along with this knife when Mr. Weekes like was trying to get into him...Well, **I can't say that I saw when the accused pelt the rock,** because I start looking away and feeling bad about the whole situation and that I didn't try to part it earlier" (LS, 124, 128, 130 to 133 and 134). (Emphasis added).

KW, 227, 228 and 259 did see the appellant use the rock and subsequently pointed it out to the police; it was a "suck rock (with) different crowns on it, points and things". "After he tek up the rock, he was on the move and Weekes was following him, and it went straight, right in his face... he turned around and threw it at him... I mean, sir, it was so fast. And next thing Weekes and he together clenching, he clenching the knife, got the man down, he got the knife in his face still want to stab him...the man was dropping. He was staying like if you kill a fowl, he blood all 'bout the place ... **the man get stab."** (Emphasis added.)

(v) "The fighting stopped after a lot of blood was on Mr. Weekes' body and stuff like that ... the accused still had Weekes holding up to a point, like the two of them was still struggling up to a point, although he had all of this blood on him. He started losing a lot of blood ... he was there floundering, the blood spouting all over he." The appellant "like he just vanished ... like disappear." (LS 131, 132 and 260.)

(vi) The incident with the arguing and then the lashing "didn't last very long because everything happened fast" and the fighting lasted "ten minutes ... everything happened fast". (LS 124 and 129).

[5] An analysis of the prosecution evidence shows first that only Spooner and not Walcott saw the beginning of the incident. Further, according to that evidence (but contrary to the defence case) the appellant started the incident by putting his hands in Weekes' face which was prior to Weekes hitting him with the bat (pages 151 and 329A). Walcott saw only the hitting with the bat, which he described as "the first blow" (page 255). Secondly, Walcott, but not Spooner, saw the appellant pelt the rock in Weekes' face. Also, contrary to the defence case, Spooner did not remember seeing Weekes with any stone (pages 155 and 156) and Walcott gave no evidence of Weekes having a stone nor was he cross-examined on the same. In summary, the prosecution evidence was that the appellant started the incident and Weekes retaliated by hitting the appellant with the bat. Fighting then ensued and it was the prosecution case that the appellant fought Weekes with a knife and struck him in his face with a rock.

The Defence

[6] On 15 October 2004, the appellant accompanied by his then attorneys -at-law, not his present counsel, handed over in typed form to Sergeant Bridgeman a written statement produced at page 329A (of the record of appeal) as follows:

"My name is Jeffrey Gittens also known as "Jerry". I am thirty-two (32) years old and I live at Venture No.3, St. John. I work as a job hand doing gardening, yard cleaning, concrete mixing, etc.

On Saturday, 9th October, 2004, I went to the shop at Four Roads, St. John to buy a phone card. When I stepped on to the premises a gentleman called "Sis" was sitting by the shop's door. Another gentleman was standing in front of "Sis". I know him by seeing him before. As I approached, I heard the gentleman standing say, "He is the man that took up my brother money". Suddenly he gave me a hard lash with a bat to the back of my left ear and across my left shoulder. I felt dizzy and stumbled into the shop. I tried to escape through one of the doors in the shop but the man blocked me with the bat. I went back to where I entered trying to leave but he followed me. I remember I had a knife and I took it out to scare him off. He swiped at me with the bat and I tried to run away. He ran behind me and I fell down. The man running behind me also fell down near me.

When I got up I took up a rock. He got up with one too. We were about 6 feet apart. He said "I gine kill you for my brother's money. I am not leaving you". I was really scared and felt that he was serious in trying to kill me.

At the time when I fell my knife had dropped out of my hand and his bat had dropped, too.

After threatening me, he moved in on me with his stone about 3 or 4 lbs and I struck him with my

stone. We started to clinch and struggle. I was bleeding from the back of my ear and from my left hand. The man was bleeding from his face. The struggle continued for about 7 minutes or more as I tried to free myself from his grip. At one time I had my back on the step and he was still holding and choking me.

In the course of struggling on the ground I got back my knife. I called on Miller who was with me for help. I remember someone was shouting "Jerry gine get beat now". The man tried to get the knife from me and I was trying to prevent him from getting the knife and killing me by swiping at him. The struggle for the knife continued and after I was freed, I ran to my car and heard someone say that the man was bleeding.

I have never had any contact with this man before. The whole thing was sudden and unexpected. I did not know he was hurt except in his face until I heard that he had died".

[7] Mr. Edwards in his closing address levelled some trenchant criticism (page 583 to 591) at the appellant's prepared written statement. His submission was that material facts in the statement were not supported by any other evidence, for example:

(i) There was no evidence that Weekes said anything to the appellant or of the remark "Jerry gine get beat now".

(ii) There was no evidence that "a hard lash with a bat" started the altercation. Further, the positive findings of the doctor who examined the appellant were two wounds, one to the appellant's skull and the other to his hand, both of which she described as "minor" and "superficial" (page 184).

(iii) There was no evidence that Weekes had a rock.

(iv) There was no evidence that Weekes was "threatening" the appellant.

(v) There was no evidence that Weekes was "holding and choking" the appellant.

[8] At his trial the appellant gave an unsworn statement at page 560 as follows:

"Sir, before this incident happen, me and the deceased brother were gambling and they were tiefin" and while tiefin" I take up my money and went 'long. Sir, and the [written] statement that I give [to the police] is the truth and nothing else but the truth. Thank you".

The altercation seems to have arisen out of a gambling dispute as to whether the appellant had taken up money belonging to Weekes' brother, Leon, or whether he had taken up his own money because, as he alleged, the other gamblers were not playing fairly. The defence case was one of self-defence against an unprovoked attack".

The Appeal

Ground 1: Sentence Excessive

[6] Counsel for the appellant, in seeking to establish that the sentence was excessive, has (a) invoked the guidelines established in **Pierre Lorde v R (2006) 73 WIR 28 (Pierre Lorde)** and (b) drawn attention to **R v Ronald Gill (Gill)** (a case of which no information has been submitted to this court) in which counsel alleges that **Worrell J** imposed a sentence of 5 years imprisonment for manslaughter in circumstances in which the accused had poked the

deceased in an eye with an umbrella in retaliation for the deceased having driven a motor car over the accused's foot. The deceased died as a result of the injury inflicted by the umbrella.

[7] Counsel for the appellant submitted that in the instant case, the appellant was first struck with a cricket bat by the deceased and the appellant whilst in flight, struck the deceased with a stone, thereby causing his death. The evidence given at the trial (paragraph 5 above) disclosed otherwise.

[8] Counsel for the respondent submitted that **Worrell J,** having heard and seen the witnesses at the trial, was in the best position to determine the appropriate sentence. He also submitted that in his sentencing remarks the judge took all relevant matters into consideration before imposing the sentence.

[9] The judge thought that the starting point before considering the aggravating and mitigating factors "would have been 17 years". He weighed the aggravating and mitigating factors and thought a sentence of 15 years adequate. He then said at page 319 lines 2 to 9 and lines 12 to 21, respectively:

> "You have been there since 2004, April. The Court has to take that into consideration."

> "... and if that is taken into consideration and the time that you would have spent on remand, this Court is of the opinion that you should be given a discount of four years for that period. In the circumstances then, the sentence of this Court, taking into account all of the circumstances, aggravating and mitigating, the time that you have spent on remand pending trial and pending appeal, the court is of the opinion that a sentence of 10 years would meet the justice of the case,"...

[10] The judge used 17 years imprisonment as the starting point of the sentence and after considering the aggravating and mitigating factors, thought a sentence of 15 years appropriate. He then said that he would give a discount of 4 years for time spent on remand pending trial and appeal. In fact he gave a discount of 5 years. That was an exercise of discretion. He was under no legal duty to do so.

[11] We note that counsel for the appellant has not asserted that the judge acted on wrong principles or that the sentence was manifestly excessive or that he took into account matters that he should not have taken into account or that he omitted to take into account matters that he ought to have taken into account.

[12] With regard to **Gill,** counsel did not submit any information on the facts and circumstances of that case so we can express no opinion on it. If, however, counsel's reference to **Gill** was intended to demonstrate inconsistency in the judge's sentences for manslaughter, then we do not agree. Consistency in sentencing lies in the consistent application of correct sentencing principles and not the imposition of the identical number of years imprisonment on every offender.

[13] Every case turns on its own facts. It therefore follows that every case will attract the sentence deemed appropriate to that case. No judge is bound by the sentence he imposed in any particular case. It is often said that sentencing is an art not a science. Manslaughter attracts the broadest range of sentences, from a conditional discharge to life imprisonment.

[14] Counsel for the appellant also sought to rely on guideline no. 4 in **Pierre Lorde** which states that:

> "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."

[15] The evidence disclosed that the appellant was armed with a knife, an intrinsically dangerous weapon. The evidence also disclosed that the fatal injury was inflicted by a stone. The stone, also called the 'big rock', the tautologous 'rock stone', the 'poor man's gun' has now been dethroned from its position of pre-eminence by the gun as the main weapon of offence and weapon of defence but it is no less deadly than hitherto. The big rock needs no adjective, e.g., intrinsically dangerous weapon, to place it in the arsenal of deadly weapons. It has long since, through its notorious history as an effective and deadly weapon, earned its place. As a result, the courts of Barbados have tried many an accused for causing serious bodily harm, wounding, murder and manslaughter by the use of a 'big rock'.

[16] The judge must, therefore, in applying guidelines, have due regard to the facts and circumstances of the particular case, apply correct sentencing principles and where relevant, have due regard also to the cultural circumstances of Barbados: in this case, the use of the 'big rock' a missile that has always been used with the same deadly effect as the gun.

[17] In **Burton and Nurse v The Queen Criminal Appeals Nos. 1 & 4 of 2011 (unreported) (Burton and Nurse),** a very recent decision of this Court, at paragraphs [21] and [22] we quoted from two cases to illustrate that sentencing guidelines are not cast in stone and must be adapted as circumstances require. Those paragraphs follow:

> "[21] In **R v. Nicholas, The Times, April 23, 1986, Lord Lane, C.J.** emphasised that the guidelines were only guidelines and were not meant to be applied rigidly to every case. They were for assistance only and were not to be used as rules never to be departed from.

[22] Similar sentiments were expressed by **Sir David Simmons, C.J.,** at paragraph [30] of **Bend and Murray:**

> "[30] We have issued these guidelines on sentences for manslaughter merely to indicate the range or scale of sentences. Judges will still be free to tailor sentences according to the facts of a particular case. It must be remembered that, in our system, judicial discretion is at the heart of the sentencing process. That discretion will invite flexibility and, from time to time it will produce inconsistency. These guidelines are intended merely to assist judges and the legal profession, not to bind judges and fetter their discretion. At the end of the day sentencing is very much an art and not a science."

[18] Having regard to those premises, we find that this ground cannot be sustained.

Ground 2: Sentence in Breach of Law

[19] On this ground, counsel contended that the sentence of 10 years was imposed in breach of the law and that, in any event, the term of the appellant's imprisonment has expired and his continued incarceration is unlawful.

[20] With respect to the first contention, he submitted that **Romeo Hall v R (2011) 77 WIR (Hall)** took effect from 22 January 2005 when **Hall** committed the offence and not from 16 April 2011 when the decision of the **CCJ** was given. He cited Wilson J in **R v Gamble (1988) 2 SCR 595 (Gamble)** where he said, "It is fundamental to any legal system which recognises "the rule of law" that an accused must be tried and punished under the law in force at the time the offence is committed". He also submitted that legal effect is measured from the date of the criminal conduct and not from the date of the sentence.

[21] With regard to the second contention, counsel submitted that **Hall's** sentencing date was 27 May 2008, the date of sentencing by the trial judge and since that date preceded 25 January 2011 when the appellant was sentenced, the decision handed down by the **CCJ** took effect from 27 May 2008 which date is earlier than 25 January 2011 when the appellant was finally sentenced.

[22] With regard to the first contention, the dictum of Wilson J enunciated in **Gamble** is enshrined in **section 18(4)** of **the Constitution** which provides:

> "(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is more severe in degree or nature than the most severe penalty that might have been imposed for that offence at the time when it was committed".

The penalty for manslaughter is set out in **section 6** of the **Offences Against The Person Act, Cap. 141 which** provides:

> "Any person convicted of manslaughter is liable to be sentenced to imprisonment for life".

In the premises, the appellant was tried and punished in accordance with the law in force at the time the offence was committed. There is, therefore, no merit in that contention.

[23] With regard to the second contention, the High Court is the sentencing court and the Court of Appeal is the reviewing court. In the instant case the trial judge, before imposing the sentence, considered all relevant issues of law. The CCJ's decision in **Hall** was yet to come. Therefore, the trial judge could not have taken **Hall** into account before imposing the sentence and, accordingly, he did not err in law. As a result, in reviewing the sentence there was no error of law for this Court to correct.

[24] This conclusion is supported by the fact that the CCJ did not determine that **Hall** was to be applied retroactively. In any case, this Court in **Burton and Nurse** held that **Hall** is not retroactive. This Court, being a court of appeal, is bound by its own decisions until it is overruled. We therefore find no merit in this contention.

Disposal

[25] The established principle is that an appellate court will only interfere if the judge exercised his discretion on wrong principles or the sentence was manifestly excessive. **Worrell J** did not fall into any such error.

[26] We therefore hold the sentence entirely appropriate in the circumstances and accordingly the appeal is dismissed and the sentence is affirmed.

Justice of Appeal

Justice of Appeal

Justice of Appeal