BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No.23 of 2008

BETWEEN:

WAYNE HAREWOOD ***Appellant***

AND

THE QUEEN ***Respondent***

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. Frederick Waterman, and the Hon. Sherman Moore, Justices of Appeal

2009: 23 April; 21 December

Dr. Erskine Hinds Q.C. and Ms. Grace McCaskie for the appellant

Mr. Roy Hurley for the respondent

DECISION

Introduction

SIMMONS CJ: The appellant was arraigned for the murder of Andrew Browne (the deceased) on 24 August 2007. He pleaded not guilty of murder but guilty of manslaughter. The Director of Public Prosecutions accepted the guilty plea "based on the evidence of provocation as well as the medical and psychiatric history of the accused". A comprehensive report of Dr. Maisha Emmanuel, consultant psychiatrist, spoke of the appellant's long history of marijuana and cocaine use from age 16 and concluded that at the time of the offence when the appellant was aged 33, he was "angry and experiencing psychotic symptoms as a direct result of poly-drug intoxication". ***Reifer J*** sentenced the appellant to 15 years' imprisonment on 4 September 2008. He has appealed on the ground that the sentence is excessive.

[2] *Inter alia*, this appeal raises an important question concerning the use that may be made of previous convictions of an accused person in the context of the ***Penal System Reform Act, Cap.139*** (the Act). The appellant had 22 previous convictions.

The Background

[3] Both the deceased and the appellant were practising homosexuals. It appears that they had a very stormy relationship which ended in the deceased's violent death. The two men met in 2005 when the appellant was prostituting himself in the area of the Y.M.C.A. The deceased took the appellant to his abode at Condor House and the appellant took up residence there. According to the appellant's written statement, he worked and gave money to the deceased who still engaged in prostitution. Their love for each other was so intense that the appellant readily confessed to burglarising a large store in order to get a birthday gift for the deceased. For that offence the appellant was convicted and imprisoned for 3 years. During his incarceration the deceased never visited the appellant.

[4] On 4 July 2007 the appellant was released from prison and that evening he visited the deceased at Condor House. Sometime later the deceased told the appellant that he heard that he used "to hit blackies" (a combination of marijuana and cocaine) and he was concerned about the appellant. They had a disagreement with the proprietors of Condor House, so they moved out to another place at 10th Avenue, Belleville. But again there were problems with the landlord and they moved to yet another avenue in Belleville. It was at this last address that the relationship between the two men deteriorated.

[5] Apparently the landlord of this property and the deceased were having a sexual affair and the appellant suggested to the deceased that, in those circumstances, he should not be paying rent to the landlord. When the deceased explained that the landlord paid him to have sex with him, the appellant was enraged. The two men fought. The appellant says that he did not give the deceased any money for three weeks.

[6] About 18 August 2007 there was an altercation between the appellant and the accused near to the Y.M.C.A. and the deceased told the appellant that their relationship was at an end. They walked towards Central Police Station quarrelling and eventually made their way to a house where they were living. There was an incident between them in the house. The appellant armed himself with a small knife but did not injure the deceased with it. The police were called and, in the words of the appellant, "I wait 'til the police come and I get arrested for threatening Andrew with the knife".

[7] The appellant was charged with possession of an offensive weapon viz. a knife. He pleaded guilty before the Magistrate and was placed on a bond for 12 months to keep away from the deceased. But, on the very night of this conviction, the appellant sought out the deceased. He says that they talked.

[8] On the following evening, the appellant went to the deceased's house. The deceased spoke to him through a window and said that there was a man with him. After the man left, the appellant and the deceased talked about their relationship, including 'the blackies' that the appellant was abusing. According to the appellant, the deceased professed his love for him and he was willing to give their relationship another chance but he said that the appellant should seek drug rehabilitation.

[9] The appellant claimed that friends destroyed the relationship. On 23 July 2007, he became very angry. It seems that a mutual friend told the appellant that the deceased was HIV positive. When confronted by the appellant about his HIV status, the deceased "got real beserk". They quarrelled and fought. He did not wish the relationship to end but he was upset at the intermeddling of their friends. He says that he went to the deceased's house and threatened to kill him because the deceased "had people laughing" at him. The appellant pulled out some flaps from the first door he saw, opened it, and then kicked open the bedroom door. He had a bottle in his hand. In the bedroom he took up a knife and he hit the deceased. Then he destroyed a DVD player. The appellant admits that he left the house shouting that he would kill the deceased and walked to the area of the Globe cinema. He said that he had made up his mind to kill the deceased. He proceeded to smoke marijuana and crack cocaine and to drink alcohol.

[10] Next morning the appellant went to the deceased's house intending to kill him. He hid behind a wall and saw the deceased. He ran towards him and they fought in the kitchen. He stabbed the deceased 21 times. When he saw a crowd of people coming, the appellant ceased stabbing the deceased. He threw away his shirt and pants and made his way towards the Flour Mill where he threw the knife into the sea.

[11] There was evidence before the Court that the appellant had a mental or psychiatric history. On three occasions between July 1994 and April 2005, he was admitted to the Psychiatric Hospital following appearances in the Magistrate's Court on criminal charges. On at least two occasions he attempted suicide while in prison. In her report, Dr. Emmanuel, wrote –

> "Of note Mr. Harewood was intoxicated with marijuana, cocaine and alcohol at the time. By his own admission when intoxicated, he became aggressive and paranoid and experienced visual and auditory hallucinations. This was also documented in clinical notes from the Psychiatric Hospital."

The Ground of Appeal

[12] Dr. Erskine Hinds Q.C., for the appellant, submitted first that the sentencing judge erred in law because she took into account or gave weight to the several previous convictions of the appellant while making a determination of the seriousness of the offence.

[13] Counsel referred to s.40 of the ***Penal System Reform Act***, ***Cap. 139*** which provides –

> "(1) An offence shall not be regarded as more serious for the purposes of any provision of this Act by reason of any previous convictions of the offender or any failure on the part of the offender to respond to previous sentences.
>
> (2) Where any aggravating factors of an offence are disclosed by the circumstances of other offences committed by the offender, nothing in this Act prevents the court from taking those factors into account for the purpose of forming an opinion as to the seriousness of the offence."

[14] The purpose and intent of subsection (1) are plain. A judge must not use the previous convictions of an offender in order to make a determination of the seriousness of an offence. Even before the passing of the Act, the common law had affirmed a similar principle as that enunciated in s.40(1) – see ***Queen v. R. (1981) 3 Cr.App.R. (S) 245*** and ***Bailey v. R. (1988) 10 Cr.App.R.(S) 231***.

[15] Section 40 is identical with s.29 of the ***English Criminal Justice Act 1991*** on which the Act is modelled. In ***Bexley and Others v. R. (1993) 14 Cr.App.R. (S) 462***, ***Lord Taylor CJ*** interpreted s.29(1). He said at p.465:

> "The approach, commonly adopted before the Act, of regarding the instant offence as more serious and deserving of custody because it repeated previous offending which has been treated more leniently is now forbidden. Thus the second limit of section 29(1) expressly provides that failure of the offender to respond to previous sentences is not to be regarded as rendering the instant offence more serious.
>
> It follows that familiar sentencing remarks before the Act such as, "you have a long history of committing offences of this kind", or "you have been given every chance, fines, probation, community service, and here you are again," will no longer be appropriate. They would be statutorily irrelevant indicators of seriousness in the instant offence. So much is clear from section 29(1)."

[16] Then His Lordship turned to s.29(2) and asked –

> "What then is the effect of s.29(2)? Whereas subsection (1) refers to "previous convictions", by contrast subsection (2) refers to "the circumstances of other offences". In our judgment the effect of the contrast is this. A sentencer cannot regard the mere existence of previous convictions as relevant to the seriousness of the instant offence A or its continuation with one other offence B, but he can take into account on that issue the circumstances of previous offences or of other offences presently before the court.
>
> What circumstances of other offences can he take into account? Only those which disclose some aggravating factor in offence A or offence B. In other words the sentencer must concentrate his attention on A or A and B. Keeping that offence or combination in the forefront of his mind, he may properly ask himself whether there are any circumstances of other offences committed by the offender which shed light on offence A or offence B, so as to disclose some aggravating factor in either of them. If an aggravating factor is revealed by such circumstances, the sentencer is entitled to weigh it in deciding the seriousness of either A or A and B in combination. Relevant circumstances will usually be those which bear upon the offender's guilty mind. For example, they may show an aggravating element of planning, deliberation or selection; or they may disclose some added gravity of criminal purpose in the instant offence."

[17] One example cited by ***Lord Taylor*** may assist in appreciating the subtle nuances in his interpretation of the section.

> "If the instant offence is house burglary by night, the mere fact that the offender has six previous convictions for house burglary by night would not make the instant offence more serious, although it could rebut a mitigation on behalf of the offender that his offence was a one-off piece of opportunism. However, if the burglary was at the home of an 80-year-old widow, the fact that the previous offences were also burglaries of elderly widows would be a circumstance disclosing an aggravating factor in the instant offence; to wit, that the offender had deliberately targeted or selected an elderly victim."

[18] Section 29 proved to be problematic. It has been repealed and is now replaced by s.143(2) of the ***Criminal Justice Act 2003*** in these terms:

> "In considering the seriousness of an offence (the current offence) committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular to –

(a) the nature of the offence to which the conviction relates, and

(b) the time that has elapsed since the conviction."

We venture to suggest that s.40 of the Act should be amended along similar lines to express more clearly the purposes for which previous convictions may be used.

[19] We feel obliged to make an observation that is pertinent to an interpretation of s.40(2) of the Act. In this jurisdiction, the full details and circumstances of previous offences are not usually placed before the sentencing judge. The police officer who produces the criminal record of a convicted offender reads from the offender's 'conviction card' on which are recorded: the date of an offence; the court which dealt with the offence; the offence and the sentence of the court. In the instant case the appellant's record did not reveal any serious offences against the person involving violence except one conviction for robbery in March 1999 and, of course, the conviction for threatening words towards the deceased on 20 August 2007 referred to at para.[9]. Sentencing judges must therefore be very careful of the use they make of previous convictions as a consideration in sentencing. But, of course, it is wrong in principle to sentence an offender on his record.

[20] We are not persuaded that ***Reifer J*** allowed the previous convictions of the appellant to influence her in determining the seriousness of the offence. Section 40 was fully argued before the sentencing judge, together with relevant citations and she was fully alerted to the correct approach to be taken in relation to the issue of the use of previous convictions. In our view and, contrary to the submissions of counsel, she considered those previous convictions in evaluating the factors aggravating the offence. In particular, she noted the abusive nature of the relationship between the two men (implicit in the appellant's written statement to the police); his abuse of narcotic substances and his propensity to commit theft to support his drug habit.

[21] At p.104 ***Reifer J*** said –

"The aggravating factors far outweigh the mitigating ones and the reaction to the provocation was clearly disproportionate. This murderous intent is mitigated by the circumstances of this unfortunate matter in which the Crown has conceded that there are elements of provocation and loss of control aided by extreme drug use and alcohol use. Your criminal record reveals 22 convictions with a preponderance of convictions for theft, indicative of a life of crime for one relatively young, to support what the report shows to be a significant drug habit.

I have taken note of your unfortunate history and the pleas of your counsel. There are, however, certain aspects of this case that cannot be avoided, namely, the abusive nature of the relationship between yourself and the deceased, the fact that you, in the words of the probation officer and of your own volition, continued with this dysfunctional behaviour and lifestyle inclusive of the use of drugs and alcohol.

I have gleaned from the various reports that you have embraced this negative lifestyle and show no intent to rehabilitate."

[22] Counsel criticised the sentencing judge's remarks to the effect that the several reports before her suggested that the appellant had "embraced "[a] negative lifestyle" and showed no intention to rehabilitate. Again, those remarks were made in the context of the judge's weighing the aggravating and mitigating factors surrounding the offence. In accordance with the provisions of s.37 of the Act she was entitled to take into account and give due weight to the pre-sentence report of the probation officer, Mrs. Stella Scantlebury, the medical report of Dr. Emmanuel and the psychiatric report of Dr. Ermine Belle. Such reports are especially relevant to a sentencer's determination of the length of a custodial sentence. That is plain from reading ss.36 and 37 of the Act together.

[23] Counsel's third submission was that the judge took into account two matters not warranted by the evidence; namely, that the killing was a culmination of 'a pattern of violence' and that the appellant was a danger to himself and others. In addition, the sentencing judge was criticised for referring to the appellant's negative lifestyle. There is no merit in this submission. The pre-sentence report of the probation officer, on which she was cross-examined, is redolent with evidence – even from the appellant himself – that his abuse of narcotics led him to a life of crime. In Mrs. Scantlebury's opinion, "he decided, of his own volition, to continue with his dysfunctional behaviour and the lifestyle that eventually placed him before the court". The judge was perfectly entitled to give such weight as she thought fit to the report and Mrs. Scantlebury's opinion.

[24] Moreover, the reports and the appellant's statement spoke eloquently of a tempestuous relationship between the appellant and the deceased. His attempted suicide and his convictions for burglary betrayed a proclivity to being a danger to himself and others. As Mr. Hurley pointed out, there was not the same degree of persistent domestic violence as in the case of ***Padmore v. R. (Criminal Appeal No.18 of 2005, unreported decision of 30 March 2007)*** but there certainly was "an emerging pattern of violence". In the factual matrix of this case, the judge's comment that the appellant "embraced a negative lifestyle and showed no intent to rehabilitate" was, in our view, a reference to his drug abuse. Both the report of the probation officer and that of Dr. Emmanuel provided ample evidence of the appellant's drug addiction. There is no compelling evidence that the judge held the fact of the appellant's homosexuality against him.

[25] On the issue of the length of the sentence, Dr. Hinds invited us to hold that the facts of this case were more in line with ***Bend and Murray v. R (Criminal Appeal Nos.19 and 20 of 2001 unreported decision of 27 March 2002)*** than with ***Pierre Lorde (2006) 73 WIR 28***. In our judgment, the facts of this case are far worse than those in ***Bend and Murray***. In the sentencing judge's opinion the circumstances of this case, when looked at objectively, took it outside the guidelines in ***Pierre Lorde***. We agree. The starting point which the sentencing judge identified as 20 years seems to us eminently reasonable.

Conclusion

[26] It has not been demonstrated that the sentencing judge erred in principle or extent in deciding upon the appropriate sentence. It certainly was not manifestly excessive. Indeed, having regard to the appellant's premeditation, his expressed intent to kill the deceased and the resultant severity of the appellant's attack on the deceased, the sentence was entirely proportionate. ***Reifer J*** carefully balanced and assessed the aggravating and mitigating factors and gave appropriate consideration to the experts' reports. It seems to us that the legitimate penal objectives of incapacitation and public protection were relevant considerations to be taken into account by the sentencing judge in fixing sentence. These objectives were amply achieved by the term of

imprisonment. And to the extent that the sentencing judge ordered that the appellant attend drug rehabilitation programmes and undergo psychological and psychiatric counselling during his incarceration, it is plain that she also paid attention to the principle of individualised sentencing and the rehabilitation of the appellant.

Disposal

[27] In the result the appeal is dismissed. The sentence is affirmed and will run with effect from 25 June 2008.

Chief Justice

Justice of Appeal

Justice of Appeal