BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 24 of 2008

BETWEEN

JERMAINE JULIUS HAZELL *Appellant*

AND

THE QUEEN *Respondent*

BEFORE: The Honourable Peter D.H. Williams, the Honourable Sherman R. Moore and the Honourable Sandra P. Mason, Justices of Appeal

2010: March 15;

2011: September 16

Mr. Andrew Pilgrim and Mrs. Angella Mitchell-Gittens for the Appellant

Mr. Charles Leacock Q.C., Mr. Roy Hurley and Mrs. Wanda Blair for the Respondent

DECISION

PETER WILLIAMS JA

I. INTRODUCTION

[1] The appellant, Jermaine Julius Hazell, appealed against the sentence of 8 years' imprisonment imposed on him on 17 October 2008 by ***Chandler J*** following his plea on 16 September 2008 of guilty to unlawful wounding with intent to do serious bodily harm.

II. THE SENTENCING HEARING

[2] Mr. Charles Leacock Q.C., Director of Public Prosecutions (DPP) outlined the facts, abbreviated as follows:

> The accused is 24 years old. On 9 July 2006 there was a party at "Tims on the Highway" along Spring Garden Highway in celebration of the Italian victory of the World Cup. The accused was at that party with a number of his friends, and so was the deceased, Jammal Adams, who at the time was 22 years old. It was while they were all on the floor dancing that one of the friends of the accused bumped into or stepped onto the toes of one of the deceased's friends and there was an exchange of words, which developed into an exchange of fists, as a result of their inebriated state. In short, a fight broke out on the floor and the accused as well as the deceased and his friends were ejected by the security from the area and sent on the outside. The accused was not the aggressor of the incident on the dance floor.
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> It was when they were outside that tempers got hot again and another fight erupted. Tracy Barrow said, "the shorter guy (appellant) and the deceased got into an argument. I saw the shorter guy flaring off his hands in the taller guy's face. I saw the shorter guy looked down on the ground as if looking for something. It looked to me that the shorter guy took up something like a stone and strike the taller guy on the left side

of his head. I saw the taller guy hat fall off". It was in those circumstances that the deceased got injured. He got stabbed in the neck with a bottle that was broken, it was a single stab wound to the neck that killed him, that resulted in haemorrhage and shock as a result of the injury. Tanya Reveira said, "the man that was stabbed did not have anything with him. The short fellow, that's the accused, did not have anything. He went and came back with something in his hand."

The accused after he stabbed the deceased left the area and he went home. A day or two later he co-operated fully with the police and he gave them the statement which really forms the basis of the prosecution's case and which explains his role in the matter.

[3] The DPP read the appellant's statement given to the police on the day following the incident:

"Yesterday, me and some fellows from up by me went down by Tims. We went and sit down for a little while, then when the performers come on, we went up inside de crowd near to de stage. A guy was jumping up, jumping up and jump on pun a little youngster that was with we. So I turn and I ask he, "Big man, man, you ain't got to jump 'bout so rough," and the man turned round and give me a cuff. Me and he start fighting and then four other men bong in--and start to cuff me up pon my head. De bouncer in Tims come and take up the last fellow that was on me and put he outside.

After fifteen minutes I went outside on my way home. I butt de same man. He take up a bottle off the ground and brek it and charge at me. I grab de top of de bottle and that is how I manage to get cut. I get the bottle out he hand and I juck he somewhere in his neck or shoulder. I run off pun de highway. When I get a little ways down Spring Garden I see a ice-cream van. I flag down de van and tell de driver to give me a drop home in Greenfields."

[4] The DPP stated that:

"The appellant acted in self-defence and that is why a more serious charge is not being proffered. Where he got into trouble with the law here is after he took the bottle from the man, when the man was effectively disarmed, he stabbed him, and for that reason he has properly pleaded to the charge, a much lesser charge that he has pleaded to and I have accepted it, because at the point he was free to leave or he was free to go. So, he is guilty of wounding, but I cannot hold him accountable for the more serious charge, when in fact, he was the one under attack in those circumstances."

[5] The appellant had one minor conviction for which he was reprimanded and discharged; it is not relevant to be taken into account. The appellant said to the court:

"I am sorry for what happened and sorry for the pain I caused the deceased family and I'm just sorry it had to turn out this way."

[6] The judge had for his consideration a Social Enquiry Report dated 14 October 2008 prepared and produced by Mr. Paul Bentham, Probation Officer. The appellant was born on 5 December 1981. His background and education were as follows: brought up in a single parent family; left secondary school without certification; trained in a skill but he first worked as a labourer and his subsequent steady employment was in low skilled jobs. The report on him as a person was favourable as indeed was the probation report generally.

[7] Three character witnesses gave evidence on his behalf and they spoke well of him. They expressed their surprise and shock when they heard of the incident in which he was involved, which they regarded as out of character for him. One of them was his former employer and stated that he was willing to re-employ him.

[8] In mitigation of sentence, Mrs. Mitchell-Gittens submitted to the judge that there were no aggravating factors relating to the offence: no planning or premeditation and no use of a firearm or dangerous weapon. The mitigating factors in relation to the offender were: no relevant previous convictions; a cooperative and deeply remorseful appellant and a favourable pre-sentence report; his age of 24 years at the time of the offence and the scope for rehabilitation. Counsel made reference to the period of over two years during which the appellant had been incarcerated pending trial. Counsel also stressed his responsible attitude towards the offence and his guilty plea.

[9] Mrs. Mitchell-Gittens submitted that the manslaughter guidelines in ***Pierre Lorde (2006) 73 W.I.R 28*** are properly applicable only to manslaughter cases. Counsel relied on a number of "murder cases that were reduced to wounding with intent or simple wounding". On the basis of those cases, she invited the judge to pass a non-custodial sentence; she said:

"Given he has come with a timely plea of guilty, given the remorse that attends it, given all the attendant mitigating circumstances, given the absence of several of the relevant aggravating features, given the excess of two years which he has spent on remand in this matter, I would urge the court to impose a sentence that would see him going back to his family."

[10] The judge's sentencing remarks to the appellant were in part as follows:

> "I have referred to the fact that you have expressed remorse and I have taken into account all the case law which has been cited, paid due regard to the pre-sentencing report and the most stirring plea of mitigation which your counsel has made on your behalf. The fact that you have been on remand for just over two years, I also take into account in terms of an appropriate discount on the sentence which I will impose on you. So in terms of the guidelines in ***Pierre Lorde***…I have read this case thoroughly and I have looked at all of the mitigating and aggravating circumstances. I have taken into account the plea of mitigation, the fact that also this argument started inside of Tims and ended up outside, but also the fact that you disarmed the deceased by taking the bottle from him and that at that stage had you taken a sensible and appropriate course this young man would not have lost his life. In the circumstances rather than impose a sentence of ten years upon you, I would take into account the fact that you would have been on remand for two years, give an appropriate discount for that, having regard to all of the mitigating circumstances, the sentence of this court is that you will spend eight years in prison with effect from the date of your conviction."

III. THE APPEAL

[11] We granted leave to appeal against sentence on the ground that the sentence was excessive. Mrs. Mitchell-Gittens in a skeleton argument filed on the behalf of the appellant stated that the judge erred in law in two respects:

1. He sentenced the appellant for the offence of manslaughter when the offence to which the appellant had pleaded guilty was wounding with intent.

2. He failed to distinguish the cases of Andrew Holder, Kirk Marshall, Gerald Clarke, Carlos Millington and Catrina Dyer.

It is convenient to discuss those two points below in the context of the propriety of the indictment containing a first count of murder and a second count of wounding.

[12] There are no guidelines in this jurisdiction on sentencing for wounding. However, assistance can be obtained from the principles set out in the (English) Sentencing Guidelines Council definitive guideline on offences of assault that do not result in the death of the victim: ***Archbold 2011 Supplement*** at ***K-113***. The seriousness of the offence of wounding is to be determined by the culpability of the offender and the harm caused.

IV. DISPOSAL

[13] We do not find that the judge's starting point of 10 years' imprisonment was excessive taking into account the seriousness of the offence and the aggravating and mitigating factors. The judge deducted two years to take account of the time spent on remand and the mitigating circumstances thereby arriving at a sentence of eight years. However, we would compute the sentence as follows. From the 10 years we would make a specific discount for the guilty plea of 20% as was suggested in ***R. v. Richard Hurley, DPP's Reference No. 2 of 2010***, ***unreported decision of 8 July 2011*** at ***paragraph [92]***. The notional sentence is therefore eight years. Full credit must be given in accordance with ***(Romeo) da Costa Hall v. R. (2011) 77 WIR 66 CCJ*** (decided after the judge imposed sentence) for the two years and 69 days spent in custody from 10 July 2006 to 17 October 2008, the date of sentence. The appeal is therefore allowed and the sentence of eight years imposed is varied to a sentence of five years and 296 days to commence from the date of the original sentence imposed on 17 October 2008.

[14] The appellant pleaded guilty to wounding on 16 September 2008 and was sentenced on 17 October 2008. The judge ordered his sentence to commence from the date of conviction. However, a sentence runs from the date that it was imposed not from the date of conviction: see ***(Romeo) da Costa Hall, CCJ*** at ***paragraph [25]*** and ***Ryan Harewood v. R., Criminal Appeal No. 18 of 2007, unreported decision given on 16 September 2009*** at ***paragraph [1]*** referring to ***R. v. Gilbert [1975] 1 WLR 1012 CA***.

V. ADDENDUM ON THE INDICTMENT

[15] The hearing of this appeal came before a number of differently constituted panels over a protracted period. Somewhere along the line concern was expressed by one or other of those panels as to the propriety of the form of the indictment which charged a capital offence, murder, with a non-capital offence of wounding in circumstances where the wounding was the cause of death. Counsel were invited to make submissions on the issue.

[16] The appellant was indicted on two counts as follows:

FIRST COUNT

STATEMENT OF OFFENCE

Murder

PARTICULARS OF OFFENCE

Jermaine Julius Hazell on the 9th day of July, 2006, in the parish of St. Michael in this Island, murdered Jammal Adams.

SECOND COUNT

STATEMENT OF OFFENCE

Wounding with intent. Contrary to Section 16 of the Offences Against the Person Act, Chapter 141.

PARTICULARS OF OFFENCE

Jermaine Julius Hazell on the 9th day of July, 2006, in the parish of St. Michael in this Island, unlawfully wounded Jammal Adams with intent to do him serious bodily harm or to maim, disfigure or disable him.

[17] The case of ***Romeo da Costa Hall v. R., Criminal Appeal No. 15 of 2008, unreported decision given on 12 March 2010,*** was an appeal against sentence in which the appellant pleaded not guilty to murder but guilty to wounding and was sentenced to six years' imprisonment. This Court ***(Waterman, Moore and Mason JJJA)*** dismissed the appeal and stated at ***paragraph [2]***:

> "During the course of the argument on this appeal this Court noted that the indictment as drafted joined the capital offence of murder with the non-capital offence of causing serious bodily harm with intent. However, this issue was not made a ground of appeal by Counsel for the appellant. Although the court recognised at the time the inherent difficulties which the drafting of indictments in this manner creates, the Court did not request that it be addressed on the issue whether an indictment which contains a count for murder may also contain counts charging offences, other than murder. In the circumstances, the Court has decided not to address this issue in the instant appeal."

[18] The ***Caribbean Court of Justice (CCJ)*** allowed the appeal and, unlike the lower courts, gave full credit for the time spent by the appellant on remand pending trial. However, the ***CCJ*** was not invited to and did not address the issue as to whether it was appropriate to accept a plea of guilty of wounding where the offender had caused the death of another. It was in these circumstances that we heard submissions on the issue. Although the submissions were cursory, it would still be helpful to state our tentative opinion on them.

[19] It should be made clear that no objection was taken to the fact that the appellant was indicted with murder and wounding on the same indictment. Further, there has been no suggestion that the indictment was in any way defective or contrary to the ***Indictments Act, Cap. 136***. The sole issue was the propriety of the counts of murder and wounding being on the same indictment and of the acceptance of the plea of guilty of wounding where the death has been caused by the criminal conduct of the defendant.

[20] The DPP acknowledges that he cannot proceed to trial on both counts because the jury provisions for murder are different from those for a wounding trial. This is explained by ***Dana S. Seetahal SC*** in her book ***"Commonwealth Caribbean Criminal Practice and Procedure", Third Edition (2011)*** at ***page 85***:

> "There is one significant exception to the principle that offences should be joined in one indictment if they are founded on the same facts or form part of a series in the Commonwealth Caribbean, and that is in respect of capital offences. By and large, the death penalty still exists in these countries and murder is one offence for which it is mandatory. It has been held that capital offences should not be tried with non-capital offences. This is because statute in general envisages different modes for trial of capital and non-capital offences: *R v McLeish* (1980) 31 WIR 317. A majority verdict is not accepted in a capital case, for instance. Furthermore, the number of jurors for murder or treason is generally 12 and for non-capital offences less. Thus a jury of 12 cannot sit on a non-capital offence where statute provides a different number of jurors for non-capital offences: *Seeraj Ajodha v The State* (1981) 32 WIR 360 p. 373, PC. If a jury comprises a greater number of jurors in trying a capital offence than a non-capital offence, any ensuing conviction for such later offence by a jury selected to try the capital offence will, in the absence of permitting statutory provisions, be invalid."

[21] The ***Juries Act, Cap. 115B, section 24***, provides that in trials on indictment for murder (and treason) the array shall consist of 12 jurors and in trials on indictment for any other criminal matter the array shall consist of nine jurors. Further, ***section 38*** provides that in a trial on indictment for murder (or treason) the verdict of the jury is required to be unanimous in contrast to non-capital cases where majority verdicts are permitted.

[22] Nevertheless, the DPP maintained that he can properly indict with counts of both murder and wounding and then decide on which count to proceed to trial or accept a plea of guilty to wounding which caused the death. The merit or otherwise of this claim can be determined by a careful examination of the ingredients of the offences of murder, manslaughter and wounding.

[23] ***Professor Andrew Ashworth*** in his book ***"Principles of Criminal Law", Sixth Edition (2009),*** makes a distinction between homicide offences or fatal violations of the person (discussed in Chapter 7) and non-fatal violations of the person (discussed in Chapter 8). Murder and manslaughter are homicide offences that have a common conduct element because they consist of behaviour which causes death. On the other hand wounding with intent or reckless wounding are offences of non-fatal physical violation because the criminal behaviour does not result in death.

[24] In this case the appellant was indicted for murder, which required him to have been responsible for the death of the victim but he was also indicted for wounding which required him to have been responsible for wounding the victim. The conduct element for murder and wounding are different; the former requires death but the latter excludes death. Implicit in a conviction for murder or manslaughter is the fact that the convicted person has caused the death of another person; implicit in a conviction for wounding is the fact that the convicted person has wounded but not caused the death of another person. It follows that where death has been caused by the offender, he is properly indicted for murder or manslaughter and not for wounding.

[25] The second count was wounding with intent under ***section 16*** of the ***Offences Against the Person Act, Cap. 141 (OAPA)***, which provides that:

> "Any person who with intent to maim, disfigure or disable any person, or to do some serious bodily harm to any person, or to resist or prevent the lawful arrest of any person, unlawfully wounds or does any serious bodily harm to any person by any means whatever is guilty of an offence and is liable on conviction on indictment to imprisonment for life."

Section 16 is in similar terms to section 18 of the (English) Offences Against the Person Act 1861. The charging standards for the offence under section 18 are set out in the (English) Crown Prosecution Service which makes it clear that the offence requires the offender either to have wounded another person or to have inflicted grievous [serious] bodily harm on another. The charging standards for murder and manslaughter require death and a causal link between the act of the offender and the death.

[26] In one of the sentencing decisions referred to below a plea of guilty to causing serious bodily harm under ***section 17*** of the ***OAPA*** was accepted. ***Section 17*** provides that:

> "Any person who unlawfully and maliciously wounds or inflicts any serious bodily harm upon any other person, either with or without any weapon or instrument, is guilty of an offence which is triable on indictment or summarily."

The main difference between ***sections 16*** and ***17*** is in the fault element: ***section 16*** requires intention whereas ***section 17*** requires recklessness. The punishment is also different; the maximum punishment on indictment for a ***section 17*** offence is imprisonment for a term of 10 years.

[27] Death caused by the offender is a necessary ingredient of the offence of murder and manslaughter; it is not an ingredient of the offence of wounding. The position is supported by a consideration of the implications of sentencing for wounding where the offender has caused a death. We were unable to find any cases (except in this jurisdiction) in which the offender had been sentenced for wounding in circumstances in which he had caused the death of the victim. An offender cannot properly be sentenced for wounding when he has caused death; the only appropriate sentence is for manslaughter.

[28] The dilemma created by accepting a plea of guilty to wounding where death has occurred is exemplified by trying to apply the ***Pierre Lorde*** guidelines to arrive at an appropriate sentence. The ***Pierre Lorde*** guidelines at ***paragraph [23]*** are expressly applicable to manslaughter cases only***.*** We therefore agree with counsel for the appellant that the ***Pierre Lorde*** guidelines were inappropriately applied to the guilty plea of wounding: see ***(Romeo) da Costa Hall, CA*** decision at ***paragraph [15]*** and ***CCJ*** decision at ***paragraph [5]***. It does not however follow that the appellant was thereby sentenced too severely because as the DPP has stressed, imprisonment for life is the maximum punishment for both offences. Nevertheless, it is still important to differentiate the ingredients of the two offences.

[29] The second point raised by the appellant's counsel was that the judge failed to follow his earlier sentencing decisions in which there were indictments for murder but guilty pleas of wounding were accepted. Out of deference to the industry of counsel, who has produced the transcripts of the cases, we record briefly the circumstances of each case.

> 1. ***Andrew Holder,*** Indictment No. 1 of 2006, was indicted for murder but pleaded guilty to causing serious bodily harm with intent contrary to ***section 16*** of the ***OAPA***. He was 22 years old at the time of the incident and killed his best friend with a knife during an argument over marijuana. However, he had been in prison on remand for over 5 years and was on bail and in employment when sentenced to 2 years' imprisonment, suspended for 2 years.

2. ***Kirk Marshall***, Indictment No. 9 of 2007, was indicted for murder but pleaded guilty to causing serious bodily harm with intent contrary to ***section 16*** of the ***OAPA***. He was 32 years old at the time of the incident and killed the deceased with a knife following an altercation about disciplining the deceased's child. He had been in prison on remand for over 3 years. He was sentenced to 3 years' imprisonment, suspended for 3 years.

3. ***Gerald Clarke***, Indictment No. 91 of 2007, was indicted for murder but pleaded guilty to causing serious bodily harm contrary to ***section 17*** of the ***OAPA***. He was 43 years old at the time of the incident and killed the deceased by striking him in the temple with a hammer during the prison riot. He was sentenced to 3 years' imprisonment, suspended for 3 years.

4. ***Carlos Millington***, Indictment No. 124 of 2007, was indicted for murder but pleaded guilty to causing serious bodily harm with intent contrary to ***section 16*** of the ***OAPA***. He was 26 years old at the time of the incident and killed his brother by striking him with an axe. He was on bail and in employment when sentenced to 2 years' imprisonment, suspended for 2 years.

We do not find these cases helpful since the vital fact of each case; namely, the death of the victim is not taken into account as an ingredient of the wounding offences to which the offenders pleaded guilty.

[30] The fifth case was not one in which the defendant was indicted for murder and pleaded guilty to wounding as stated in the appellant's skeleton argument but a case in which the appellant was indicted for and pleaded guilty to manslaughter.

5. ***Catrina Dyer***, Indictment No. 64 of 2007, was indicted for manslaughter and pleaded guilty. She was 24 years old at the time of the incident and was responsible for the death of her 19 month old infant son by dropping him on the pavement after he bit her. She was sentenced to 3 years' imprisonment, suspended for 2 years.

The facts and circumstances of the above case are very distinct from those of the instant case.

[31] The maximum punishment for manslaughter and wounding with intent is the same; imprisonment for life (***sections 6*** and ***16*** of the ***OAPA***). It has been stated in numerous cases that the offence of manslaughter attracts the widest band of sentences; in this jurisdiction it has varied from life imprisonment (***Scantlebury (Nicholas) v. R., Criminal Appeal No. 14 of 1996, unreported decision given on 27 September 1999***) to probation (***Richard Hurley*** at ***paragraphs [41]*** and ***[73]***). It follows that neither the Crown nor the defendant is prejudiced by a plea of guilty to manslaughter because the punishment can be as severe or as lenient as the facts and circumstances warrant. However, the offence must be a true reflection of those facts and circumstances.

Justice of Appeal Justice of Appeal

MOORE JA

[32] I agree with the disposal of this case. I have no comment on the Addendum on the Indictment.

Justice of Appeal