BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeals Nos. 1 & 4 of 2011

BETWEEN:

JEFFREY RAY BURTON **Appellants**

KEMAR ANDERSON NURSE

AND

THE QUEEN **Respondent**

Before: The Hon. Marston C.D. Gibson, Chief Justice,
The Hon. Sherman R. Moore, CHB and The Hon. Sandra P. Mason, Justices of Appeal.

2012: June 27 & July 2

2013: October 4

Mr.
Andrew Pilgrim for the Appellant Burton.

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

Mrs.
Donna Babb-Agard, Q.C., Deputy Director of Public Prosecutions for the Respondent.

DECISION

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Introduction

MOORE
JA: The appellants
(Burton and Nurse) were charged with the murder of Averell Wright (Wright)
which was committed on 6 October 2006. On 8 March 2010 both appellants pleaded guilty
to manslaughter and on 20 January 2011 Burton was sentenced to 7 years
imprisonment and Nurse was sentenced to 5 years imprisonment. Each appellant has appealed on the sole ground that the sentence is excessive.

The
Facts

[2] It is now necessary to set out a summary of the facts as given by counsel for the prosecution:

"The deceased Wright was born in London, England on 9 November 1990 to Andrea Taitt who resides in Christ Church and Averell Robert Wright Snr., who at the time the police file was compiled, resided in England. He was a pupil of Hilda Skeene Primary School before going to the Garrison Secondary School. There he was involved in the extra-curricular activities of dancing, Karate, cricket and football. He was also a junior member of the Paradise Football Club.

Burton who is now 19 years old was born in Jamaica on 18 November 1990 to Marcia Fredericks, a Jamaican national and Anthony Burton. At the time in question Marcia Fredericks resided in Barbados and Anthony Burton resided in Jamaica. He came to Barbados in 2005 and was a pupil of the Ellerslie Secondary School.

Nurse was born in Barbados on 19 April 1982 to Jennifer Nurse and Lennox Scantlebury. He was a pupil of Ellerslie Secondary School.

The facts revealed that the incident out of which this case arose, although occurring on 6 October 2006, had its genesis in an incident that occurred on 29 September, 2006. On that day Stephen McAllister, who was then 14 years old and a pupil of the Garrison Secondary School, lost his mobile telephone on the school bus and at that time the appellants Nurse and Burton and the deceased Wright were on that bus and there seemed to have been some disagreement among them. On 6 October 2006 the appellants attended school and they boarded the Ellerslie school bus in the afternoon. There were other pupils on the bus. The appellants sat at the rear of the bus. The driver, Anthony Ifill, took the bus along the usual route and picked up pupils, including Wright, from the Garrison Secondary School and his friends Tonya Bartlett and Stephen McAllister.

When the bus reached Maxwell, Christ Church, the appellant Burton got up from his seat at the rear of the bus and started walking towards the front of the bus. The deceased Wright was standing and he asked the appellant Burton why he had kicked him the day before. Burton said, "Get from in front of me." Wright could not move and Burton pushed him. In response Wright shoved him and they started exchanging blows. As the bus travelled towards Oistins the fight seemed to continue until they were fighting through the bus door and onto the pavement. The appellant Nurse then jumped out of the bus and joined the scuffle. There was kicking and cuffing of the deceased Wright in the process. The appellant Burton then drew a knife from his bag and plunged it into Wright's chest.

Eyewitness Tonya Bartlett then 15 years old, who was a friend of the deceased, said that the appellant Burton got up to get out of the bus and Wright put his hand in Burton's way and Burton told him to move his hand twice and Wright refused to do so. Wright eventually moved his hand after Tonya told him, "Man let the boy pass." Burton eventually pushed Wright's hand out of the way and then he slapped him around the head. That's what the eye-witness Tonya Bartlett said. The two began to scuffle. She referred to accused Nurse as 'Fat Man' that's how she knew him, and she said he came to the back of the bus and pushed Wright through the door of the bus and when Wright turned around Tonya saw Burton stab him with the knife. The knife was a black-handled knife, with a red scarf tied around the handle. "He pulled out the knife", she said, "and he 'jucked' at Averell."

Eyewitness Stephen McAllister who was also on the bus, said that he saw Burton's hand pull back from Wright's body but Wright managed to get away and started to run and he ran towards the Kentucky Fried Chicken Restaurant in Oistins. Another eyewitness said that while Burton had the knife in his hand and as Wright ran he stopped near a garbage can, picked it up and threw it at the appellants to prevent them from getting close to him. He then ran in the direction of the bus but the bus driver closed the door. So he ran in the direction of Kentucky Fried Chicken and collapsed.

Shanique Agard a pupil of Queen's College and Shakima Hamblin corroborated the evidence of the other witnesses. They went to Wright's assistance and one of those pupils sheltered him with her umbrella as it was raining.

About 4:30 p.m. Station Sergeant 995 Peter Dawson and P.C. 1260 Marvin Brathwaite apprehended the appellants along Enterprise Road. Appellant Burton was carrying a blue haversack on his back and appellant Nurse was seen trying to conceal an ice pick in the guard wall that they were passing. Station Sergeant Dawson invited them to accompany him to the Oistins Police Station, which they did voluntarily.

At Oistins Police Station, Station Sergeant Dawson searched the accused Burton's blue haversack and found a black-handled knife and a red scarf and the knife appeared to have blood on its surface.

The appellant Nurse was interviewed in the presence of his father and he refused to

give the police a written statement but told them, inter alia, "I was just trying to part the fight and stop it."

The appellant Burton was interviewed in the presence of his mother. He made certain oral statements and gave the following written statement:

> "Yesterday I was in the school bus and I ring the bell to get off at Oistins. While I was trying to come out the bus his friend tried to block me from coming out the bus. I asked for an excuse twice and he did not move, so I walked under his hand. When I walked under his hand I butt up on Averell and I ask he excuse. I tried to went under his hand and he started to beat me and I fell out of the bus. When I fell out the bus he started to beat me more. I had a knife in my bag. The knife fell out of my bag. He started to run to the knife so I started to run to it too. I reached the knife before he and I grabbed up the knife and I hold up the knife and told he stop but he did not stop. He ran straight up into the knife and cuff me in my mouth. Then he ran and Kemar Nurse ran behind he and I started running behind Kemar Nurse shouting that he had got cut. Then we turn back and started to run behind the beach where I was caught by police. Why he wanted to beat me is because the 4 October I was fighting with one of his fellow school mates and he came in the fight and started to beat me and I kick he and I went off the bus and he come back Friday with his friends to beat me."

A post-mortem examination was carried out on the body of the deceased Wright by Dr. Stephen Jones who concluded that the cause of death was as a result of a stab wound to the chest with haemorrhage and shock. Dr. Jones also noted the following injuries: a skin incision, 2.5 centimetres by 1.5 centimetres at the anterior chest which entered the pericardial sac and a small abrasion to the face.

The Pre-Sentencing Reports

Appellant Burton

[3] The Vice Principal of Bridge Port High School, Jamaica, described Burton as generally disruptive, unsettled in class and excessively talkative. He was involved in a fight in grade 9. His attitude towards school work needed improvement. He related well to his peers but they negatively influenced his behaviour and his academic progress. Burton's performance at school was below average as a result of his irregular attendance. His last attendance at Bridge Port High

School was given as December 2005.

[4] The Acting Principal of Ellerslie Secondary School, Barbados, reported that between January and July 2005 Burton spent two terms at that school. He returned there in January 2006 and was suspended for five days for gambling during that very month.

[5] On his arrest for this offence, Burton was remanded to the Government Industrial School. The discipline at that institution seems to have had a salutary effect on him, for reports from that school show that he made good use of his time there and gained passes in Music, Social Studies and English.

[6] Burton expresses remorse about the incident and regrets the pain and agony that it has caused the victim's family.

Appellant Nurse

[7] Nurse received his education at Mount Tabor Primary School and Ellerslie Secondary School. He volunteered information that on one occasion he took a weapon to school to scare pupils who wanted to take his cellular phone and he recalled that at age 14 years his school associates encouraged him to smoke illegal drugs. At school he was interested in sports, particularly cricket.

[8] The report from Reverend Doctor Cicely Athill-Horsford shows a positive aspect of his life. He and his family are regular worshippers at the Mount Tabor Moravian Church and he willingly prepares for church functions and is responding favourably to counselling offered by her.

[9] Nurse had limited academic success having obtained two school certificates. He left school at the age of 17 years.

[10] Nurse has shown remorse: expressing regret at the event and stating that he feels 'bad' for the family and their loss.

Sentencing Remarks

[11] In his sentencing remarks in respect of both appellants, the judge took their ages, contriteness and early guilty pleas into account. He also took into account the time each appellant spent on remand. The judge also considered the relevant provisions of the Penal System Reform Act, Cap. 139 and guideline decisions relied on by counsel for the appellants when they made their speeches in mitigation. He said that he also had to take into account the fact that both appellants were armed. He concluded that the offence was serious and he considered that a period of incarceration was necessary. He noted that Nurse had not inflicted the fatal wound and treated him as the secondary party. In keeping with his assessment of the roles played by the appellants he sentenced Burton to 7 years imprisonment and Nurse to 5 years imprisonment.

Submissions on Appeal

[12] One ground of appeal was advanced on behalf of the

appellants. Both counsel contended that the sentence was excessive. Counsel for both appellants relied on: (i) Romeo Hall v. R. CCJ Appeal No. CR1 of 2010 (Romeo Hall) and submitted that each appellant should have been given a full discount for time spent on remand; and (ii) that the sentences should be in accord with those imposed in Pierre Lorde v. R (2006) 73 WIR 28 (Pierre Lorde), Bend and Murray v. R (Criminal Appeals Nos. 19 and 20 of 2001, unreported decision of 27 March 2002) and other guideline judgments of this court.

[13] Counsel for the respondent submitted that the judge could not have applied Romeo Hall because it had not yet been decided and it cannot operate retro-actively. With regard to the guideline cases, counsel said that the judge made it quite clear that notwithstanding the mitigating factors he considered the case a serious one especially because of the loss of life.

Discussion

[14] A sentence is excessive where:

(a) it is not justified by law;

(b) it has been passed on the wrong factual basis;

(c) some matter has been improperly taken into account or there is some fresh matter to be taken into account; or,

(d) it was wrong in principle or manifestly excessive (Archbold 2011 (p. 1105) pars. 7-137 to 7-141).

[15] The maximum sentence for manslaughter is life imprisonment: the sentences are therefore justified by law. The facts are not in dispute. Counsel for the appellants have not complained that the trial judge improperly took some matter into account or that there is some fresh matter to be taken into account. They have also not complained that the trial judge acted on wrong principles or that the sentence was manifestly excessive.

[16] They have simply contended, in effect, that the trial judge ought to have foreseen that the Caribbean Court of Justice (CCJ) would have decided Romeo Hall as it did.

[17] The legislature is the law making body for Barbados. When the legislature passes an enactment and wishes it to have retroactive effect it is specifically so provided in the enactment. It is the duty of the court to expound and apply the law, not to make it. Therefore when a person was sentenced in accordance with the legislation in force at the time, and the tariff prevailing at the time, the Court of Appeal will not intervene on account of subsequent changes in the legislation, or in the tariff. That proposition found expression and support in R v. Graham [1999] 2 Cr. App. R. (S) 312, CA where Rose LJ said at p. 315:

“A defendant sentenced lawfully, in accordance with the prevailing tariff, and when all factors relevant to sentence were known to the sentencing judge, can, in our view, hardly be described as the victim of such a miscarriage. Secondly, an alteration in the statutory maxima or minima penalty between sentence and reference cannot, in our view, give rise to legitimate grievance.”

[18] There is nothing that has been said in Romeo Hall that would lead us to believe that the CCJ contemplated that it should be applied retroactively. In fact that court put the matter beyond doubt in Jerry Anderson Weekes v The Queen AL 0011 of 2011, an application before the CCJ for an extension of time within which to appeal, where Nelson J said:

“It is obvious that a judgment can only take effect from then on into the future. It can’t be retrospective otherwise you would never be able to come to new decisions in the law. The law could not evolve because you’d be constantly going one step forward and a hundred steps backwards. I don’t think that’s the way it operates.”

Counsel for the appellants also contended that the sentences imposed on the appellants ought to have been directly influenced by the tariffs suggested in the guideline judgments.

In the guideline judgments much emphasis is placed on the weapon used to kill. We do not think that the method of killing or the weapon used to kill is necessarily the main, and is certainly not the sole factor taken into consideration by the sentencer when determining the appropriate sentence to impose for the offence. Sentencing is an art, not a science. Every sentence must be considered with due regard being had to all of the circumstances of the particular case. Therefore, the sentence imposed in every case must be left to the discretion of the sentencer acting on known sentencing principles.

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.”

[23] The vagaries likely to be encountered in the application of a guideline judgment were highlighted in R v. Mawson, 13 Cr. App. R. (S.) 218 in which it was said that no guideline case could cover the entire field of offences arising under a particular section of an Act. In that regard the difficulty in applying the guideline judgments, especially Pierre Lorde, to the instant appeals was acknowledged by Mr. Thorne, Q.C. in his argument. He said: "I do respect the guidelines in Pierre Lorde. What I do not find attractive is the fact that those guidelines are deficient in terms of the many categories which may arise". (See page 60 of the Appeal record).

Conclusion

[24] The fact that this offence had its genesis in an incident which occurred on 29 September 2006 is a sufficient element of pre-meditation by the appellants. Both the appellants were armed, Burton with a knife and Nurse with an ice pick. After Wright was stabbed and he ran away they pursued him. When they were apprehended Nurse was trying to hide his ice pick in a crack in a guard wall.

[25] Burton's response to his detention shows that he needs a disciplined atmosphere where he can be nurtured and rehabilitated. Even though Nurse's report was more favourable than Burton's, he admitted that on one occasion he took a weapon to school to scare pupils who wanted to take his cellular phone, and also recalled that at age 14 years his school associates encouraged him to smoke illegal drugs. Given these circumstances, we think that he too would benefit from a period of counselling and rehabilitation in a disciplined atmosphere.

[26] This court will only interfere where a sentence was manifestly excessive or wrong in principle and "will not interfere with the discretion of the sentencing court merely on the ground that it might have passed a somewhat different sentence": see R v. Gumbs, 19 Cr. App. R. 74. This court aims not at uniformity of sentence but at uniformity of approach: see R v. Bibi, 71 Cr. App. R. 360.

[27] In our opinion the judge did not err in principle and the sentence was not excessive.

Disposal

[28] We therefore dismiss these appeals and affirm the sentences.

Chief Justice

Justice of Appeal **Justice of Appeal**