BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeals Nos. 19 and 20 of 2001

(Consolidated)

BETWEEN:

ROMAIN BEND

and

RODNEY MURRAY

(Appellants)

AND

THE QUEEN

(Respondent)

Before: The Hon. Sir David Simmons, K.A., B.C.H., Chief Justice, the Hon. Errol Chase, Justice of Appeal, and the Hon. Colin Williams, Justice of Appeal

2002: February 15 and March 27

Mr. Andrew Pilgrim and Ms. Alicia Archer for appellant Bend

Mr. Ralph Thorne and Mr. Stephen Conliffe for appellant Murray

Mr. Charles Leacock Q.C., Director of Public Prosecutions, and Mr. Delroy Saddler for the Respondent

DECISION

SIMMONS CJ: This is an appeal against sentence. Four young men, Lennox Boyce, Jeffrey Joseph and the two appellants, were originally charged together with the murder of Marquelle Hippolyte ("the deceased") on April 15, 1999. However, on January 10, 2001, appellant Murray pleaded Guilty to manslaughter whereas appellant Bend pleaded Guilty to manslaughter on January 24, 2001. Sentence was postponed and, eventually on February 27, 2001, they were each sentenced to 12 years' imprisonment.

[2] The other two accused, Boyce and Joseph, pleaded Not Guilty on January 24, 2001, but were convicted of murder by the jury on February 2, 2001 and sentenced to death. [1]

The Facts

[3] The facts were that on April 10, 1999, about 11.00 a.m., the deceased and the appellant Murray were passengers on a bus travelling towards St. James. There was an argument between them. When the bus reached St. Albans in St. James, either the deceased or a friend of his, threw a rock into the bus. Murray was struck on his hand.

[4] Later that day, Boyce, Joseph, Murray and Bend were at the Alexandra School's playing field in St. Peter. The four of them left St. Peter and took a bus headed for the Weston district in St. James.

[5] They got off the bus at Weston where they saw the deceased. When he saw them, he ran. They pursued him. While running the deceased fell. The Crown's case was that all four men then held the deceased and beat him unmercifully with rocks and "2x4" planks of wood. This terrible beating took place in the full view of many residents of the area who begged the appellants and their co-accused to cease the beating. Many of the bystanders screamed and there were shouts of "Murder".

[6] The deceased suffered multiple injuries including brain damage. Medical and surgical interventions could not save his life. He died on April 15, 1999 from shock and haemmorhage as a result of head injuries. He was 22 years old. According to the Forensic Pathologist, there was "haemmorhage all over the brain".

The Appeal

[7] Both Mr. Pilgrim and Mr. Thorne argue that the sentence of 12 years is excessive. Mr. Pilgrim submits that the sentence is out of line with other sentences for manslaughter and he referred to a number of local cases (not reported). He argued that there was no [2] settled range of sentences for manslaughter; this case did not involve firearms or knives and the appellants in a "ride-by shooting" were sentenced to 10 years by the Court of Appeal – see Forde and Callender v. R. (Criminal Appeals Nos.13 and 14 of 1997, unreported)).

[8] Secondly, it was submitted by Mr. Pilgrim that the trial judge was not entitled to use his knowledge of the whole case, gained from the trial of Joseph and Boyce for the purpose of determining an appropriate sentence for the appellants.

[9] When sentencing the appellants, the trial judge had said to them:

"I must say that this was a rather brutal offence because, having heard the case of the other two who pleaded not guilty, I am fairly familiar with the facts of the case and I don't accept for one minute that you went there to talk to anybody or to resolve any conflict."

[10] Mr. Thorne, on behalf of appellant Murray, adopted Mr. Pilgrim's submissions and was emphatic that it was not proper for the trial judge to have taken into account what he had heard during the trial of Boyce and Joseph. The Director of Public Prosecutions disagreed. For his part, he contended that we ought to increase the sentence and referred us to two decisions of this Court.

[11] In Mark Savoury v. R. (Criminal Appeal No.62 of 1995 unreported) on a plea of guilty to manslaughter the Court of Appeal reduced a sentence of life imprisonment to 20 years. The appellant had originally been charged for the murder of a fellow prisoner whom he had stabbed in his neck.

In Ian Edward Cumberbatch v. R. (Criminal Appeal No.40 of 1996 unreported), the appellant was found guilty of manslaughter by a jury and sentenced to imprisonment for 15 years. On Christmas Day, 1995, he had walked into a house where guests were having [3] lunch and stabbed the deceased in a rage born of jealousy over the loss of his wife's attentions. The Court of Appeal affirmed the sentence.

Procedure re Sentencing of Accomplices

[12] Counsel's submissions raise an interesting and important question as to the proper course to be followed by a trial judge where several persons are joined in an indictment and some plead Guilty and others plead Not Guilty. The English Court of Appeal has had occasion to consider the proper procedure in many cases over the years. The procedure contended for by Counsel i.e. restricting the trial judge from using evidence adduced in the contested trial, found support in two decisions of Roskill LJ in the mid-seventies – See Bremner and Rawlings (unreported March 4, 1974) and Cripps (unreported December 19, 1975).

[13] However, as long ago as 1949, Lord Goddard LCJ in the case of Robert Payne 34 CAR 43 at p.45 held that:

"The proper course is to postpone sentence on the prisoner who has pleaded Guilty until the other or others who have pleaded Not Guilty have been tried, and then to bring the prisoner who has pleaded guilty up to Court where the other or others have been tried and let all who have been convicted be dealt with together, because by that time the Court will be in possession of the facts relating to all of them and will be able to assess properly the degrees of guilt among them." (emphasis supplied)

[14] More recently, in Patrick Smith [1988] 10 CR. APP. R. (S) 271 it was held that the sentencer is not obliged to sentence one conspirator on the basis of facts advanced by him and then to sentence the other on the basis of totally disparate facts advanced by them. The sentencer was obliged to determine the factual situation and was not bound by the rules of admissibility which would be applicable in the trial of an issue of guilt or innocence. Lord Lane CJ said at p. 276: [4]

"He (the trial judge) can take into account the contents of witness statements or depositions; he can take into account evidence he may have heard in the trial of co-defendants. He must, however, bear in mind the danger that self-serving statements are likely to be untrue, that such statements have as a rule not been subjected to cross-examination and that the particular defendant whom he is sentencing may not have had the opportunity to put forward his version of the events…"

[15] The Court of Appeal in Patrick Smith approved the decisions in Taggart [1979] 1 CR. APP. R. (S) 144 and Depledge [1979] 1 CR. APP. R. (S) 185 inter alia. In 1997, the principles established in those cases were reiterated – See Winter, Colk and Wilson [1997] 1 CR. APP. R. (S) 331. What we may call "the Roskill view" is no longer good law.

[16] In this appeal we are of opinion that the trial judge followed the proper procedure and was well entitled to inform himself of the totality of facts adduced during the pleas of mitigation and at the trial of those who had pleaded Not Guilty.

The Appropriate Sentence – The Penal System Reform Act

[17] We turn now to the matter of an appropriate sentence. The Penal System Reform Act 1998-50 ("the Act") was not argued before us but we think that it is important to make some observations on it. This Act radically and fundamentally reformed the penal system in Barbados. Whereas prior to its enactment, sentencing options in the courts of Barbados were limited to imprisonment, fines, probation and flogging (so seldom used as virtually to have fallen into desuetude), the Act has introduced a new regime of punishments. The powers of criminal courts are now enlarged to allow for sentences other than imprisonment, fines and probation. Thus, the new regime of what may conveniently be called "community punishments" provides for absolute and conditional discharge; [5] suspension of prison sentences; attendance centre orders; community service orders; curfew orders, combination orders of community service and probation or curfew and mediation.

A colonial regime of limited punishments unsuited to the needs of contemporary society survived for 32 years after Independence. It has now been expanded by a penal system in which imprisonment is to be used as a punishment of last resort and contemporary penological notions of just deserts and restorative justice are given a statutory basis for expression.

[18] PART IV of the Act sets out the principles of judicial sentencing in respect of community sentences and custodial sentences. For the first time the law seeks to underpin the power of sentence with a philosophy. In regard to custodial sentences, section 35 provides that where a person is convicted of an offence punishable with a custodial sentence other than one fixed by law, the court shall not pass a custodial sentence unless it is of opinion –

"(a) that the offence, or the 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."

In section 36(2) it is provided that:

"(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 [6] is necessary to protect the public from serious harm from the offender."

[19] The sections cited above propound a penological theory of just deserts as the rationale for custodial sentences. It is the contemporary form of retributive philosophy and enjoins sentencers to apply notions of proportionality in setting the quantum of punishment. The Act therefore introduces a new legislative regime for sentencing based on the seriousness of the offence or just deserts. It issues a reminder to sentencers that they should not pass a custodial sentence unless they are of opinion that the offence was so serious that only such a sentence can be justified.

[20] In this appeal, it cannot be denied that the circumstances of the offence for which the appellants were convicted and sentenced were appalling in the extreme. They set out from one parish and journeyed to another as members of a group bent upon seeking revenge for the incident involving Murray earlier that day. In the presence and to the horror of innocent bystanders, they armed themselves with planks of wood and proceeded to beat the deceased with such venom and violence that death was inevitable.

[21] This Court, in determining the seriousness of the offence, as we must do, cannot exclude from our consideration that there were aggravating factors which impinged upon the seriousness of the offence. For example, the planned reprisal; the type of instrument used to cause death; the beating of the deceased on the ground; and the serious injuries sustained by the deceased. We cannot also ignore the fact that this was a very bad case of group offending in a public place in the full glare of terrified bystanders. The level of public fear generated by group offending is a consideration of the [7] highest significance. This Court sets its face firmly against this form of offending and sends the message that such offenders can expect to receive heavy sentences.

[22] This was a very bad case of manslaughter with many appalling aggravating features and no mitigating circumstances. In the hierarchy of serious crime this type of manslaughter is next in line to murder and attempted murder.

[23] Counsel in their pleas of mitigation before the trial judge made submissions in a settled expectation of the imposition of a custodial sentence. The only issue was what was the appropriate length of sentence.

[24] We must say, however, that in the past decade, criminals in Barbados have become more dangerous, better organized and more sophisticated in the means used to commit offences. There has been also a trend towards the use of deadly or potential deadly weapons. And groups, near-groups or gangs have become attractive associations for some deviant youths. These phenomena are contrary to the cultural values and norms of this country and they threaten to undermine the cohesion and stability of the social fabric.

[25] Civil society must be protected and sentences by way of general deterrence must be used in appropriate cases to mark down our disapproval of behaviour such as was witnessed in this case. Courts must do all in their power to deter such behaviour. And we should also observe that the fact that Murray had no previous criminal record does not avail him when this Court is dealing with a case of this gravity.

[26] Since the Act introduces in Barbados the principle of offence-seriousness, it is a counsel of prudence to establish relativities between [8] murder and other very serious crimes. The sentence of death is still the penalty for murder but, it has not been possible to carry out the death penalty in this country since 1984. Nevertheless, it is still possible to set benchmarks against which offences should be measured.

[27] Two local cases indicate the very top end of the scale. The first is Nicholas Scantlebury v. R (Criminal Appeal No.14 of 1996 unreported). On a trial for murder, he was subsequently convicted of manslaughter and sentenced to imprisonment for life on April 29, 1996. This sentence was affirmed by the Court of Appeal.

In the words of the Court of Appeal –

"It was a very grave offence. This young woman who was in bed at her home was awakened in the early hours of the morning by an armed intruder and bravely sought to respond. Tragically, she succumbed to a bullet from his gun."

Rodney Hinds v. R. (Criminal Appeal No.44 of 1998 unreported) is the other. In that case, the appellant shot a man while he was on a stretcher in an ambulance. The conviction for murder was overturned in the Court of Appeal because of judicial misdirection and a conviction for manslaughter was recorded. The appellant was sentenced to 25 years' imprisonment.

[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 [9] 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.

[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 centre 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.

[31] In this appeal the trial judge quite properly took into account the pleas of guilty. He said so in open court. Therefore, discounting the sentence by approximately one-fourth, (from say 16 years) for the pleas, we cannot say that sentences of 12 years were excessive. They were, in our view, proportionate to the seriousness of the offence, manifestly fair and just.

[32] In the result, the appeals are dismissed and the sentences affirmed. They will commence 6 weeks after the date of conviction.

Chief Justice

Justice of Appeal Justice of Appeal