

BARBADOS

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL**

Criminal Appeal No. 6 of 2011

BETWEEN:

SUMARRA OMAR SMITH

Appellant

AND

THE QUEEN

Respondent

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

2013: November 21

2014: June 19

**Mr. Andrew Pilgrim, QC., and Mrs. Kristin Turton for the Appellant.
Mr. Lancelot Applewhaite and Miss Krystal Delaney for the Respondent.**

DECISION

Introduction:

[1] **MOORE JA:** The appellant was charged that he murdered Keisha Perch on 20 August 2008. On 26 January 2011 he pleaded “Not Guilty” to murder, “Guilty” to manslaughter. On 23 February 2011 **Worrell J** sentenced him to 10 years imprisonment. He has now appealed to this Court on the sole ground that the sentence was excessive.

The Facts

[2] The appellant and the deceased were in an intimate relationship. That relationship broke down. On 20 August 2008 the appellant visited the deceased at her house at Gall Hill, Christ Church. Ritse Harewood (Harewood) a friend of the deceased, was in the yard hanging out clothes. Harewood heard screams coming from the house. She went inside, saw the appellant stabbing the deceased and she pulled the appellant away from the deceased. He fought off Harewood and continued to stab the deceased. He later ran from the house. The deceased then stumbled out of the house mortally wounded.

[3] A post mortem conducted on the deceased's body revealed the 5 injuries described in the post mortem report which follows:

“A. An incision/laceration type skin injury located in the left supraclavicle fossa 3 cms from the middle and measuring 1.7 by 0.7 cms. It had an oblique lie and at least one sharp apex. The skin injury extended as a stab wound downwards through the soft tissue and muscle behind the medial end of the left clavicle with incision of the left subclavian artery and vein. It then entered the left chest cavity through the first intercostal space and ended as 1 cm incision in the upper lobe of the left lung. 700 mls of blood was present in the left chest cavity.

B. An incision/laceration located on the anterior lateral aspect of the right arm. It measured 1 cm in length and was further located 12 cms from the top of the shoulder. At the upper apex there was a 4.5 cms long linear abrasion commonly called or referred to as a scrape.

C. An incision/laceration located on the medial aspect of the left forearm which measured 2.8 x 1 cm with its midpoint 75 cms above the wrist. The skin injury extended as a stab wound

upwards in the subcutaneous tissue and muscle for a distance of approximately 6 cms.

D. An incision/laceration that measured 3 cms in length and which was located on the hypothenar eminence of the left palm. This injury is limited to depth of the skin.

E. Located below the lower border of the right hemi-mandible and measuring 1 cm in length. Other significant findings consisted of generalized organ pallor, collapsed spleen which had a wrinkled capsule.”

[4] Dr. Jones was of the opinion that death resulted from a stab wound to the chest, with shock and haemorrhage.

[5] The appellant gave the police the following statement:

“Yesterday I was at home when Keisha called me on my cell phone telling me to come down the road, so I left and went down the road. Keisha open the house and let me in. We mek love, and after that I tell she that I gine home. She asked me if I want something to drink and I say yea, and she bring some red Kool-Aid drink in a glass and I drink some of the drink and I then tried to get up but I could not move. I start to spit blood. I asked Keisha, ‘Wha going on here?’ And she tell me that she put Flodden in the drink and I get vex and bound on pon she, and we start to scuffle, and Keisha get up and went in the kitchen for a knife and she bound at me. I tek way the knife from she and we continue scuffling. Keisha shout for Ritzy and Ritzy come in the house and asked what happening. I turned to talk to Ritzy and Keisha then bound on pon me. As I turn around to look at Keisha, she come on on the knife and she get stab. I drop the knife in the house and left to hear later that she dead. When I left Keisha she was alright and standing up walking around. My father called me on my cell phone and asked me what happen and I told him what I did. He tell me that he will get a lawyer for me, and when that happen I came to Oistins Station with my lawyer and I told him what I did.”

The Appeal

- [6] The appellant's sole ground of appeal is that the sentence was excessive. On that ground counsel for the appellant, in his written submissions, made what he called two complaints. The first was that "The Learned Trial Judge erred in law in sentencing the Appellant in accordance with guideline 3 of **Pierre Lorde**; and the second was that "The Learned Trial Judge erred in law by failing to give the Appellant full credit for the time which he spent on remand".
- [7] With regard to the first complaint, counsel contended that only guidelines 3 and 4 of **Pierre Lorde v R (2006) 73 WIR 28 (Pierre Lorde)** are relevant. He said that (at the trial) counsel for the appellant, the Crown and the trial judge, all accepted "that the circumstances of this case did not fall squarely within those guidelines."
- [8] Counsel submitted "that the starting point in this case ought to have been no more than 10 years. The fact that a knife was used is the only aggravating feature and that forms the basis of the starting point being at the lower end of guideline 3. Thereafter reductions ought to be applied to the sentence having regard to the mitigating factors of his age, his history of drug addiction, the evidence of provocation, the spontaneous nature of his action and the fact that he did not arm himself with the knife but took it away from the deceased in self defence." Counsel suggested a sentence of 7 years.

- [9] On the contrary, counsel for the respondent contended that the sentence was not excessive. He submitted that it did not fall exclusively within guideline 3 of **Pierre Lorde** and that the trial judge said that it did not fall within guideline 3 or 4. He submitted that the judge considered many mitigating and aggravating factors but omitted to mention the 5 stab wounds as an aggravating factor.
- [10] Counsel also submitted that being an act of domestic violence in respect of which a hue and cry has been sounded in Barbados, the judge referred to the need for deterrence. Counsel cited **Cumberbatch v R Criminal Appeal No. 15 of 2005 (unreported); Pierre Lorde; and Bend and Murray v R Criminal Appeals Nos. 19 and 20 of 2001 (unreported) (Bend and Murray)**. He further submitted that the sentence was lenient and should be increased and urged this Court to increase it. Counsel contended that there is need for individual as well as general deterrence.
- [11] With regard to the first complaint, guidelines 3 and 4 of **Pierre Lorde** are as follows:
- “3. In a contested trial where no firearm was used and there are no mitigating circumstances, the range of sentence should be 16 to 20 years. An early plea of guilty in this type of case will reduce the range of sentence to 10 to 14 years.
 4. In a contested trial where no intrinsically dangerous weapon was used and there are no mitigating features, the range of sentence should be 8 to 12 years. An early

plea of guilty in this type of case may attract a sentence of less than 8 years."

[12] In paragraph [36] of the said decision, immediately following those guidelines **Simmons CJ** acknowledged their limitations when he said:

“[36] We fully recognise that there may, from time to time, be the odd case, whose special or exceptional facts fall outside these guidelines. Nothing that we have said above should be construed as fettering the discretion of judges to deal with those special or exceptional cases as the justice of the case requires.”

[13] **Simmons CJ** made it clear that guidelines cannot fetter the discretion of judges. In the earlier decision of **Bend and Murray**, he said at paragraph [30]:

“[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.”

[14] **Pierre Lorde** is distinguishable from the instant case on the facts and circumstances. In **Pierre Lorde** there was a history of bad blood between the appellant and the deceased. On the day in question **Pierre Lorde** had a garden fork, the deceased had a bottle, there was a dispute and **Pierre Lorde** struck the deceased on his head with the fork. The deceased fell to the

ground and **Pierre Lorde** proceeded to stab him a number of times with the fork and then threw a concrete block on his head.

[15] In the instant case, the appellant and the deceased had an intimate relationship. The appellant said that he was at his house and the deceased invited him to her house. He went there and they were intimate. After that act of intimacy, he said that she gave him a drink of 'Kool Aid' and having drunk it she told him that she had put poison in the drink. He said that he felt weak, was unable to move and was spitting blood. According to him, the deceased then armed herself with a knife, he "bound pon she", took away the knife, there was a scuffle and she ran onto the knife.

[16] The evidence of Harewood is that she was outside the deceased's residence hanging out clothes when she heard screams coming from the residence. She entered and saw the appellant stabbing the deceased; she pulled him away and he returned and continued to stab the deceased.

[17] It was on those facts that the Director of Public Prosecutions (DPP) accepted the appellant's plea of "Guilty of Manslaughter", on the ground of provocation that the appellant had said that he had ingested poison administered by the deceased. Medical tests found no evidence of poison in the appellant's body.

[18] The post mortem examination revealed that the deceased suffered five injuries. The first "located in the left supraclavicle fossa", the second

located on the “anterior lateral aspect of the right arm”, the third located on the “medial aspect of the left forearm”, the fourth located on the “hypothenar eminence of the left palm” and the fifth located “below the lower border of the right hemi-mandible”. Yet the appellant said that she ran onto the knife. The statement attributed to him contains no hint that he administered even one stab wound in retaliation for her statement that she had put poison in his drink. Having regard to the spread of the injuries about the body of the deceased, for her to have sustained them by running onto the knife she would have had to be an acrobat with a death wish and the appellant her willing obliger.

- [19] The facts and circumstances of the instant case are more on point with those in **Griffith v The Queen Criminal Appeal No. 6 of 2007 (unreported) (Griffith)**. In **Griffith**, the appellant said that the deceased sent him a text message asking him to meet her at Prior Park, St. James where she worked at 7.30 a.m. on the day in question. He met her in the street, they quarrelled and she pushed her hand into her bag and took out a gun. There was a struggle for the gun and he fell. She pulled the gun and he heard two explosions. He continued: “I get frighten and she told me she get hit, and that is when I ran and get in the car and left. Before I left I took up the gun and pelt it in the sea behind Edge Water Hotel.” In **Griffith** the deceased sustained three gunshots injuries. In **Griffith**, as in the instant case the

deceased and the appellant were lovers, the appellant was invited by the deceased to visit her and the appellant did not admit to having inflicted the injuries. **Griffith** pleaded “Guilty to Manslaughter” and was sentenced to 18 years imprisonment.

[20] Justice is not about gaining an advantage or causing someone else to suffer a disadvantage. It is about finding a just solution to the issue that confronts us. The guideline judgment was intended to assist judges and lawyers in finding that just solution. It was never intended to be the solution. This Court was conscious of the infinite possibilities that abound especially in the offence of manslaughter. No number of guideline judgments can exhaust them. When we are confronted by facts and circumstances that do not fit squarely into the guidelines we should not throw up our arms in defeat and say, revisit the guidelines and give us guidelines that fit the problem now before us. New guidelines will not help the present problem for those guidelines are in the future. Rather, we must do what we were trained to do: think. In the modern idiom we must “think outside the box” of the guideline judgment. That was the clear message of this Court given in paragraph 36 of **Pierre Lorde** and paragraph 30 of **Bend and Murray**.

[21] **Worrell J** was alert to that message and he heeded it and brought his training to bear on the matter before him. He saw the futility of throwing his arms up in defeat. He said at page 54:

“The difficulty which this court finds itself in matters like these, that they do not fit squarely within guideline 3 nor guideline 4. They don’t fit clearly within guideline 4, because I think, we are all agreed that a knife is an intrinsically dangerous weapon. It does not fit squarely within guideline 3 because that speaks to where there are cases with no mitigating circumstances.

It has already been conceded by the Crown in respect of this matter and stipulated by your counsel that there are mitigating factors. So to fit the matter squarely between 3 and 4, it would be with some difficulty to do that, and therefore the Court has to devise a scheme by which it may depart from both of those guidelines because your facts in your case do not fit exactly within those guidelines or those aspects of the guidelines.”

However at page 57 the judge said that the use of the knife was an aggravating factor and concluded that the matter fell somewhere between guidelines 3 and 4.

[22] Having concluded that he needed to devise a scheme by which to depart from both guidelines, the judge said that he considered the offence a very serious one because a person’s life had been taken away, “cut down in the prime” of her life, and he thought that only a period of incarceration would suffice. After weighing the aggravating and mitigating circumstances, he thought a sentence of 10 years imprisonment appropriate.

[23] There is nothing in the judge’s sentencing remarks that can be construed as corroborative of counsel’s contention. In fact, as was noted at para [7] of this judgment, counsel for the appellant accepted that the circumstances of this case did not fall squarely within those guidelines.

[24] We have said all of that to emphasise that guidelines are only guidelines. They are neither the source of law nor the source of authority for the judge to impose a sentence. The maximum sentence is not fixed by the guidelines. In the instant case the maximum sentence is fixed by Parliament, the law making body, under **section 6 of The Offences Against the Person Act, Cap. 141 (Cap. 141)**, thus:

“Any person convicted of manslaughter is liable to be sentenced to imprisonment for life”.

Section 22(5) of the Interpretation Act Cap.1 (Cap. 1) provides:

“Where an enactment provides a punishment for an offence against the enactment, the offence shall be punishable by a punishment not exceeding that so provided”.

It is clear that the punishment of 10 years imprisonment imposed on the appellant complies with **section 22(5) of Cap. 1** and is well within that fixed by **section 6 of Cap. 141**.

[25] No guideline judgment can usurp the authority of Parliament or fetter the discretion of the sentencing judge. The appropriate sentence is within the discretion of the trial judge, which discretion he must exercise judicially having had due regard to proper sentencing principles, including the guideline judgments; the **Penal System Reform Act, Cap. 139**; the pre-sentencing report, the plea in mitigation by counsel, the mitigating and aggravating factors, the attitude of the appellant whom the trial judge would

have seen and heard and what may be called ‘the court room dynamics’ or ‘court room atmosphere’ that is so alive during the course of a trial and so well known to all trial judges. It is an atmosphere – a dynamic that cannot be replicated in the sterility of the Court of Appeal. There are nuances to which only that solitary High Court Judge sitting in his High Court of Justice is privy. The things that are said and that occur in the court room during the course of the trial combine to inform and to influence judicial opinion and therefore the exercise of discretion. It, therefore, behoves all of us to proceed with judicial and judicious caution when reviewing the exercise of his discretion.

[26] Therefore, a Court of Appeal should pay due deference to the sentencing court and should only interfere with a sentence imposed by a trial judge where it can be shown on the record that he acted on incorrect principles of law or that the sentence is manifestly excessive and should not alter the sentence of the sentencing court merely because the Court of Appeal might have imposed a slightly different sentence.

[27] In the shifting sands of human ingenuity and inventiveness, it is impossible for any guideline judgment, current or future, to capture or exhaust every possibility that can arise. The guidelines laid down in the cases cited by counsel are very narrowly drawn and therefore cannot be of universal application. Those guidelines are not elastic. It is not a case of one size fits

all. It is necessary to examine the peculiar facts and circumstances of each case and apply an ounce of commonsense and half an ounce of reason to those facts and circumstances. No judge is required to sing the mantra: "Those guidelines are not applicable to this case." Even where the guidelines are applicable to a particular case, if the circumstances are so horrendous as to require departure from the guidelines, the judge is not required to say: "I am departing from the guidelines because..." Things that are clear to a blind man on a trotting horse need no explanation.

[28] For the reasons given above there is no merit in this complaint.

[29] With regard to the second complaint, (full credit for time spent on remand) this Court, in **Terry Wayne Moore v The Queen, Criminal Appeal No. 7 of 2008 (Unreported)**, raised questions concerning the ambit of operation of the **Caribbean Court of Justice's (CCJ)** decision in **Romeo Hall**. However, in **Jeffrey Ray Burton and The Queen** and **Kemar Anderson Nurse and The Queen CCJ Application BBCR 2013/002 (unreported)** (**Burton and Nurse**), the **CCJ** said at paragraph 23:

“In particular, it was impossible for the trial judge to have taken account of our decision in *Romeo Hall*, which had not been given at the time he pronounced sentence, and it would have been improper for him to have attempted to anticipate that decision. The real question is whether the Court of Appeal hearing the appeal from the trial judge and seised, as it was by then, of the decision of *Romeo Hall* ought to have applied the principle of full credit for time served on remand. We consider that the Court of Appeal should have done so.”

We are bound by **Burton and Nurse**.

Some Observations on the Sentence

- [30] In compliance with the **Penal System Reform Act Cap. 139**, the trial judge said that he considered it a very serious offence. Counsel, in his plea of mitigation, proffered a custodial sentence. The length of the sentence was the only issue.
- [31] We have observed over the last few years a dramatic increase in acts of domestic violence mainly by males against females. Statistics gathered by the Royal Barbados Police Force for the period June to December, 2013 reveal 220 reports of domestic violence, five of which resulted in the death of females. In response the Force has established The Family Conflict Intervention Unit to deal exclusively with reports of domestic violence. In addition to reports made to the police stations, that Unit gets referrals from Non-Governmental Organisations such as the National Organisation of Women, SAVE (Service Alliance For Violent Encounters) Foundation and the Barbados Professional Women's Club. Safe houses for battered women are provided by the Crisis Centre and counselling by Network Services.
- [32] The killing of females by their male partners has become so prevalent that a hue and cry has gone up in the country and protest marches are occasionally organised to keep this phenomenon constantly before the public. It is our

view that this phenomenon requires an individual as well as a general deterrent.

[33] The evidence of the appellant was that he was weak and spitting blood at the thought of having ingested poison. However, despite being weak and spitting blood, he suddenly got vigorous strength to “bound” on the deceased, disarm her and use the knife to stab her fatally. After having been separated from the deceased by Harewood, the appellant returned and inflicted further stab wounds on her. That in our opinion is a serious aggravating factor.

[34] The facts of this case are not unlike those of **Griffith**. The difference lies only in the weapon used to effect the killing. In that case this Court said at paragraphs 36 and 37 of that decision:

“[36] The circumstances of this case are horrendous and revolting. A general guideline set forth in **section 41(2)** of the **Act** for the observance of the Court in sentencing is that the gravity of the punishment must be commensurate with the gravity of the offence. The appellant has already secured the benefit of a favourable sentence; it would be wrong for this Court to reduce that sentence. The sentence should signify the Court’s emphatic denunciation of violence as a means of solving relationship problems and its concern to protect the public from harm. The length of the sentence imposed in this case properly reflected that denunciation and concern...

[37] The Courts must adopt an approach of strong disapproval to behaviour which causes death or risks causing death. The words of Professor Andrew Ashworth in the Fifth Edition (2006) of his book the “Principles of Criminal Law” at page 249 are worthy of quotation:

“For practical purposes, the culpable causing of another’s death may fairly be regarded as the most serious offence in the criminal calendar...The harm caused by homicide is absolutely irremediable, whereas the harm caused by many other crimes is remediable to a degree...this finality makes it proper to regard death as the most serious harm that may be inflicted on another person...”

[35] In the instant case the appellant has already secured the benefit of the acceptance of a plea of “Guilty of Manslaughter” by the DPP rather than having to undergo a trial for murder with its attendant traumatic anxiety and uncertainty of outcome. As with **Griffith**, we emphatically denounce the violence presently meted out to females by males in the settlement of domestic disputes. Civil society in general, but females in particular, must be protected by the use of general and individual deterrents in appropriate cases. We think that a sentence of 10 years imprisonment was appropriate.

[36] **Section 14** of the **Criminal Appeal Act Cap 113A** empowers this Court to increase sentences where it considers them unduly lenient. This Court will consider invoking that power in cases such as these if circumstances warrant.

Disposal

[37] In the circumstances, the appeal is dismissed, the sentence of 10 years’ imprisonment affirmed and will commence six weeks after it was imposed.

[38] In light of paragraph 23 of the **CCJ's** decision in **Burton and Nurse** this Court is expected to reduce the sentence imposed by deducting therefrom the time a prisoner has spent on remand awaiting trial. Prison records show that the appellant was on remand, before trial, for a period of 915 days or 2 years and 285 days. He will, therefore, serve a sentence of 10 years minus 2 years 285 days or 7 years and 80 days imprisonment.

Postscript

[39] Before leaving this decision it is important to make an observation with respect to the judicial treatment of time spent on remand. In England prior to 1967 the judicial treatment of time spent on remand was discretionary. That was so in Barbados prior to **Hall**. In England between 1967 and 2012 the treatment of time spent on remand was regulated by statute. During that time the practice "gave rise to a host of difficulties" in England and by the Legal Aid Sentencing and Punishment of Offenders Act 2012 the treatment of time spent on remand is now dealt with administratively. The following extract which explains the new practice is taken from paragraph 5.639 of

Archbold 2013:

"Prior to the coming into force of section 240 of the CJA 2003, time spent on remand would generally count towards any custodial sentence eventually imposed by virtue of the operation of section 67 of the CJA 1967, with the sentencing court having no role to play. Section 67 was repealed by the C(S)A 1997, s56(2) and Sched. 6, but this repeal only came into force on April 4, 2005, and it was of no effect in a case in

which a court imposed a sentence of imprisonment in respect of an offence committed before that date (whether or not it also imposed a sentence of imprisonment in respect of an offence committed after that date): *Crime (Sentences) Act 1997 (Commencement No.4) Order 2005* (S.I. 2005 No. 932). Section 240 of the 2003 Act came into force on the same date. This introduced a new regime for offences committed on or after that date, under which the counting of time on remand towards any custodial sentence imposed was dependent on the sentencing court making a direction that it should do so. The legislation generally required the court to make such a direction. It is notorious that, in practice, section 240 gave rise to a host of difficulties. The upshot is that the LASPOA 2012 has provided for its repeal as from a day to be appointed, and for its replacement by new section 240ZA which reintroduces a scheme for the crediting of time on remand to be dealt with administratively. The sentencing court will once again have no function in this connection, and, it is submitted, that the proper approach will be for the court to decide on sentence without reference to any possible effect of administrative crediting of time on remand”.

[40] In **Burton and Nurse**, the **CCJ** seemed alert to the “host of difficulties” made notorious by **section 240** of the UK Act, for at paragraphs 31 and 32 of their decision in that case their Lordships said:

“[31] Finally, counsel for the appellants urged this Court to adopt the ‘set off’ approach to sentencing as advanced by Justice Wit in his minority decision in *Romeo Hall* in preference to the majority decision which required that the sentencing judge decide the ‘notional term’ from which the period spent on remand is deducted. Under Justice Wit’s formulation the trial judge would impose the appropriate sentence while declaring that the time spent in custody will count as time served under the sentence. This would permit the time spent on remand to count for purposes of remission under the prison rules and has the obvious advantage to the prisoner that computation of his or her period of remission would be on

the entire sentence and not just the term of the sentence less the time spent on remand...

[32] The majority was well aware of the practical consequences in adopting the approach of Justice Wit but was of the considered view that legislative intervention was necessary to empower it to declare that time spent on remand should be counted as time served. The majority considered that the time spent on remand could not be treated as “prison years” and grossed up to calendar years because remission of sentences was earned whilst serving sentences in prison and were normally effected by administrative action under the prison rules during the prisoner’s incarceration”.

[41] We invite the Parliament of Barbados to do likewise and return this matter to the prison authorities who are best equipped to administer the practice, especially having regard to the calculation of time to be served by prisoners under the prison rules.

Chief Justice

Justice of Appeal

Justice of Appeal