BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 22 of 2012

BETWEEN:

LORENZO JASON JORDAN **Appellant**

AND

THE QUEEN **Respondent**

BEFORE: The Hon. Justice Sherman R. Moore, CHB, The Hon. Madam Justice Sandra P. Mason, and the Hon. Justice Andrew D. Burgess, Justices of Appeal

2014: June 2
2014: July 3

Mr. Marlon Gordon for the appellant

Ms. Alison Burke in association with Ms. Krystal Delaney for the respondent

DECISION

Introduction

[1] **MASON JA:** This is an appeal against a sentence of 16 years imprisonment imposed on the appellant by **Crane-Scott J** for the killing by

the appellant and a co-accused of taxi driver Rudolph Taylor (the deceased) in the early hours of 14 May 2006.

[2] At his arraignment on 11 September 2012, the appellant pleaded not guilty to murder. A jury was empanelled and his trial was scheduled for the next day. However on his return to court on 12 September 2012 for the start of his trial, when arraigned the appellant again pleaded not guilty to murder but guilty to manslaughter. This plea was accepted by the Director of Public Prosecutions.

Facts

[3] The following salient facts are part of the facts which were read into the record by the Director and which were accepted by defence counsel.

[4] On Sunday 14 May 2006 about 4:00 a.m., the deceased was asleep in his taxi by the Treasury Building in the City when he was awakened by a knock on the window. The appellant was at the time accompanied by his girlfriend, the co-accused, and they enquired of the deceased of the cost of taxi fare to St. Philip. The amount was agreed and they boarded the taxi.

[5] As the deceased was negotiating a turn in the Gemswick, St. Philip, area, the appellant placed a cord around the deceased's neck and started to choke him. The co-accused who was sitting in the front passenger seat then sought to immobilise the car by putting it in "park" and pulling up the handbrake. All

of this was part of a pre-arranged plan in which they had also brought along with them some duct tape, a knife and the cord with which to effect a robbery.

[6] The deceased strenuously resisted these attempts at which time the co-accused began to repeatedly stab him while the appellant continued to choke him. When the car stopped, the co-accused ran around to the driver's side and opened the door, whereupon the deceased fell out. The appellant got out, pulled the deceased away and he and the co-accused drove off with the car. Some five minutes later the appellant drove back to where the deceased lay and according to the appellant in his self-written statement to the police which was also read into the record, the deceased "lunged" at the car and the left side of the car "was either on top of him or the foundation he was on" and when the appellant reversed and stopped, the deceased was no longer moving.

[7] The appellant and co-accused then drove to the home of a friend, requested the use of his bathroom, some bleach and a change of clothing, then cleaned themselves up, dressed and left.

Judge's Approach to the Sentence

[8] The judge began by having regard to her "judicial obligations under sections 35 to 41 of the Penal System Reform Act" **(Cap 139)**. She stated that after

considering the facts and the manner in which the offence had been committed as well as the pre-sentence report, she formed the opinion that **section 35** of **Cap 139** applied in that the offence was so serious only a custodial sentence was justified.

[9] The judge considered that while the appellant and the co-accused might not have deliberately set out to kill the deceased, the unlawful act of robbery was premeditated: they had left home armed with the duct tape, cord and knife with the intention to rob a taxi driver.

[10] The judge, taking into account the actions of the appellant and the co-accused – the stabbing of the deceased by the co-accused while the appellant was choking the deceased – therefore dismissed the appellant's argument that his sentence should have been lesser merely because he had not been holding the knife. She found him to be equally guilty of the offence.

[11] The judge also took into account the post-offence actions and behaviour of the appellant: he drove away the deceased's vehicle returning to the scene soon afterwards, striking the deceased, albeit accidentally according to him, but driving away leaving the deceased motionless on the road and not seeking to assist him by, for example, making an anonymous call to the Police. In her opinion, this "showed a callous and reckless disregard for human life" and "greatly aggravated the seriousness of the offence".

[12] The judge highlighted the fact that the offence had been committed against a taxi driver, a person whom she considered to be a vulnerable class of worker, rendering important and valuable public service in this Island and who must be able to earn his living free from fear and from persons bent on violence.

[13] The judge next adverted to **section 6** of the **Offences Against the Person Act Cap 141** which provides for a sentence of life imprisonment for the offence of manslaughter but took cognisance of the decision in **Pierre Lorde v R (2006) 73 WIR 28 (Pierre Lorde)** which established guidelines for cases of manslaughter and which stated that life imprisonment ought to be reserved for only the most serious cases.

[14] The judge, while emphasising that these guidelines were not meant to put her in a straitjacket or fetter her judicial discretion with regard to the sentencing process, was nevertheless satisfied that her role as sentencer was to "seek as far as possible to position this case within the appropriate Pierre Lorde guideline, while at the same time complying with the procedures set out in the Penal System Reform Act".

[15] In seeking to "position" the case within the guidelines, she emphasised that the case was one in which there was a need for deterrence to be reflected in

the sentence and therefore a "longer sentence than otherwise might be the case must be imposed for this violent and reprehensible crime".

[16] The judge was satisfied that "the relevant portion of guideline 3 as currently framed was woefully inadequate to enable the Court to do justice in this case" and went on to exercise her unfetterable discretion to go outside of the guideline to establish 20 years as the appropriate starting point in the sentencing process.

[17] In coming to her final decision to impose a sentence of 16 years imprisonment, the judge took into account the gravity of the offence, the necessity for deterrence, guideline 2 of **section 41(2)** of **Cap 139** (the gravity of the punishment must be commensurate with the gravity of the offence) and the issue of proportionality in **section 36** of that Act.

[18] She next focussed on the mitigating factors – the appellant's guilty plea, his relatively young age (21 at the time of commission of the offence), his clean record, his cooperation with the police and his expressed remorse for his actions. The judge also took into account the period of remand.

Grounds of Appeal

[19] The appellant filed 2 grounds of appeal:

(a) that the judge failed to properly apply the Court of Appeal guideline decision of **Pierre Lorde** which was intended to be applied in cases of manslaughter; and

(b) that the sentence imposed on the appellant was excessive.

Submissions of Counsel for the Appellant

Ground 1

[20] On this ground counsel for the appellant argued that the judge's approach to the guidelines undermined the authority of a decision from a superior court and created uncertainty in the sentencing process.

[21] Counsel conceded that a trial judge in the role of sentencer has a wide discretion. He stated that the judge must however exercise that discretion in a manner which maintains public confidence in the system of justice and so in choosing a sentence that is fair and just for a particular case, the court must observe and "follow essentially guidelines set by the court of superior jurisdiction".

[22] Counsel was critical of the judge's remarks in relation to her approach to the application of guideline 3 at p. 132 lines 4 to 12 of the transcript and submitted that her approach was incorrect and significantly undermined the role of guidelines issued by a superior court.

[23] Counsel further argued that it was therefore wrong in principle to position the case within guideline 3 and then not comply with the sentencing range in that guideline.

Ground 2

[24] On this ground counsel for the appellant contended that the facts demonstrated that the commission of the offence was in a joint enterprise and the judge's imposition of a longer sentence on the appellant than on the co-accused was excessive by virtue of the fact that the act which caused the unlawful killing was done by the co-accused. He argued that the imposition of the higher sentence was not merited and was in breach of the procedure set out in **sections 35** to **37** of **Cap 139**.

[25] Counsel stated that the judge's findings on the facts that the appellant suborned his co-accused into committing the act was stretching the facts beyond their limits and was totally inappropriate. He further submitted that the judge erred in law when she applied the actions of the co-accused as an aggravating factor and that this finding offended against the principle of individualised sentencing which requires that the court focus on the level of culpability of each offender within the context of the criminal enterprise. He also noted that it was incorrect for the judge to find that the appellant was

the mastermind behind the venture when it was clear that both parties were principals in the joint enterprise and went equipped for the robbery.

[26] Counsel argued that according to the calculation made by the judge in sentencing, "the conclusion can only be that only a period of one year was discounted for all of the other mitigating features of the appellant" and it was therefore "inadequate for the learned sentencing judge to mention the mitigating features but then fail to give them commensurate weight in sentencing".

[27] Counsel made a comparative analysis of manslaughter cases in which the Court of Appeal considered that a starting point of 20 years would have been justified in the circumstances. He submitted that the facts of those cases were more egregious than the case at bar and concluded that consequently the sentence imposed on the appellant was excessive and should be reduced. The sentences in those cases ranged from 13 to 20 years: **Wayne Harewood v The Queen Criminal Appeal No. 23 of 2008 (Unreported decision of 21 December 2009); Director of Public Prosecutions Reference No. 1 of 2003 R v Kurt Skeete (2002) 66 WIR 94; Director of Public Prosecutions Reference No. 2 of 2010 R v Richard Hurley.**

<u>Jurisdiction of the Court of Appeal to Alter Sentences</u>.

[28] **Section 14** of the **Criminal Appeal Act, Cap. 113A** speaks to the issue of the alteration of a sentence on appeal to the Court of Appeal. It provides:

> "14. On an appeal against conviction or sentence, the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence authorised by law, whether more or less severe, in substitution therefor as it thinks ought to have been passed; but in no case shall any sentence be increased by reason or in consideration of any evidence that was not given at the trial."

[29] While by that **section** the Court of Appeal is given the authority to alter a sentence "if it thinks that a different sentence should have been passed", the established principle is that the Court of Appeal will only vary a sentence if the sentencing judge applied wrong principles or failed to comply with some statutory or procedural requirement or if the sentence was manifestly excessive, disproportionate or inadequate.

[30] This Court will not attempt to improve upon the following statement by Hallett JA speaking for the majority of the Court of Appeal of Nova Scotia, Canada, in the case of **R v Muise 1994 Can LII 4074 (NSCA),** a statement which we find to be apposite:

> "[81] The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts. If it is a fit sentence an appeal court cannot interfere. My view, that this is the correct approach for an appeal court, is not based on the notion that a trial judge has had the advantage of seeing and hearing the witnesses. This reason is expressed in some of the

> older cases as being the underlying reason for non-interference; that rationale clearly does not apply to a guilty plea. My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion that is the true basis upon which courts of appeal review sentences when the only issue is whether the sentence is inadequate or excessive."

[31] The appellant's central complaint on the first ground is that the judge by not employing guideline 3 of the **Pierre Lorde** guidelines used an incorrect approach and as a consequence "significantly undermined the role of guidelines issued by a superior court" thereby creating uncertainty in the sentencing process. That guideline reads:

> "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."

[32] This Court concurs with the precept that it is expected that a judge must approach the sentencing decision by reference to any relevant guidelines set by a superior court. We are mindful however that guidelines are no more than guidelines or in the words of the oft quoted adage: sentencing guidelines are guidelines, not tramlines.

[33] Sentencing guidelines are established to promote consistency in sentencing by providing for the judge a starting point by which to arrive at the

appropriate sentence. They do not purport to identify that appropriate sentence. In addition they do not nor are they meant to constrain the proper exercise of judgment on the facts of a specific case. In other words, they are not meant to be slavishly followed, for such a mechanistic approach could result in either inappropriately high or inappropriately low sentences. Thus what the Court of Appeal is aiming for is not uniformity of sentence but uniformity of approach: see **R v Bibi [1980] 71 Cr. App. R 360.** As was pointed out in **Pierre Lorde**, the entrenched exercise of judicial discretion removes any obligation to follow a particular guideline and so a judge is at liberty to pass a sentence outside of the guidelines provided the circumstances of the case dictate it.

[34] Counsel for the appellant argued that the judge "having established that the circumstances of the case were in the **Pierre Lorde** guidelines the judge was duty bound to follow the guidance from a superior court". He further argued that her sentencing remarks at page 132 line 4 to 12 of the record "therefore had the effect of undermining public confidence in the system of justice".

[35] At page 132 line 4 to 12 of the record, the judge in her sentencing remarks stated:

> "The Court was satisfied that the relevant portion of Guideline 3 as currently framed is woefully inadequate to enable the Court to do justice in this case. In the circumstances, doing the best that it can do within the existing Pierre Lorde guidelines, which

> the Court is of the view may be in need of revision, the Court in the exercise of its sentencing discretion established as a working principle 20 years as the appropriate starting point for determining the length of your sentence."

[36] Our interpretation of the judge's remarks is at variance with that of counsel and so we have come to a totally different conclusion. The judge noted that while she had borne in mind guideline 3 as she had been recommended to do by both counsel (see page 131 lines 6 to 19); and while she recognised her role as sentencer (see p. 131 lines 1 to 5) and while she was keeping guideline 3 "firmly in mind", she was however of the view that this was a case where the need for deterrence had to be reflected in the sentence and where a longer sentence had to be imposed given the peculiar circumstances of this case. The judge then made it clear that in her opinion guideline 3 was not appropriate because the relevant portion of that guideline was "woefully inadequate" as a consequence of which and in order to do justice in the case, she had in the exercise of her judicial discretion to go outside of that guideline using 20 years as her starting point.

[37] We are satisfied that it was entirely appropriate for the judge to do so. Although this Court has previously observed in the case of **Curtis Joel Foster, DPP Reference No. 1 of 2010 (unreported)** that the guidelines are now well established and are routinely followed, this statement cannot be

interpreted to mean that the judge must contort a case so that it would fit into a particular guideline.

[38] It is also our view that the judge, in emphasising the need for the principle of deterrence to be factored in, took into account the obligation on these courts to assure the society that violent and reprehensible acts such as those of the appellant will neither be condoned nor go unpunished. In other words the importance of deterrence is a major consideration in the protection of society and must be given substantial weight. We cannot therefore agree with counsel for the appellant that public confidence in the system of justice was undermined by the judge's decision.

[39] The criticism of the alleged excessive sentence is based primarily on the disparity in sentencing between the appellant and the co-accused. Counsel complained that since the commission of the offence was in a joint enterprise, the appellant is entitled to be given the same length of sentence as the co-accused who had been given 12 years imprisonment.

[40] It must be noted that disparity is never a ground in itself. The question to be asked is whether the sentence was wrong in principle. Lawton LJ in **R. v Fawcett [1983] 5 Cr. App R (S) 158** suggested that when considering the issue of disparity in sentencing it must be asked "would right thinking members of the public, with full knowledge of the relevant facts and

circumstances, learning of this sentence, consider that something had gone wrong with the administration of justice?"

[41] We accept that in many cases involving joint enterprise it is prima facie unnecessary and unhelpful for the court to differentiate between the defendants and entirely appropriate for the same sentence to be passed on each. However, we consider that in some cases certain issues play a larger role in the resulting disparity of sentence meted out to the different actors. Justice requires that consideration be taken of the part played by each offender before an appropriate sentence can be identified. It also demands that certain other factors like age and degree of culpability be taken into account.

[42] In this case the judge took note of the fact that the appellant was older than the co-accused. She also took note of his complicity in the stabbing of the deceased in that he continued to choke him while the co-accused was stabbing the deceased and in effect did nothing to stop her from so doing. She concluded that while it was accepted that the fatal act was as a result of the stab wound by the co-accused, the appellant both by his acts of commission and of omission was equally culpable of the killing. She also deplored his post offence behaviour driving off with the vehicle, returning and striking the deceased with it and leaving him helpless on the road.

[43] It must be borne in mind that the appellant and co-accused were sentenced by 2 different judges under different circumstances and at different times. Counsel sought to argue before this Court that since the judge had been made aware of the 12 year sentence imposed upon the co-accused, she ought therefore to have imposed a similar sentence on the appellant. However, when during the mitigating phase counsel had urged a similar position on the judge, she quite correctly observed that she did not know the circumstances under which the co-accused had been sentenced e.g. that judge's starting point, the mitigating factors etc, and she duly noted that "the punishment has to be tailored to the individual offender and the crime".

[44] We are in agreement with the established authorities that the formulation of a sentence is a profoundly individualised process in which a balance is sought by taking into account the relevant principles of deterrence, protection of the public, punishment and rehabilitation of the offender underscored by the principle of proportionality. Once the judge has employed these principles, her discretion in coming to a determination of a sentence is not to be interfered with lightly.

[45] We are also satisfied that there is no rule of law that where it appears that one court has dealt more severely with an offender than another court has dealt with another offender involved in the same case, that the first offender

should have his sentence reduced: per Lawton LJ in **R v Pitson [1972] 56 Cr. App R 391** at **396.** In **R v Stroud [1977] 65 Cr. App R 151,** Roskill LJ quoting Lord Chief Justice May in the unreported case of **R v Brown** stated:

> "It was never intended that a sentence should be reduced on the basis of disparity unless there was such a glaring difference between the treatment of one man as compared with another that a real sense of grievance would be engendered in the case of a man suffering the more serious penalty ... An argument based on disparity should be based on the circumstances prevailing when the sentence attacked was itself passed and we do not think save in the most exceptional circumstances that it would ever be proper for the Court to listen to an argument based on disparity which involves bringing in sentences passed on other people before a different judge in another court. The argument should be based, if it is to be raised at all, upon the circumstances prevailing at the time when the criticised sentence is imposed."

[46] It is therefore critical that a judge in sentencing cannot ignore the context in which the crime for which the court must at the time pass sentence was committed.

[47] Counsel took exception to the judge's remarks with respect to the aggravating circumstances of the appellant. He incorrectly concluded that by these remarks the judge found that the appellant suborned the co-accused into committing the act.

[48] A pivotal factor in the determination of an appropriate sentence for manslaughter or for any other crime is an assessment of the culpability of the offender. The judge found that the appellant did have a considerable degree

of culpability: his actions during commission of the offence in her opinion showed a predatory callousness. At page 126 line 18 to 23 the judge stated:

> "... The offence was seriously aggravated by the use of a knife and by the fact that the knife was used by your companion to inflict multiple stab wounds on Mr. Taylor at a time when you were choking him from behind with the cord that you had placed around his neck."

at page 127 line 9 to 14 she said:

> "Next, the Court found that the offence was also aggravated by the fact that although you clearly witnessed the knife attack on Mr. Taylor from beginning to end, you did absolutely nothing to stop Miss Adams from stabbing him multiple times with the knife which she had in her possession."

and at page 127 line 19 to 25 she stated:

> "... the Court is satisfied that it was your action in continually choking the victim with the cord which you placed around his neck which facilitated Miss Adams' prolonged knife attack on Mr. Taylor. Simply put, the Court finds that although you may not have held the knife, you were just as culpable for causing his death."

Counsel was critical of these remarks. In our view however, the judge was merely highlighting the appellant's degree of, and equal culpability in, the offence thereby concluding that "although you may not have held the knife, you are just as culpable for causing his death". This could not lead to a finding of subornation.

[49] Although conceding that "the judicial process of sentencing is never a mathematical or scientific formula", counsel took issue with the calculation

of the judge in coming to the final figure of 16 years imprisonment. He argued without any specificity that the judge failed to give "commensurate weight" to the mitigating factors after having reduced the sentence by 3 years for the guilty plea.

[50] We are satisfied that there is no specific formula of words that the judge must employ when determining sentence. All that is required is a balancing of factors in an individualised setting underlined by correct principles.

[51] We find support for this stance in a determination by the English Court of Appeal in the case of **R v Martin [2007] 1 Cr App R (S) 3** at **14:** the sentencing decision does not represent a mathematical exercise nor does it result from arithmetical calculation. The idea that each element relevant to the sentencing decision has or should have some notional length ascribed to it is to be rejected. All that is required is for the judge to declare all the ingredients of the case whether aggravating or mitigating. There is no grid plan nor points systems to be attached.

[52] In support of his submission that a sentence of this length is excessive, counsel referred to decisions of this Court in a number of manslaughter cases. We have examined those cases but nevertheless consider that the attempt by counsel to seek similarities with or differences from other cases of manslaughter committed by other people to be a very frustrating and

counterproductive exercise and that those cases were not at all helpful to his cause. It must be recognised that since sentencing is an inherently individualised process, sentences for a particular offence must be expected to vary depending on the particular circumstances and therefore comparison with other cases becomes a difficult exercise. This Court has regularly emphasised that manslaughter is an offence that may be committed in an exceptionally wide variety of circumstances and that the legal limits of possible sentence are very great.

[53] Despite the assertion by counsel, the circumstances of this case are such that when viewed in the context of those other cases which he cited are egregious by any standard. This was a sustained and exceptionally violent attack upon a hapless taxi driver who when woken from sleep in his car during the very early hours of the morning, agreed to take this couple to the far reaches of the Island. The resulting attack on him at the hands of these miscreants was unprovoked, outrageous and premeditated. We can only but be in agreement with the judge that the society's revulsion and abhorrence to this "particularly reprehensible" type of crime must be signalled and we reiterate that deterrence must be a major consideration in the protection of society.

[54] While it is accepted that the statutory imposition of life imprisonment for manslaughter has unfailingly been reserved for only the most severe cases,

we view as abominable the killing of another human being in light of the finality of the act and we consider that regardless of the circumstances it must be condignly punished. It is basic to any theory of punishment that the sentence imposed must bear relationship to the offence. It must be a fit sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender deserved the punishment he received and feel a confidence in the fairness and rationality of the criminal justice system.

[55] We are not convinced that the appellant has established any substantial and or marked departure from sentences customarily imposed for similar offenders committing similar crimes which would support appellate intervention in these particular circumstances.

[56] Another feature of counsel's complaint about the excessiveness of the sentence related to the imposition of a "higher" sentence which he stated was in breach of the procedure set out in **section 35 to 37** of **Cap 139.**

[57] This criticism cannot be sustained. A perusal of the sentencing remarks made by the judge clearly discloses that she approached the sentencing process by first having due regard to her judicial obligations under **section 35** to **41** of **Cap 139**. She determined that in accordance with **section 35** and based on the offence seriousness and the need to protect the public, only a

custodial sentence would suffice. As required by **section 37** she duly considered the pre-sentence report taking into account the circumstances of the offence including the aggravating and mitigating factors. Keeping in mind the requirement of guideline 2 of **section 41(2)** that the gravity of the punishment should be commensurate with the offence, the judge proceeded to sentence the appellant in accordance with the principle of proportionality as provided for by **section 36**. All this while the judge was mindful of the individualisation of the sentencing process: that "the punishment has to be tailored to the individual offender and the crime". There is therefore no doubt that the judge considered all of the relevant factors and properly directed herself.

Disposal

[58] We have carefully considered the judge's approach to the sentence as well as the submissions of counsel, both oral and written, and have come to the conclusion that the circumstances and consequences of this case do not support a reduction in the sentence imposed.

[59] It is our judgment that there being no error in principle nor refusal to comply with a statutory or procedural requirement, the sentence is not manifestly excessive but is entirely appropriate.

[60] In these premises the appeal is dismissed and the sentence is hereby confirmed.

Justice of Appeal

Justice of Appeal Justice of Appeal