BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 6 of 2014

BETWEEN:

ANDREW O'NEIL HUNTE **Appellant**

AND

THE QUEEN **Respondent**

Before: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal

2015: January 28
November 24

Mr. Keith Simmons, QC, for the Appellant

Mr. Elwood Watts for the Respondent

DECISION

MASON JA:

Introduction

[1] The appellant had been charged that he on 24 March 2012 murdered Malcolm Husbands. At his arraignment on 18 February 2014 he pleaded not guilty to murder but guilty to manslaughter. This plea was accepted by the Director of Public Prosecutions (DPP) and on 9 May 2014 the appellant was

sentenced by **Crane-Scott J** to a term of imprisonment of 20 years. The appellant now appeals that sentence.

Facts

[2] The following facts have been distilled from those which were read into the record by the DPP, accepted by defence counsel and reiterated by the judge who also included references from the appellant's statement which he had written himself.

[3] The deceased shared a friendship with the appellant and Ms. Keisha Johnson. At one time, the deceased and Ms. Johnson lived together and although they had parted they maintained a friendship in which they would sometimes visit and sleep at each other's house.

[4] On 24 March 2012 the three friends went to a karaoke session in St. Thomas. At around 4.30 a.m. the deceased was taking Ms. Johnson to her home in his car when they stopped at a service station. The appellant who was in his own car also made a stop at the service station where he saw the other two. Those two left and drove to the deceased's apartment. The appellant went to his apartment which was nearby. Later he went over to the deceased's apartment.

[5] While the deceased and Ms. Johnson were in the house, the appellant broke a window of that house and entered. At the time the deceased was lying in bed covered with a sheet while Ms. Johnson sat in a chair nearby.

[6] As the facts go, the appellant and the deceased then had a "very civil conversation" in which the appellant apologised for breaking the window and asked that the deceased not to call the police because he would pay the landlord for the damage to the window. The deceased apparently accepted this offer and got up to let the appellant out of the house. At this point the appellant realised that the deceased was naked. On looking back he saw panties on the bed which he believed belonged to Ms. Johnson. Thereupon he stabbed the deceased in the neck with a knife which he had brought to the house. The deceased ran out of the house shouting. The commotion caused the neighbours to come out of their houses. They came to the deceased's assistance but he later died.

Sentencing Remarks

[7] The judge in seeking to determine the appropriate sentence to be imposed took into account the requirements of **sections 35** to **40** of **the Penal System Reform Act Cap 139 (Cap 139)** including the contents of the pre-sentence report and more particularly **section 35 (2) (a)** of **Cap 139**. The judge was of

the opinion that because of the seriousness of the offence, only a custodial sentence could suffice.

[8] The judge had regard to guidelines in **Attorney General's Reference (No. 74, 95 and 118 of 2002) (Suratan and Others) [2003] 2 Cr. App. R (S) 42** (the **Suratan** guidelines) in determining the seriousness of the offence and "assumed" that the seriousness of the offence had been mitigated by the fact that at the time of the killing the appellant had lost his self control.

[9] The judge then recounted the events of the night, enumerating 15 facts and circumstances which in her opinion made it "reasonable in all the circumstances" for the appellant to have lost his self control and to have stabbed the deceased making it thereby "sufficiently excusable to reduce the gravity of the appellant's actions from murder to manslaughter".

[10] The judge next listed six aggravating factors in "a grave case of manslaughter" in which the only mitigating factors of the offence were the fact that "faced with what would have appeared to be lies and deception on the part of both Keisha Johnson, your girlfriend and Malcolm Husbands, your friend, you were provoked and lost your self control and stabbed him in circumstances that were spontaneous and not planned or premeditated".

[11] The judge adverted to the statutory penalty for manslaughter and noted that it had been accepted by the Court of Appeal that imprisonment for life had been reserved only for the most serious manslaughter cases.

[12] After considering the submissions of counsel in which reference had been made to the manslaughter guidelines in **Pierre Lorde v R (2006) 73 WIR 28 (Pierre Lorde)** and the case of **Oliver St. Clair Archer v R Criminal Appeal No. 26 of 2005 (Archer),** and weighing the aggravating and mitigating factors of the offence, the judge was "satisfied that the special and exceptional facts" of the case disclosed that "this was nonetheless a wanton and senseless killing of an unarmed man". The judge was therefore of the view that the circumstances "placed this offence firmly on the borderline of murder and at the top of the manslaughter scale".

[13] Consequently in the judge's opinion "the parameters and the suggested range of sentences currently provided for in the four guidelines "of **Pierre Lorde"** were "woefully inadequate to enable the court to do justice in the case". The judge then continued:

> "The Court is confident that the guidelines, with their obvious bias towards deaths caused by a firearm, could not have anticipated such a deliberate and wanton stabbing death as has been disclosed by the special and exceptional facts of this case which cannot, in the view of this Court, fall any lower than at the top end of the manslaughter scale.

> In the circumstances, employing the flexibility provided within paragraph 36 of **Pierre Lorde** and having also regard to the special and exceptional facts of the case and doing the best that it can do within the framework of the existing **Pierre Lorde** guidelines, which as this Court has previously stated, may be in need of revision, the Court in the unfettered exercise of its sentencing discretion, established 25 years as the appropriate starting point for determining the length of your sentence".

[14] The judge being mindful of the general judicial guidelines set out in **Cap 139** which includes that the gravity of the punishment must be commensurate with the gravity of the offence also took into account the issue of proportionality. The judge then finally considered the mitigating factors which in her view "further reduced the seriousness of the offence and suggest a level of personal mitigation" of the appellant as the offender.

Grounds of Appeal

[15] Counsel filed the following grounds of appeal:

(1) The trial judge was wrong to equate the facts of this case with the facts of either **Oliver St. C. Archer** or that of **Pierre Lorde** where the trial judge seemed to have accepted the DPP's view that **Oliver St. C. Archer** also involved a stabbing death in what the DPP said was a similar domestic context in which the appellant had been sentenced to 25 years imprisonment.

(2) The judge was wrong to conclude that the appellant stalked his girlfriend but did not go on to state what constituted stalking.

(3) The judge seemed at times to dismiss or deny that there was a provocation.

(4) The judge failed to acknowledge the fact that although the appellant and his girlfriend no longer lived together that they still had a visiting relationship and would sleep together from time to time either at his residence or hers.

(5) The judge could not and should not have viewed the killing of Mr. Husbands warranted a sentence of more than 14 years.

Submissions

[16] We have decided to restrict our considerations in this case to the questions of provocation and the consequent length of sentence imposed, there being no merit in the other grounds of appeal. As a consequence the submissions of counsel will be similarly confined.

[17] Mr. Keith Simmons QC on behalf of the appellant submitted that the judge's reference to provocation was inadequate taking into account that the Crown had accepted the plea of manslaughter on the basis of provocation. He maintained that although the judge had herself accepted that there had been provocation, she had yet resorted to terms like "deliberate and wanton killing" when describing the actions of the appellant. According to counsel, the judge's remarks were contradictory to the definition of provocation and

she ought not to have equated the circumstances to "close to murder" if she had indeed accepted that there had been provocation. Counsel contended that provocation is more than "at the time of the killing you lost your self control".

[18] For support of this position, Mr. Simmons QC referred to the case of **Duffy v R [1949] 1 All E.R 932** where the English Court of Appeal approved the test of provocation as adumbrated by Devlin J in the case at first instance. Devlin J said in part:

> "Provocation is some act or series of acts that were done by the dead man to the accused which would cause any reasonable person, and actually caused in the accused, a sudden and temporary loss of self control rendering the accused so subject to passion as to make him or her for the moment not master of his mind".

Mr. Simmons QC suggested that the actions of the appellant fell squarely within the four corners of that definition of provocation.

[19] On the issue of sentence, Mr. Simmons QC sought to fit the circumstances of the case into the **Pierre Lorde** guidelines and more particularly guideline 3, referring specifically to a question of an early plea of guilty which would reduce a sentence from the range of 16 to 20 years to the range of 10 to 14 years.

[20] Counsel urged the court that the judge had erred by establishing 25 years as the appropriate starting point because she concluded that because of the

"special and exceptional facts" the case could not fall any lower than at the top end of the manslaughter case. Counsel further urged the court to acknowledge that the case could not be equated to either **Archer** or **Pierre Lorde** where in neither case there were no mitigating circumstances. Mr. Simmons QC complained that despite the many mitigating factors viz the early guilty plea, the relatively young age of the appellant, the fact that this was his first offence, the fact that he had been given a very favourable pre-sentence report, that he had expressed remorse and that the words of his character witness were "impressive", the judge had imposed a sentence of 20 years where by all accounts it ought not to have been greater than 14.

[21] Mr. Elwood Watts, counsel for the respondent, conceded that for the most part, Mr. Simmons QC's submissions with respect to provocation were sound but he joined issue on the question of the length of the sentence. He emphasised the need for an analysis of the **Pierre Lorde** case and its application to the case at bar. Mr. Watts referred the Court to para 22 of **Pierre Lorde** where the Court of Appeal after having analysed a number of other cases suggested that "the bottom of the scale for a grave case of manslaughter without the use of a firearm is 16 years and the top of the scale is 20 years".

[22] Mr. Watts submitted that these remarks appeared to have formed the basis of guideline 3 which indicate that the bottom of the scale for manslaughter without the use of a firearm would be 16 years and the top 20 and that an early plea of guilty in this type of case would reduce the sentence to a range of 10 to 14 years. Counsel rather astutely observed that the Court in **Pierre Lorde** had not defined the word "grave" but that it seemed to connote some out of the ordinary or "outrageous circumstances within the killing". He therefore queried whether it is the use of a firearm and the absence of mitigating circumstances which would make a case a "grave" one because the range of 16 to 20 years in the guideline is the same as in the circumstances set out in para 22 which speak to "a grave case of manslaughter".

[23] Mr. Watts noted that the judge had not made any clear statement with respect to nor identified any special and/or exceptional facts which would take the case outside the guidelines as mentioned in **Pierre Lorde.** Therefore it had to be recognised that in the final analysis the Court had sought to preserve the discretion of the trial judge so that where in the opinion of the trial court a case fell outside the guidelines, sentencers were free to exercise that judicial discretion which must remain at the heart of the sentencing process. In the circumstances he urged the Court to conclude that

such was the position in this case and that the sentence ought to be affirmed and the appeal dismissed.

Discussion

Issue of Provocation

[24] We are in agreement with Mr. Simmons QC and appreciate the concession by Mr. Watts that the judge's remarks were contradictory regarding the issue of provocation.

[25] The judge appeared initially to have accepted the definition of provocation as defined in **Duffy** but she did not seem to fully apply it to the case at hand. In other words, according to the accepted facts, after having had the "civil" conversation with the deceased, the appellant looking back while on his way out of the house and seeing that most intimate of female garments on the bed from which the deceased had just risen naked, became so enraged and inflamed by passion that he reacted and stabbed the deceased. These facts, in our view, ought to have influenced the judge's determination.

[26] The judge was satisfied that the loss of self control was reasonable in all the circumstances and although this was "a grave case of manslaughter "she accepted that the appellant had been:

> "faced with what would have appeared to be lies and deception on the part of both Keisha Johnson, your girlfriend and Malcolm Husbands, your friend, you were provoked and lost

> your self control and stabbed him in circumstances that were spontaneous and not planned or premeditated".

The judge also recognised that

> "The offence occurred, in this Court's view, within the context of what would seem to be "a love triangle" in which you were unable to control your raging emotions of jealousy, rejection and betrayal and where the only mitigating factors which reduced the seriousness of the offence itself, were the fact that you were provoked and lost your self-control and your actions were spontaneous".

[27] There is therefore some merit in Mr. Simmons QC's argument that the judge erred when after having accepted that the appellant had been provoked and had lost his self control causing his sudden and unlawful knife attack on the deceased, she then termed the result a "deliberate and wanton stabbing death". This determination caused her to "place the offence firmly on the borderline of murder and at the top of the manslaughter scale".

[28] It is our view that the judge erred in so positioning the case because as a consequence it affected the sentence which was ultimately imposed.

Length of Sentence

[29] It is well established and on myriad occasions repeated by this Court that the Court of Appeal will only intervene to quash a sentence if it can be shown that the sentence imposed was manifestly excessive, disproportionate or inadequate or if the judge applied wrong principles or failed to comply with some statutory or procedural requirement or was wrong in principle.

[30] This Court accepts that where a superior Court has laid down sentencing guidelines, the sentencing court must have regard to them. The Court also recognises however that where the peculiar facts and circumstances of the case do not fit within those guidelines, the sentencing court is free to exercise its judicial discretion and pass the sentence it considers appropriate.

[31] In the case at bar, the judge indicated that in determining the length of sentence she had among other things considered the manslaughter guidelines in **Pierre Lorde** and had found them "woefully inadequate" to allow her to do justice in the case. She expressed the intention to exercise her unfettered discretion which would allow her, as is her right, to deal with the "special and exceptional circumstances" of this case. It is noted however that while on a number of occasions during her sentencing remarks, the judge adverted to the "special and exceptional circumstances" of the case, she never at any time catalogued them. It is our view therefore that despite the judge's unfettered discretion, this Court ought to have been apprised of what were those "special and exceptional" circumstances which guided her in the determination of her sentence in a case which she categorised as a "grave case of manslaughter" which placed it "firmly on the borderline of murder and at the top of the manslaughter scale".

[32] The Court is therefore left in a state of uncertainty. Were these "special and exceptional" circumstances the 15 instances to which the judge adverted had mitigated the seriousness of the offence and which in her opinion caused the appellant to lose control? Or on the obverse side, were the "special and exceptional" circumstances the 6 facts which according to the judge aggravated the offence?

[33] It is our opinion that as was done in her consideration of the defence of provocation, the judge has contradicted herself and thus fell into error when determining what should have been the appropriate sentence. The judge found the loss of self control to be "reasonable in all the circumstances" – she itemised 15 instances which caused that loss of self-control – yet did not appear to "credit" the appellant with said circumstances.

[34] It would seem then that, despite her acceptance of provocation and of the spontaneity of the appellant's reaction to the situation in which he found himself, the judge did not look beyond her depiction of the death as "a wanton and senseless killing of an unarmed man", and as "a grave case of manslaughter which was at the top of the scale". And this despite her expressed consideration of the **Suratan** guidelines which were adopted by this Court in **Ricardo Deverne Griffith v R, Criminal Appeal No. 6 of**

2007. There this Court, repeating the exhortation of Mantell LJ in **Suratan,** stated in the relevant part:

> "... when sentencing an offender who is not guilty of murder but guilty of manslaughter by reason of provocation, the judge must make certain assumptions in the offender's favour.
>
> First, he must assume that the offender had, at the time of the killing, lost his self-control. Mere loss of temper or jealous rage is not sufficient.
>
> Second, he must assume that the offender was caused to lose his self-control by things said or done, normally and as in the cases with which we are concerned, by the person whom he has killed.
>
> Third, he must assume that the defendant's loss of control was reasonable in all the circumstances, even bearing in mind that people are expected to exercise reasonable control over their emotions, and that as society advances it ought to call for a higher measure of self-control.
>
> Fourth, he must assume that the circumstances were such as to make the loss of self-control sufficiently excusable to reduce the gravity of the defendant's offence from murder to manslaughter.
>
> Moreover, the sentencing judge must make these assumptions whether the offender has been found not guilty of murder but guilty of manslaughter by reason of provocation by a jury after a contested trial, or the Crown has accepted a plea of not guilty of murder but guilty of manslaughter by reason of provocation."

[35] There is no denying that a serious offence has been committed and that a custodial sentence is merited. This Court has oftentimes declared that regard

must be had to the irremediable nature of manslaughter to which has been statutorily prescribed a term of imprisonment for life which in turn is reserved by this Court for the most atrocious of cases. However, even if it were to be agreed that the present case could not fall any lower than the top of the manslaughter scale, and the starting point of 25 years as was established by the judge were to be accepted, we are nevertheless of the view that some regard ought to have been paid to the mitigating factors which in the opinion of the judge herself "reduced the seriousness of the offence and suggest a level of personal mitigation" of the appellant as the offender.

[36] This Court in other cases noted that the sentencing decision is not arrived at through mathematical or arithmetical calculation for as rather elegantly stated by Lord Bingham CJ in **Tony Avis and Others [1998] 2 Cr. App. R. (S) 178** at **185:** "Any rigid formulaic approach to levels of sentence could be productive of injustice in some cases". We recognise that sentencing is essentially an individualised process in which the judge considers the peculiar circumstances of each case while balancing correct principles in order to determine sentence. Here the judge adverted to the appellant's early guilty plea, the fact this was his first offence, his evident and genuine remorse, his positive pre-sentence report, the evidence of the character

witness and the plea in mitigation in which his attorney-at-law listed these factors as well as the appellant's relatively young age and his immediate cooperation with the police. The judge's starting at 25 years and discounting 3 years for the early guilty plea and 2 years for the other mitigating factors does not appear to us to have given adequate consideration to the factors which in her view reduced the seriousness of the offence and suggested that level of personal mitigation which she considered relevant to the ultimate sentence.

[37] Although repeated suggestions and references have been made, this Court has not as yet definitively stipulated the discount which ought to be afforded an accused person who enters a timely guilty plea. For example, in **Bend and Murray v R, Criminal Appeals Nos. 19 and 20 of 2001,** this Court opined that "the plea of guilty is a factor to be taken into account and from which a discount on the sentence should be given". The English authorities seem to suggest that a guilty plea should typically result in a sentence reduction of between a quarter and a third in the length of a custodial sentence. These authorities also accept that in some cases a guilty plea may be evidence of genuine remorse on the part of the offender. Thus the reason why the courts tend to grant a substantial discount on sentence for a guilty plea is that by so doing, the offender is cooperating in the smooth running of

the criminal justice system by helping to shorten trials, reduce court backlogs and save court costs.

[38] We are of the view that in the absence of statutory provision, sentencing courts when faced with an early guilty plea, should, after having balanced the peculiar circumstances of the individual case, actively consider an appropriate discount of the proposed custodial sentence.

[39] While generally concurring with the judge's observation that the guidelines in **Pierre Lorde** which deal principally with contested trials and with offences committed by use of firearms are not particularly helpful, we however surmise that guideline 2 perhaps comes closest to reflecting the circumstances of this case. That guideline reads:

> "In a contested trial where death was caused by a firearm and the **facts are grave** but mitigating factors such as **provocation** exist, the range of sentence should be 18 to 20 years. However, an **early plea of guilty** in a **non-contested case** on similar facts will attract a lower sentence in the range of 14 to 18 years". (Emphasis supplied)

[40] In the present case, factors relative to guideline 2 – death while not caused by a firearm but resulted from use of another intrinsically dangerous weapon, a knife, the facts are grave, provocation is accepted to exist, other mitigating factors are present and the case was not contested by reason of the early guilty plea – could have assisted in contemplation of a lower sentence. So that while this Court has stated that guidelines are merely guidelines, not

meant to be slavishly followed, and that there must never be an attempt to contort a case to fit within a particular guideline, we at the same time apprehend that there can be some correlative guidance to be garnered from that source. A similar stance can be taken with respect to guideline 3 which 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 guilty plea will reduce the range of sentence to 10 to 14 years."

[41] We do not propose nor intend at this time to attempt an analysis or revisit of the case of **Pierre Lorde** and its guidelines. Suffice it to say that we merely pause to reflect our acceptance of the Court's perspective in that case with reference to the positioning of so-called "grave" cases of manslaughter without the use of a firearm. At para 22 of that case, after having reviewed a number of cases which involved death both with and without the use of firearms, this Court opined:

> "[22] These paragraphs indicate that the bottom of the scale for a grave case of manslaughter without the use of a firearm is 16 years and the top of the scale is 20 years. But then the Court must consider all of the circumstances of the offence including the aggravating and mitigating factors in arriving at a sentence that is commensurate with the seriousness of the offence. In other words, having arrived at the starting point the judge should then take account of the aggravating and mitigating factors which will take the period of custody above or below the starting point."

[42] Connotation of "grave" was not specifically spelt out but can be discerned from the facts of the cases which the Court had reviewed. If this formula is to be employed, and we are of the view that it should, then the judge in this case having determined this to be a grave case of manslaughter, ought to have used 16 to 20 years as her starting point after which the circumstances of the offence including the mitigating and aggravating circumstances should be considered in order to arrive at the sentence commensurate with the seriousness of the offence.

Conclusion

[43] As stated earlier this Court will never arbitrarily interfere with a sentence. This Court will however consider that where a sentence appears to be manifestly excessive or disproportionate, that sentence must be adjusted accordingly. We are of the view that while in large measure the judge ostensibly took account of relevant factors the sentence of 20 years still manages to be excessive.

[44] **Section 14** of the **Criminal Appeal Act, Cap. 113A** permits this Court to alter a sentence if it thinks that a different sentence should have been passed. This Court can therefore quash the sentence passed at the trial and substitute one of greater or lesser severity. We exercise that discretion to reduce the appellant's sentence.

[45] In the result the sentence of 20 years imprisonment is quashed and a sentence of 14 years substituted therefor.

Justice of Appeal

Justice of Appeal **Justice of Appeal**