BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

CRIMINAL APPEAL No. 5 of 2014

BETWEEN:

CARSON ANTHONY ISMAEL **Appellant**

AND

THE QUEEN **Respondent**

BEFORE: The Hon. Chief Justice, Sir Marston C.D. Gibson, KA, the Hon. Sandra P. Mason and the Hon. Kaye C. Goodridge, Justices of Appeal

2015: October 22
2016: February 17, May 18

Mr. Marlon Gordon in association with Ms. Safiya Moore for the Appellant.
Mr. Elwood Watts for the Respondent.

DECISION

MASON JA:

Introduction

[1] This is an appeal against sentence.

[2] On Wednesday 25 September 2013, the appellant was arraigned on an indictment which charged that he on 26 May 2010 murdered Callista Alleyne.

In response to the arraignment, the appellant pleaded not guilty to murder but guilty to manslaughter. This plea was accepted by the Director of Public Prosecutions (DPP) and by the court.

[3] On 25 April 2014 the appellant was sentenced by **Crane-Scott J** to imprisonment for 20 years and now appeals that sentence.

Facts

[4] The facts were outlined by the DPP and accepted by the appellant's then defence counsel and by the court.

[5] Briefly they are: the appellant and his partner, the deceased, lived together in Tichbourne, Ivy, St. Michael. In the early hours of the morning of 26 May 2010, they had a dispute about a cell phone. The deceased attacked the appellant from behind and cut his throat with a knife. The appellant sustained an 11 centimetre long laceration to the front of his neck which left his larynx exposed and he unable to speak. The appellant retaliated with a cutlass and inflicted seven (7) wounds to the deceased: a chop wound to the neck which almost severed her head; a wound to the right shoulder; a wound to the upper right back; a wound to the left upper back; a wound to the left hand which almost severed the thumb; a wound to the right wrist and a wound to the mid back. The deceased was pronounced dead at the scene.

[6] The appellant was taken by ambulance to the Queen Elizabeth Hospital where, being unable to speak, he wrote the name of the deceased on a piece of paper as well as a brief version of what had happened:

> "The woman cut my throat and I hers and she dead".

[7] On 17 June 2010 in an interview with the police after having been informed of his rights, the appellant gave the following statement:

> "… I get up in the morning after six, then I went and pass water in the yard. While coming back in Callista was on the bed lying down then she had my phone. She tell me that she was trying to call her daughter cause her phone does not have any money. Then I take up the phone cause she put it down and I dial back the number and a man answer the phone. I give her back the phone and she answer it and walk way from the bed. She get vex and slam down the phone on the floor and she then take it up from on the ground and start breaking the chip. She take up the phone that I did buy for she the day before and she mash it up. She ask me for the chip for she phone and she asked me if I mash it up. I tell she look it there on the ground, it break and I did by the back door. Then she say, "You is a madman," all I know is that I feel this knife in my neck. I feel this knife cut my throat and I grab the knife in her hand. We fall down in the backyard and the knife fell out of my hand. They had a cutlass by the back door, I start feeling weak and I take up the cutlass and give her two chops on her shoulder with the cutlass. When I see that my neck cut I rub the blade on she neck too and that is what happen."

The Appeal

[8] The appellant's complaint is that the sentence was excessive for the following reasons:

1. The judge failed to take into consideration any element of self-defence.

2. The judge minimized the serious nature of the provocative conduct of the deceased.

3. The judge had sight of photographs which served no evidential or probative value but which had the possibility of inciting an emotive prejudice towards the accused.

4. The judge over emphasised the appellant's prior conviction.

1. Self Defence

[9] In this instance Ms. Safiya Moore, counsel for the appellant, submitted that although in a contested trial, the jury might have rejected a plea of self defence given the facts of the case, the judge as sentencer ought to have acknowledged that there was some measure of self defence.

[10] Ms. Moore stated that the appellant reacted after having been attacked by the deceased resulting in a life threatening injury. Accordingly, this amounted to self defence. In her written submissions, counsel noted that while the guideline decision of **Pierre Lorde v R [2006] 73 WIR 28 (Pierre Lorde)** does not elucidate on the mitigating factor of self defence, it clearly stipulates that the sentencing court can take into account some element of self defence even where rejected by a jury. Counsel suggested that in these circumstances where the appellant had pleaded guilty he ought similarly to have been afforded the benefit of the factor of self defence.

[11] In response, Mr. Elwood Watts, counsel for the respondent, pointed to the inaccuracy of this contention. He referred this Court to the judge's remarks at page 71 line 15 to 20 in the trial record where the judge stated:

> "since the deceased was the initial aggressor and had used a knife and inflicted, what must have appeared to have been a life-threatening injury on you. In this regard, he also argued that your violent actions were a response to the attack on you by the deceased".

Mr. Watts also referred the Court to page 72 line 13 to 19:

> "He [Mr. Pilgrim QC], nonetheless urged the court to have regard to the spontaneity of your actions, the provocation, the self-defence arguments which he raised, your early guilty plea and your contrition and remorse and to place your matter within Guideline 4 boldly suggesting that an appropriate sentence in your circumstances would be one of eight years or less."

Mr. Watts pointed more particularly to her findings at page 74 line 19 to 25:

> "Notwithstanding Mr. Pilgrim's submissions in relation to self defence, the court was unable to find that the offence had been further mitigated by your having acted in self defence, since according to your written statement, the knife had fallen to the ground and the deceased was therefore effectively disarmed prior to your having picked up the cutlass".

Finally, Mr. Watts pointed to page 75 line 1 to 16 where the trial judge said:

> "As the facts clearly disclose, after Callista Alleyne had attacked and cut you, you had grabbed the knife from her hand, after which you had both fallen into the backyard at which point the knife you had taken from her fell out of your own hand.

> It was then that acting, as this court has already found, out of provocation, you took up the cutlass, which according to you, was kept at the backdoor of the house and launched your unwarranted and vicious attack on the defenceless woman, causing those seven serious injuries about her body and neck which the Pathologist described in his report.
>
> As your statement clearly shows, the fatal blow to the deceased's neck was inflicted, not in self defence, but rather in an act of retaliation and in sheer revenge after you had realized that your neck had been cut."

Mr. Watts argued that based on the appellant's response after he had been attacked, his action could not be termed self defence.

[12] We cannot but agree with Mr. Watts that the appellant's submissions with respect to self defence cannot be sustained. The judge on the occasions referred to by Mr. Watts was merely recalling the urging by defence counsel to "acknowledge all the circumstances of self defence" with which she plainly did not agree. In rejecting defence counsel's submissions on self defence, the judge highlighted the fact that according to the appellant's written statement, the knife of which the deceased had possession, had fallen to the ground and the deceased had therefore been effectively disarmed prior to the appellant picking up the cutlass. This in the judge's opinion, belied any notion of self defence.

[13] In **Pierre Lorde** the Court listed as a mitigating factor relating to the offence: "some evidence of self defence even if rejected by a jury". The judge was

here however, notwithstanding defence counsel's submission on self defence, "unable to find that the offence had been further mitigated by any element of self defence" because as the appellant's statement clearly showed "the fatal blow to the deceased's neck was inflicted, not in self defence, but rather in an act of retaliation".

[14] The apprehensions recognised by the Court at para 27 of **Pierre Lorde** are applicable to this case. The Court considered that in the event of a contested trial, to the extent that there was evidence of the defence of both provocation and self defence in the prosecution's case, the burden of securing a conviction would not be light since the prosecution would be required to negative both defences. The Court was of the view, however, that the problem for the appellant would have been the excessive force which he used and even if he did not initially create a dangerous situation, he did not disengage from it and went too far. Similar circumstances occurred in the present case.

[15] As previously indicated, self defence as an option is unsustainable.

2. Provocation

[16] Ms. Moore's complaint in this instance is that it was incorrect for the court, having accepted the appellant's plea of guilty to manslaughter on the basis of

provocation, to have described the appellant's conduct as "particularly brutal and horrendous". Ms. Moore argued that the judge erred when after having accepted that the appellant had been provoked and had lost his self control, she then categorised the death as a "violent and terrifying death, intentionally brought about by the ferocious attack which you launched".

[17] According to Ms. Moore, these sentiments appeared to negative the judge's acceptance of the basis on which the guilty plea had been accepted and led to the judge's determination to place the offence on the borderline of murder and at the top of the manslaughter scale. Ms. Moore referred to this Court's recent decision in **Andrew O'Neil Hunte v R Criminal Appeal No. 6 of 2014 (Andrew Hunte)** where similar evocative comments had been expressed by the judge in the face of a guilty plea on the basis of provocation and resulted in a reduction of sentence.

[18] Mr. Watt's concession to the submission is indeed admirable. He acknowledged that certain of the judge's remarks were inconsistent with the concept of provocation as enshrined in **section 5** of the **Offences Against the Person Act Cap. 141 (Cap 141)** and the principle espoused by Devlin J in **Duffy v R [1949] 1 All ER 932 (Duffy).**

[19] While we accept that some of the judge's remarks with respect to the appellant's reactions to the attack by the deceased were somewhat unfortunate

and did not lend themselves to the concept of provocation which is reflected in **Cap 141** or in **Duffy,** we cannot but agree with the allegation by counsel for the appellant that "the sentencing judge minimised the serious nature of the provocative conduct of the deceased". The judge regarded that the appellant had indeed been provoked but that his reaction to the deceased's attack could be deemed excessive in the circumstances. At page 70 line 6 to 12 the judge was conscious that:

> "The deceased woman who had effectively been caught out then became the aggressor. She broke up valuable property belonging to both of you and then attacked you from behind and cut you in your throat with a knife. Following a struggle, you grabbed the knife and both of you fell into the backyard where the knife fell from your hand and the deceased woman was effectively disarmed."

[20] That having been said we are yet of the view that having accepted the plea of guilty on the basis of provocation, the judge negated that acceptance by her reference to the appellant's actions in terms such as "an act of retaliation and in sheer revenge", "unwarranted and vicious attack on the defenceless woman" and "a particularly brutal and horrendous killing of an unarmed woman" to quote a few. As stated, these comments do not correlate with the provisions of **Cap 141** which by **section 5** provides:

> "Where on a charge of murder there is evidence on which the jury can find that the accused was provoked, whether by things done or by things said or by both together, to lose his self-control, the question whether the provocation was enough to make a

> reasonable man do as he did shall be left to be determined by the jury; and in determining that question, the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man".

or the words of Devlin J in **Duffy** that:

> "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".

[21] In the premises we accept that there is some merit in this submission.

3. **Photographs**

[22] In the appellant's written submissions, it was suggested that the viewing of photographs of the crime scene by the judge served no probative or evidential purpose but created the potential for prejudice against the appellant due to their highly inflammatory nature. It must be noted that Ms. Moore declined at the hearing to stress this complaint.

[23] Short shrift can be made of this contention. Absent the authority of **section 132B** of the **Evidence Act Cap 121** which allows for the admission of photographs, it must be said that a judicial officer having been legally trained and having taken a judicial oath of, among other things, impartiality, must on occasion in the course of trial impassively and dispassionately view photographs regardless of their possible abhorrent nature and then make a

determination as to whether these photographs ought to be viewed by the jury. As the saying goes, it is all in the day's work of a judge who is trained not to be affected by such. Further, as contended by Mr. Watts, Ms. Moore has not indicated where the judge might have been influenced in a negative way after having seen the photographs nor has she provided any authority for the proposition that viewing of the photographs is an error.

[24] We can find no merit in this contention.

4. Appellant's Prior Conviction

[25] While in the written submissions counsel had submitted that there was an overemphasis by the judge with respect to the appellant's prior conviction, Ms. Moore at the hearing again did not seek to stress this issue. She acknowledged and conceded that the matter of the appellant's prior conviction had been raised by his then defence counsel and had been merely reiterated by the judge.

[26] In any event this point cannot be sustained because although the judge in her remarks acknowledged the fact of a prior conviction, there is no evidence that this had registered as an aggravating feature during the sentencing phase.

5. Excessive Starting Point and Resulting Sentence

[27] Ms. Moore argued that based on the totality of the issues but more particularly that concerning provocation, the appellant's sentence proved to be excessive.

She made reference to the facts in **Pierre Lorde** where according to her this Court took into account "the heated environment" of that morning and the level of provocation and as a consequence, reduced the sentence. She contended that a similar approach ought to be taken by this Court because the appellant in her view had not been given the full benefit of the plea of provocation. She sought in support to cite the cases of **Andrew Hunte, Oliver Devere Archer v R Criminal Appeal No. 26 of 2006** and **Anderson Beckles v R Criminal Appeal No 3 of 2006.**

[28] Mr. Watts in his turn submitted that despite the acceptance that there was some merit in the appellant's argument with respect to the issue regarding provocation, this case must be viewed as a grave case of manslaughter. In citing the case of **Andrew Hunte** which was also a grave case of manslaughter, he argued that the circumstances were different in that the number of blows inflicted by the appellant in the present case resulting in the near decapitation of the deceased set this case apart from **Andrew Hunte** where there had been a single stab wound inflicted. Counsel also suggested that this Court could consider a starting point of 20 years in place of the 25 established by the judge and that a sentence of no less than 18 years would be appropriate to meet the justice of this case.

[29] The jurisdiction of this Court with respect to sentencing is set out in **section 14** of the **Criminal Appeal Act, Cap 113A** by which this Court is permitted to alter a sentence if it is thought that a different sentence, whether of greater or lesser severity, should have been passed.

[30] That notwithstanding, this Court continues to iterate that it will only interfere with a sentence where that sentence is wrong in principle, is manifestly excessive or grossly disproportionate or where some statutory or procedural requirement has not been complied with.

[31] A review of the sentencing remarks indicate that the judge faithfully considered all the factors of which she was required to take account, namely the relevant statutory provisions of the **Penal System Reform Act, Cap 139**, the presentence report, the guidelines in **Pierre Lorde** as well as the submissions of respective counsel.

[32] In reflecting on the **Pierre Lorde** guidelines, the judge was satisfied that given the "special and exceptional" facts of this case, the parameters currently provided for in the four guidelines, coupled with the range of sentences set out in **Pierre Lorde** as currently framed, are woefully inadequate to enable the Court to do justice in this case. And so the judge determined that in the unfettered exercise of her sentencing discretion, 25 years would be the starting point for determining the length of the sentence to be imposed.

[33] The judge was mindful of her duty to ensure that the gravity of the punishment must be commensurate with the gravity of the offence and hence the issue of proportionality must be taken into account. She also considered the mitigating factors namely the early guilty plea, the presentence report, the appellant's expression of remorse and the "strong plea in mitigation" by defence counsel. All of these factors attracted a reduction by 5 of the 25 years established as the starting point for determination of the sentence. In the circumstances, we can find no fault with the manner in which the judge exercised her discretion.

[34] An assessment of the facts shows that despite the contention that provocation should result in a reduction of sentence as posited by Ms. Moore, this case remains a grave case of manslaughter. In fact it was accepted as such by defence counsel himself. The observation by this Court in **Pierre Lorde** is instructive. There the Court suggested that the period of incarceration for a grave case of manslaughter ought to be in the range of 16 to 20 years. The Court recognised however, that even after the starting point has been arrived at and account has been taken of the aggravating and mitigating factors, the sentence which is commensurate with the seriousness of the offence, can take the period of custody either above or below the starting point. It is therefore not for this Court to engage in a purely mathematical exercise in order to determine sentence.

[35] At the end of the day it must be remembered (1) that the offence of manslaughter carries an ultimate penalty of life imprisonment albeit reserved always for the most execrable of cases and (2) that there has occurred an irreplaceable loss of life.

[36] Admittedly the appellant became enraged by the attack from the deceased which left him with a slit throat and unable to speak. In his written statement he said:

> "... all I know is that I feel this knife in my neck. I feel this knife cut my throat and I grab the knife in her hand. We fall down in the backyard and the knife fell out my hand. They had a cutlass by the back door. I start feeling weak and I take up the cutlass and give her two chops on her shoulder with the cutlass. When I see that my neck cut I rub the blade on she neck too..."

[37] Despite feeling weak the appellant was able to respond to the attack and proceed to deliver to the deceased's body 7 chops, some severe and one proving fatal.

[38] Regard in these circumstances must be had to the **Suratan** guidelines adopted by this Court in **Ricardo Devere Griffith v R Criminal Appeal No. 6 of 2007** which include the dictate that the judge must make certain assumptions in favour of the offender when sentencing an offender who is not guilty of murder but is guilty of manslaughter by reason of provocation. These guidelines in seeming to reiterate the principle in **Duffy** go further to assert that even assuming that the defendant's loss of control was reasonable in all

the circumstances, he is still expected to exercise reasonable control over his emotions because as society advances, it ought to call for a higher measure of control.

[39] While accepting that the facts in **Andrew Hunte** differ greatly from the facts in the present case and while we are of the view that the judge was generally steadfast in her role as a sentencer, we must pay heed to previous decisions of this Court. In **Andrew Hunte** this Court was of the view that the judge erred, when having accepted the plea of guilty of manslaughter by reason of provocation, she used terms in describing the events which contradicted her acceptance of the defence. This resulted in a reduction of sentence of 6 years. The special and exceptional facts of the present case however, do not permit of a similar reduction. We have therefore taken into account the principle of individualised sentencing and, recognising that the circumstances of the offence determine the punishment, have reduced the sentence of 20 years imprisonment to 18 years.

Disposal

[40] The appeal is allowed to the extent that the sentence of imprisonment is varied from 20 years to 18 years.

[41] The appellant's term of imprisonment will be in accordance with the decision of the Caribbean Court of Justice in **Romeo Hall.**

Chief Justice

Justice of Appeal

Justice of Appeal