BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 25 of 2012

BETWEEN:

TEERATH PERSAUD **Appellant**

AND

THE QUEEN **Respondent**

Before: The Hon. Sir Marston C.D Gibson, K.A., Chief Justice, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal.

2015: May 13
2016: December 7

Mr. Ajamu Boardi for the Appellant.

Ms. Krystal Delaney for the Respondent.

DECISION

GOODRIDGE JA:

Introduction

[1] This is an appeal against sentence on the ground that it is excessive.

[2] The appellant, a Guyanese national, and another man, Christopher Omar McCollin (the co- accused), were indicted for the murder of Anna Druizhinina (the deceased) on 8 November 2008. At his arraignment on 11 September 2012, the appellant pleaded not guilty of murder but guilty of manslaughter. That plea was accepted by the Director of Public Prosecutions (DPP). On 11 December 2012, **Crane Scott J** sentenced the appellant to 25 years imprisonment. Having given him full credit for 4 years and 26 days spent on remand, the judge then ordered the appellant to serve 20 years and 339 days in prison.

[3] This appeal was set down for hearing on 28 May 2014. That date was vacated because Mr. Ajamu Boardi, counsel for the appellant, filed the grounds of appeal on 26 May 2014, two days prior to the hearing date. On 16 March 2015, the matter was adjourned at Mr. Boardi's request until 5 May 2015. However, Mr. Boardi was ill on that date and the matter was adjourned for one week. The appeal was eventually heard on 13 May 2015.

[4] Mr. Boardi requested and obtained the leave of this Court to refer to the transcript of the sentencing of the co-accused. The reason for Mr. Boardi's request is inextricably bound to the gravamen of this

appeal. That record revealed that the co-accused was arraigned on 3 February 2010 for the murder of the deceased. He entered a plea of not guilty of murder but guilty of manslaughter, which was accepted by the DPP. The co-accused was sentenced to 16 years imprisonment by **Worrell J** on 8 August 2010, full credit having been given for the time spent on remand.

The Facts

[5] According to the facts as set out by the DPP, the appellant worked as an agricultural worker at Palmers Plantation, St. Philip which was owned by Mr. John Jackson, the step-father of the deceased. Mr. Jackson and his wife also owned a business, Solo Distribution, in Black Rock, St. Michael. The appellant was transferred from Palmers Plantation and was allowed to reside rent free in an apartment at the Black Rock premises where he acted as caretaker, watchman and even assisted in the business.

[6] Sometime before November 2008, a large sum of money disappeared from Mrs. Jackson's handbag. There was a confrontation between the appellant and Mr. Jackson, during which the appellant allegedly attacked Mr. Jackson with a knife and the appellant received a gunshot wound to his left shoulder. Mr. Jackson was charged by the

police with causing serious bodily harm to the appellant. The appellant's services were terminated. The appellant then took up residence in Blades Hill, St Philip.

[7] On 8 November 2008, the Jacksons left the deceased at home at Palmers Plantation and went to work at the business. That afternoon the appellant and his co-accused went to the residence with the intention to steal. Due to the appellant's knowledge of the area and his familiarity with the Jackson's dogs, he and his co-accused encountered no difficulty in gaining entry into the home.

[8] On entering the house, the appellant and his co-accused encountered the deceased who started to scream. The co-accused apprehended the deceased on the balcony. The co-accused bound the deceased's arms and feet with electrical wire which had been retrieved by the appellant from a room downstairs and tied a towel around her face to silence her. Wire was tied around her neck and the end thrown over a beam in the ceiling. The appellant watched as his co-accused hoisted the deceased up and put her to stand on a paint can and a bucket which were placed one on top of the other. These items had been found by the appellant in the home.

[9] While the appellant waited on the balcony, the co-accused went through the house looking for items to steal. Sometime later the co-accused informed the appellant that the deceased jumped off the can and bucket. The co-accused took the body down and placed it on the bed. The co-accused rested for some time and then announced that he was going downstairs to look for gasoline. Having found gasoline, the co-accused returned to the bedroom and set fire to the room. The appellant then ran downstairs and went home.

[10] Mr. Jackson came home and found the house on fire and later discovered the body of the deceased.

[11] The appellant was taken into custody the same night. During the course of the investigation, the appellant gave a written statement to the police setting out in detail the events as they had transpired. In that statement, the appellant stated that his co-accused wanted to do landscaping work and he had informed him that Mr. Jackson had tools at his home which they could steal and advised him that Saturday would be the best day to steal the items as no one would be at home.

[12] A post mortem conducted by Dr. Stephen Jones, pathologist, revealed that the cause of death was ligature strangulation.

[13] Mr. Boardi who appeared as counsel for the appellant accepted the facts as given.

[14] The DPP informed the trial judge that, based on the appellant's written statement, this was a premeditated home invasion by the two men and the placing of the deceased to stand on the paint can with wire around her neck was conduct that was so wantonly reckless that anyone could have foreseen that death would result. The DPP stated that:

> "with the abolition of the murder felony rule or the doctrine of constructive malice, which had formerly said that once you do something like this it would constitute murder, the law has now been changed...the prosecution is now required to prove specifically an intention to kill. ...from the evidence on this file, we cannot establish a specific intent to murder. And it is for that reason that I am obliged to accept the plea of manslaughter."

The Appeal

[15] The appellant has filed twelve grounds in support of his contention that the sentence is excessive. We discuss these grounds hereafter in the manner in which they were argued.

Grounds 1 and 2 - Disparity of Sentence

[16] Mr. Boardi contended that (i) the sentence is manifestly excessive and (ii) the appellant's constitutional right to a fair trial was breached given his co-accused's sentence of 16 years for the same offence. He cited **Archbold Criminal Pleading, Evidence and Practice 2008**

paragraph 5-106, R v Fawcett 5 Cr. App. R (S) 158 (**Fawcett**) and **Frank Gibson v. The Attorney General of Barbados [2010] CCJ 3 (AJ).**

[17] Counsel submitted that there is no reasonable explanation for the difference in sentence, especially since the facts make it clear that the co-accused was the primary actor in the commission of the offence. Further, the actions of the appellant did not rise to the level of culpability of the co-accused, who carried out the acts that led to the death of the victim. Counsel contended that the appellant ought to have received a sentence which was considerably less than that of his co-accused and the failure of the trial judge to impose a lesser sentence amounted to a breach of the appellant's right to a fair trial. Having regard to the principle in **Fawcett**, counsel submitted that this Court should reduce the appellant's sentence given the disparity between his sentence and that of his co-accused.

[18] In response, Ms. Delaney, counsel for the respondent, submitted that this case was particularly reprehensible and the co-accused may have been very fortunate in receiving a sentence of 16 years. Counsel contended that the judge took into account the relevant considerations and in light of the many aggravating factors in this case, the sentence

imposed on the appellant was neither wrong in principle nor manifestly excessive and was therefore the right sentence in the circumstances. Ms. Delaney relied on **O'Brien and others v Independent Assessors [2007] UKHL 10** and **Lorenzo Jordan v R Criminal Appeal No. 22 of 2012 (Lorenzo Jordan)**.

Discussion

[19] Mr. Boardi's complaint on these grounds is that there is disparity between the sentences imposed on the appellant and his co-accused in that a higher sentence was imposed on the appellant whose culpability was not as great as that of his co-accused and this rendered the sentence excessive.

[20] In this regard, it is important to recall what was said by this Court in **Lorenzo Jordan** on the issue of disparity in sentence. There **Mason JA** stated:

> "[41] 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".
>
> [42] 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 the degree of culpability be taken into account."

[21] It must also be borne in mind that the appellant and his co-accused were sentenced by 2 different judges at different times. As **Mason JA** pointed out at para **46** of **Lorenzo Jordan**:

> "[46] 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 circumstances prevailing at the time when the criticised sentence is imposed'."

[22] It is with the above principles firmly in mind that we now turn our attention to the other grounds of appeal in order to determine whether the trial judge erred in the exercise of her sentencing discretion and imposed a sentence which was excessive.

Grounds 3, 4 and 5 - Misapplication of Sentencing Principles

[23] Mr. Boardi, counsel for the appellant, contended that the trial judge erred in holding/finding that the following were aggravating factors:

> "(i) that the appellant was aware that the actions of himself and his co-accused were dangerous acts;
>
> (ii) that the appellant did nothing to assist the victim; and
>
> (iii) that the appellant recklessly stood on the balcony until "the inevitable occurred"."

[24] Mr. Boardi submitted that the appellant did not physically carry out the acts that led to the death of the victim. It was the omissions of the appellant as set out above which made him guilty of manslaughter. Therefore it was unfair of the judge to go further and to consider those same omissions to be aggravating factors of the crime. This had the effect of penalising the appellant twice for the same conduct and led to the absurd result that the appellant was considered to be equally or

more culpable (in the sentencing phase) than the person who actually carried out the acts which caused the death.

[25] In rebutting this contention, Ms. Delaney submitted that the judge was correct in considering these omissions as aggravating factors, as they highlighted the appellant's involvement in the joint enterprise and his degree of culpability.

[26] In our opinion, a distinction must be drawn between the basis on which the plea of manslaughter is accepted and the determination of the appropriate sentence for the offender. At the stage of seeking to arrive at the sentence, the judge is required by the **Penal System Reform Act, Cap. 139** to take into account the circumstances of the case including any aggravating or mitigating factors. This means that the judge must consider the acts or omissions of the offender during the commission of the offence. The facts clearly indicate that the appellant was present when his co-accused engaged in the dangerous act of placing the deceased in the precarious position on the balcony and did nothing to dissuade him from this action. We do not consider that the judge erred in identifying the omissions as aggravating factors.

[27] Further, we find no fault with the judge's comment that the appellant was equally or more culpable than his co-accused. In the circumstances where the appellant had previously enjoyed the confidence of the family, was familiar with the dogs and the surroundings, and even knew the family's habits to the extent that he was fully aware of their goings and comings, it was open to the judge to comment as she did.

Ground 6

[28 On this ground it is alleged that the trial judge erred by determining that it was an aggravating factor that the appellant "showed callous lack of concern for the victim" following the news that she had died especially since such a determination could not be borne out on the facts.

[29] Mr. Boardi submitted that in his written statement the appellant's use of the phrase "me a study that girl who dead in there" was evidence that the appellant was disturbed by what had happened to the deceased.

[30] In response, Ms. Delaney contended that although the appellant stated that he had concern for the deceased, this concern was not borne out by his actions that day. There was no attempt on the appellant's part to

try to revive the deceased or to seek medical attention for her. Instead, the appellant's statement after being told that the deceased had jumped off the tin that "then we start to study, worries dey now, we say the girl dead now" showed that the appellant was more concerned about the trouble he would be in than in the welfare of the deceased.

[31] We agree with the judge's assessment that the appellant's actions displayed a lack of concern for the deceased. We are therefore not persuaded that the judge erred in the manner as alleged by Mr. Boardi. This ground cannot be sustained.

Ground 7

[32] Here counsel has argued that the judge erred by determining that it was an aggravating factor that the appellant took no action to actively discourage or prevent the stated intention of the co-accused to burn down the house and the body lying inside it especially since such a determination was not borne out on the facts.

[33] Ms. Delaney's response to this argument was that the judge correctly determined that the appellant's failure to discourage or prevent the arson was an aggravating factor.

[34] According to the appellant's written statement, after his co-accused had told him that he was going downstairs to see if there was gasoline

on the premises, he returned with a yellow pail and a two gallon container jar with a funnel. The co-accused then went upstairs and after two minutes he came back down and told the appellant that he had lit the bed upstairs. The appellant asked the co-accused why he had lit the bed. It was at this point that the appellant saw a light and he told his co-accused that it was the Jackson's car "me tell him me gine run, let we go". The co-accused said "no I got to light this (fucking) house a fire" and the appellant ran downstairs and away from the house.

[35] In our opinion, we see nothing wrong with the judge's assessment on this point. This ground also fails.

Grounds 8, 9, 10 and 11

[36] Counsel argued these grounds together. He contended that the judge erred by failing to apply an appropriate discount in the sentence for:

(i) the appellant's guilty plea;

(ii) the fact that the appellant had no record of offences;

(iii) the appellant's cooperation with the police by making oral as well as written statements; and

(iv) his expression of remorse.

[37] Mr. Boardi submitted that the trial judge gave a discount of 4 years for the appellant's guilty plea. The judge then applied a discount of 1 year for having a clean record, cooperation with the police and remorse. According to counsel, the discount for the guilty plea was just 13% and that for the other factors just 3%. These discounts, counsel submitted, were out of step with the jurisprudence and generally recognised sentencing principles. He relied on **Pierre Lorde v R (2006) 73 WIR 28 (Pierre Lorde), R v Hurley, Director of Public Prosecutions Reference No. 2 of 2010,** and *Reduction in Sentence for a Guilty Plea: Definitive Guideline, English Sentencing Council, July 2007.*

[38] Counsel also contended that the judge's comment that the appellant's expression of remorse to the probation officer that he was "saddened to hear of the death of the victim" and that "she was a good girl" who had never shown him "a bad face" suggested a level of detachment from the victim which was disconcerting caused the judge not to give the appellant the appropriate discount for this factor.

[39] Ms. Delaney's response to these submissions was that the appellant pleaded guilty about two years after his committal. It therefore could not be said that the appellant had availed himself of the opportunity to

plead guilty at the earliest opportunity. In the circumstances no appreciable discount could be given. Counsel also submitted that the trial judge was entitled to give a minimal discount for the other mitigating factors, given the severity and circumstances of this case.

[40] We consider that there is no justification for counsel's complaint in relation to the matter of remorse. In our view the judge's characterisation of the appellant's remorse did not cause her to err in determining the appropriate discount for this factor.

Ground 12

[41] The final ground was that the sentence was too severe in all the circumstances. Mr. Boardi submitted that the sentence is out of step with the jurisprudence in that it had the effect of giving the appellant a longer sentence than others guilty of similar conduct. Mr. Boardi relied on **R v Curtis Foster, Director of Public Prosecutions Reference No. 1 of 2010** and **Bend and Murray v R, Criminal Appeals Nos. 19 and 20 of 2001.**

[42] Ms. Delaney countered this submission this way. According to counsel, the trial judge correctly followed the approach to sentencing as outlined by this Court in **Pierre Lorde**. She considered the aggravating and mitigating factors relevant to the offence and the

offender. The sentence imposed was not manifestly excessive or wrong in principle and on that basis this ground should fail.

[43] This Court has been at pains to point out in its many decisions that sentencing is an individualised process and what is important is that a judge demonstrates that the correct principles have been applied. As **Mason JA** stated at para **53** of **Lorenzo Jordan**:

> " [53] .....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."

[44] Having regard to the facts and circumstances of this case, we are satisfied that the sentence imposed in this case was entirely appropriate.

Disposal

[45] Accordingly the appeal is dismissed. The sentence is hereby confirmed.

Chief Justice

Justice of Appeal

Justice of Appeal