

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Criminal Appeal No. 16 of 2013**

**BETWEEN:**

**EVANSON DECOURSEY ARMSTRONG**

**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**

**2017: February 08**

**2017: May 23**

**Ms. Safiya Moore for the Appellant**

**Ms. Krystal Delaney for the Respondent**

**DECISION**

**MASON JA:**

**Introduction**

[1] On 22 March 2013 on arraignment, the appellant pleaded not guilty to murder but guilty to manslaughter in the killing of Elvin Thomas on 25 June 2012.

On 22 October 2013, he was sentenced by **Crane-Scott J** to a term of imprisonment for 18 years.

[2] The appellant now appeals that sentence.

### **Background**

[3] The following facts were read into the record by the Director of Public Prosecutions, Mr. Charles Leacock QC, and reiterated by the judge at the sentencing phase.

[4] Several months prior to the killing, the deceased had retained the appellant to do some electrical work at his home at Hothersal Crescent, St. Michael. A dispute arose between the two men regarding the performance of the work and during the altercation, the deceased chopped and wounded the appellant. The deceased was charged for the offence and was granted bail when he appeared before the magistrate on 3 October 2011. The case was adjourned to 18 January 2012 and further adjourned to 27 June 2012.

[5] Having attended the court on the first two occasions when the case was called, the appellant formed the mistaken view that nothing was happening and that the case had been dismissed.

[6] On 25 June 2012, two days before the adjourned date, the appellant went to the deceased's home. The deceased was not at home so the appellant sat down at a nearby bus stop and awaited his arrival.

[7] Some time after 9.00 p.m. the deceased arrived home in the company of his family. He drove his vehicle into his garage and as he alighted from the vehicle, the appellant walked up to him with a gun in his hand and shot him several times. The deceased was pronounced dead at the scene by Dr. Andrew Murray.

[8] When arrested by the police the appellant cooperated fully during the investigations. He gave the following statement:

“Last year in October, me and Thomas talk ‘bout fixing up he house and I went out by the house and look at the job and I charge he \$900. I start working that day and I work on pulling through some wires.

About two days later and I tell he to get the wall plaster that I could put on the plates. The next day I went back by he and the wall did not plaster. The carpenter did there dealing with the ceiling and he tell me that he pull down some wires and to pull them back through. I went in the ceiling and connect back the wires and then I left he house. Thomas call me that night and tell me that he ain’t got no light in he bedroom and I tell he that it late to use a candle till in the morning ‘cause it too late for me to come there.

The next morning Thomas came and collect me from by the Belle and we went by he house. When I get in the house I see that the wall did not plaster, so I tell he to get the wall plaster and call me back tomorrow. I take up my bag and walk out the house. When I get in the gallery Thomas run past me and went in he van and take out a cutlass from in it. He came up to me and I say, “Thomas, where you gine with that cutlass?” Thomas cut me on my left shoulder and I say, “Thomas, you cut me,” and when I say so, he swing the cutlass at my head and I put up my left hand and the cutlass hit me on the finger and on my left hand.

Thomas then chop me in the middle of my head and I drop my bag and run off a little way from he. Thomas take up my bag and he like he did telling me to come for it. I take up some rocks and I pelt at he and he run in the house and left my bag. I ran and take up my bag and left out there. I went to the police and then I went to the hospital.

The night this thing happen I left home and walk up by Thomas when I got there I see that the van did not in the garage so I tell myself that he ain't home 'cause the gallery light and the garage light did on. I went and sat down by the bus stop in front of Roberts and wait til whatever time he come home.

When I did there sitting down Thomas drive past me from the Belle side and he turn and pull in he driveway and park. I get up the same time and walk to he house with my gun in my hand. I see a man get out the back seat of the van and he walk in the gallery and a woman did in the van. Thomas then get out he van and I walk up to he with the gun in my hand and he ain't even tell me sorry for cutting me but he tell me some foolishness.

I shoot he 'bout four or five times and the gun jam on me. Thomas jump at me and I push he off and chuck the gun and it went back in place and I shoot he till it did empty.

When he did on the ground, I went and look in he face and he tell me that I gine go jail fuh this. I tell he I know.

I remember that when I did gine to de house my keys did keeping noise and I take them out and drop them by de house. After I shoot he, I walk home and change my shirt and shoes and went in town by Independence Square. I sit down on a bench till morning and then I walk on the bridge and then throw the gun in the sea".

## **The Appeal**

- [9] The appellant complained that the sentence imposed was excessive in circumstances where (i) the judge negated the mitigating factor of provocation in the sentencing remarks; and (ii) the judge failed to appropriately apply the guideline decision of **Pierre Lorde v R (2006) 73 WIR 28 (Pierre Lorde)**.
- [10] Ms. Safiya Moore, counsel for the appellant, contended that while the judge had apparently accepted the defence of provocation, certain of her sentencing remarks did not reflect the guidelines set out in the English decision of **Attorney General's Reference (Nos. 74, 95 and 118 of 2002)** familiarly entitled the **Suratan** guidelines (the **Suratan** guidelines) nor the classical definition of provocation found in the case of **Duffy v R [1949] 1 All E R 932** and were wholly inconsistent with the definition of provocation contained in **section 5** of the **Offences Against the Person Act Cap 141 (Cap 141)**. As a consequence, argued counsel, these remarks nullified the plea of provocation.
- [11] Counsel highlighted page 147 of the trial record where the judge at line 12 to 13 had remarked that the killing was premeditated and deliberate and had continued at line 17 to 20 to state:
- “Your actions clearly show that this was no spontaneous action on your part and that you went to the deceased man’s home that night armed with a firearm with the intention of taking the law into your own hands”.
- [12] Ms. Moore submitted that in circumstances where the judge negates the basis for acceptance of the plea, any subsequent sentence must be found to be wrong

in principle, considered excessive and should be adjusted accordingly. Counsel referred the Court to its decisions in **Ricardo Deverne Griffith v R Criminal Appeal No. 6 of 2007 (Griffith)** and **Carson Anthony Ismael v R Criminal Appeal No. 5 of 2014 (Carson Ismael)**.

- [13] In contending that the judge did not appropriately or adequately apply the **Pierre Lorde** guidelines, Ms. Moore submitted that the judge either placed the facts of the offence in the wrong band of the guidelines or that in relying on para 36 of **Pierre Lorde** in order to sentence outside of the guidelines, the judge failed to go further and provide a rationale for so doing.
- [14] Counsel suggested that the case fell squarely within guideline 2 of the **Pierre Lorde** guidelines and with the mitigating factor of provocation, the judge ought to have used the maximum starting point for sentencing at 18 years. Ms. Moore noted that while the judge had a discretion to sentence outside of the guidelines, having not stated what special or exceptional circumstances warranted her so doing, this resulted in a sentence which was wrong in principle and equated to an excessive sentence. For this proposition, counsel cited the case of **Andrew O'Neil Hunte v R, Criminal Appeal No. 6 of 2014 (Andrew Hunte)**.
- [15] Ms. Krystal Delaney, counsel for the respondent, noted that while the impugned statements of the judge appeared to be inconsistent with the

principle of provocation, which requires a loss of self control, the sentence arrived at by the judge was appropriate, taking into account all of the accepted facts and circumstances of the case, and given that the aggravating factors were substantial and outweighed the mitigating factors.

### **Discussion**

- [16] It bears repetition to state that the jurisdiction of this Court in relation to appeals against sentence is to be found in **section 14** of the **Criminal Appeals Act, Cap. 113A** where this Court is empowered to alter a sentence by substituting one of greater or lesser severity. This Court has also consistently noted that it will only interfere with a sentence if that sentence can be considered manifestly excessive, disproportionate or wrong in principle.
- [17] Interference with a sentence necessitates a review of whether the sentencing judge took into account the relevant legislative provisions, legal principles and, where they exist, guidelines. In other words, this Court must ultimately determine whether having regard to all of the relevant factors, a different sentence should have been passed or whether the sentence which has been passed, notwithstanding any lapse on the part of the judge, is the appropriate sentence.
- [18] In this case the relevant legislative provision is contained in **section 5** of **Cap. 141** which 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.”

[19] The principle regarding provocation, as noted by counsel, is basically the pronouncement by Devlin J in **Duffy** that:

“Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes 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 or her mind.”

[20] This Court has accepted that the **Suratan** guidelines are relevant in this jurisdiction. They mandate that:

“... 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”.

[21] As pointed out by counsel, the judge was obligated to take direction from the Director of Public Prosecutions who is constitutionally authorised to determine the basis upon which a person alleged to have committed a crime is to be prosecuted. It was the Director who accepted the appellant's plea of guilty of manslaughter by reason of provocation. That direction having been established and plea accepted, it was then the sole province of the judge to determine sentence. This she did based on the legislative and other requirements taking into account the facts and circumstances of the case.

[22] We accept and acknowledge that some of the statements made by the judge could be regarded as inappropriate and neglectful and appeared to undermine the basis upon which the plea of provocation was accepted. We also agree that it was the duty of the judge in accepting such a plea to make certain assumptions in favour of the appellant. The judge however, is not required to be oblivious to or to blatantly ignore the facts and circumstances and so determine the case in a vacuum. Provocation as a plea operates to determine

offence seriousness and may result in a reduction of a sentence. Provocation does not operate to eclipse the passing of an appropriate sentence.

[23] In our view, the judge was ever mindful of the plea. At page 149 lines 5 to page 150 line 20 of the trial record, the judge carefully categorised the facts and circumstances which in her opinion were reasonable and such as to make the appellant's loss of self control "sufficiently accessible to reduce the gravity of your actions from murder to manslaughter". She however justifiably concluded that despite these mitigating factors, the response of the appellant could not be condoned when set against the aggravating factors.

[24] In suggesting that a reduction of sentence based on the judge's remarks was inevitable, counsel sought to rely on **Carson Ismael** where this Court reduced the appellant's sentence based on similar utterances by the sentencing judge. To imply that each time inappropriate remarks are made by a judge must result in an immediate reduction of a sentence is to state that the judge must ignore the facts and circumstances of the particular case when sentencing.

[25] In **Carson Ismael**, the actions of the appellant were decidedly spontaneous. They were in effect a tit for tat situation. "The woman cut my throat and I hers". The deceased woman was the aggressor and had slit the appellant's throat whereupon he immediately retaliated.

[26] The appellant's actions in the case at bar were dissimilar. Counsel argued that the last act of the deceased was the proverbial straw that broke the camel's back when according to the appellant's written statement "Thomas put his hand in his pocket, walk and come to me and tell me about one how, nobody ain't care nutten 'bout me what I doing by he place". While admittedly the appellant might have become incensed at this since he had formed the opinion that his case had been dismissed, what cannot be gainsaid are the appellant's actions before his confrontation with the deceased: (1) he came to the deceased's house armed with a gun; and, (2) when he found the deceased not at home, he was prepared to sit and await his arrival. Nor can be ignored his subsequent action: he shot the deceased multiple times and when the gun "jammed", he "chucked" it "and it went back in place and I shoot he till it did empty". The judge could not have explicably ignored these facts even while making assumptions in the appellant's favour.

[27] At page 154 lines 16 to 25, the judge reflected:

"The Court accepts that, as the learned Director of Public Prosecutions rightly pointed out, you chose to take matters into your own hands rather than to let the law take its course. The Court cannot condone what you did, as to do so would give credence to "jungle justice" as well as to outdated notions of vengeance and revenge which are anathema to the rule of law on which this society is based. The Court was firmly of the view that this is a case where the seriousness of this offence must be reflected in the sentence passed by the Court".

- [28] While this Court has understandably on occasion decried the instances when a sentencing judge in his/her remarks has made a blunder, we are of the opinion that it is not every case which warrants a reduction in sentence especially when it is unequivocal that the judge has to all accounts otherwise followed the requisite steps.
- [29] The record reveals that the judge adverted to the **Penal System Reform Act, Cap. 139** which by **section 37(1)** mandates the ordering of a pre-sentence report and which according to the judge afforded her the opportunity to consider the appellant's family circumstances, his educational and social background, his employment history and his attitude to the offence.
- [30] The judge noted that in accordance with **section 35(2) (e)** of that Act, she had formed the opinion that only a custodial sentence could be justified. She considered the issue of proportionality with a view of determining what length of sentence would be appropriate to do justice in the case. In focusing on the appellant as the offender, the judge took into account the factors which in her view reduced the seriousness of the offence to reflect a personal mitigation, namely the appellant's early guilty plea, the element of provocation, his cooperation with the police and his declared remorse for his actions.
- [31] We can only repeat the observation made by this Court in **Griffith** at para 33 that:

“A judge’s sentencing remarks are not analogous to a summing up to the jury. In a summation a judge is obliged to give directions to the jury on points of law but a judge’s obligations when passing sentence are far less extensive. Provided all relevant information is before the court, the judge is not obliged to mention and repeat every consideration that is relevant to the sentence imposed”.

[32] Counsel’s challenge regarding the **Pierre Lorde** guidelines was the judge’s starting point of 25 years which counsel considered excessively high in circumstances where it is suggested that the defence of provocation was negated by the judge’s sentencing remarks.

[33] There can be no criticism of the judge when, as she was entitled to do since her discretion in sentencing is expected to be unfettered, the judge considered that, notwithstanding that the appellant was provoked and lost control, the gravity of the offence as divulged by the facts made it a grave case of manslaughter and placed it on the borderline of murder and close to the top of manslaughter scale. The judge then determined that the case came within guideline 1 of the **Pierre Lorde** guidelines and established that 25 years was the appropriate starting point for determining the sentence.

[34] Guideline 1 of the **Pierre Lorde** guidelines states:

“In a contested trial where death was caused by a firearm and the facts are on the borderline of murder with no mitigating features, the range of sentence should be 25 years and upwards, including, in a proper case, life imprisonment.”

[35] Counsel argued that the facts placed the case within guideline 2 which states:

“In a contested trial where death was caused by a firearm and the facts are grave but mitigating factors such as provocation exists, the range of sentence should be 18 to 22 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.”

[36] We are in agreement with counsel that the facts would seem to more appropriately place the case within guideline 2 since (i) death was caused by a firearm; (ii) the facts were grave; (iii) the mitigating factor of provocation existed, and (iv) there was an early plea of guilty. What we do not agree with however, is the suggested automatic determinate sentence of 18 years as the starting point.

[37] We are reminded at para 22 of **Pierre Lorde** that in a grave case of manslaughter:

“... 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”.

[38] Therefore, in determining the appropriate length of the sentence, the court must balance all of the competing factors.

[39] Perusal of the record clearly reveals that the judge followed this directive. It is our view, that even if the judge had begun where counsel suggested that she ought to have done, that is at 18 years, with the aggravating factors which far

outweighed the mitigating factors, it is quite possible for the judge to have ended up where she did. Situating the case in what counsel termed the “wrong band” of the **Pierre Lorde** guidelines cannot in our view be in any way fatal to the sentence.

[40] We are not convinced that there is any substance in counsel’s argument that the judge in relying on her unfettered discretion in sentencing failed to give reasons for sentencing outside of the guidelines.

[41] Para 36 of **Pierre Lorde** upon which counsel relied for this supposition states:

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

[42] In our judgment in the first place, the judge did not go outside of the guidelines for at page 155 lines 4 to 7, she somewhat wistfully remarked:

“The Court further considered that the Pierre Lorde guidelines as currently framed are conceptually inadequate to enable the Court to fix an appropriate starting point which would enable the Court to do justice in this case”.

Then she continued at lines 8 to 13 to state:

“In the circumstances, doing the best it can and having an eye on the existing Pierre Lorde guidelines, the Court in the exercise of its sentencing discretion, established 25 years, which would obviously bring it within guideline 1, as the appropriate starting point for determining the length of your sentence.”

[43] This in our opinion indicated that despite any shortcomings which the guidelines might have presented to the judge and their inability to adequately cover the case, the judge was yet willing to consider them and have “an eye” to them when situating the case, albeit perhaps inaptly, in guideline 1. We hasten to emphasise however, that despite any conclusion to the contrary, the judge in accordance with the principle of individualised sentencing was nevertheless entitled to determine that guideline 1 was for her the appropriate guideline for this case.

[44] Counsel further suggested that based on this Court’s decision in **Andrew Hunte**, the judge ought to have identified the special or exceptional circumstances as required by para 36 of **Pierre Lorde** which led to her going outside of the guidelines. It is important to note that when this Court in **Andrew Hunte** stated that failure to state what special or exceptional circumstances existed to warrant a diversion from the guidelines created a state of uncertainty, it was our view that the case was somewhat devoid of definitive indicators of the special or exceptional circumstances which informed the judge’s decision to go outside of the guidelines. We are satisfied that in this case the judge did not go outside of the guidelines and consequently had no need to give any rationale for so doing.

[45] In conclusion we repeat the very apposite para 23 of **Pierre Lorde**:

“Before coming to a determination on the issue before us, we feel obliged to make some general comments of which sentencers should always be conscious in these types of manslaughter. First, the Constitution of Barbados places the highest value on the sanctity of human life and, save in the most exceptional circumstances, the punishment for manslaughter will inevitably be one of immediate custody. In this regard, a court must carefully examine the context in which the death occurred. Secondly, since the consequence of the offender’s act is death, culpability will be an issue to which sentencers must direct their minds. The conduct of the offender will be a critical factor in determining the length of a sentence and whether that sentence should reflect a deterrent objective and public concern about the offence. Thirdly, as *Walkins LJ* observed in **R v. Hussey (1989) 11 Cr.App.(S) 460** at 462, “cases of manslaughter vary infinitely. Therefore, so does the punishment for it.” Implicit in that observation is a requirement to consider the total circumstances of the offence. Fourthly, although the punishment should always match the circumstances of the offence, consideration should be given to the principle of individualised sentencing in passing a sentence that would be adequate to protect the public.”

### **Conclusion**

[46] Despite the fact that the judge might have situated the case within the incorrect band of the **Pierre Lorde** guidelines and despite the judge’s treatment of the issue of provocation, we do not regard the sentence as imposed by the judge in these circumstances to be either manifestly excessive or wrong in principle.

### **Disposal**

[47] For the foregoing reasons, the appeal is hereby dismissed and the sentence of 18 years imprisonment affirmed.

**Justice of Appeal**

**Justice of Appeal**

**Justice of Appeal**