**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Criminal Appeal No. 8 of 2017**

**BETWEEN:**

**TONEAL OMAR WALROND** **Appellant**

**AND**

**THE QUEEN** **Respondent**

**Before The Hon. Kaye C. Goodridge, Justice of Appeal, The Hon. Margaret A. Reifer and the Hon. William J. Chandler, Justices of Appeal (Acting)**

**2019: May 28**
**September 11**

**Mr. Marlon Gordon for the Appellant**

**Ms. Olivia Davis for the Respondent**

## DECISION

**REIFER JA (ACTING):**

**INTRODUCTION:**

[1] The appellant Toneal Omar Walrond was indicted for the murder of Evans Burnham in October 2014. On 18 February 2016, he pleaded guilty to manslaughter and the Crown accepted his plea.

[2] On 19 June 2017 he was sentenced to 15 years in prison but after being credited, in accordance with **Romeo Hall**, with the 5 years 334 days spent in jail prior to sentence, he was sentenced from that date to 9 years 21 days.

[3] He has appealed that sentence as being excessive.

**THE FACTS**

[4] The facts were outlined by counsel for the prosecution and accepted as correct by the appellant.

[5] The deceased Evans Burnham was a 60 year old man employed as a butler at a residence in Sandy Lane. He was the caretaker of an elderly 93 year old woman where they both resided at a three bedroom house at Black Bess in the parish of Saint Peter. He was assisted by a cousin who stayed with the old lady when he was not there.

[6] The Crown's case was that sometime between 1 and 2 July 2011, the deceased was struck on the head with a piece of wood by the appellant. He was alive when discovered on the morning of 2 July, was hospitalized as a result, but succumbed to his injuries on 8 July 2011.

[7] He was found on admission to the hospital on 2 July 2011, to have a subcutaneous haematoma of the scalp involving both sides of his head and a fracture of the left parietal bone with a loose 5x3 centimetre portion of the bone. There was bleeding into the brain when he was examined at the

hospital. He was discharged on 4 July 2011 after review of his CT scan, but re-admitted on 7 July 2011 and died in the hospital on 8 July 2011.

[8] His cause of death was noted as cerebral oedema, secondary to intracranial haemorrhage and head injury. He was also found to have pneumonia.

[9] Sometime in June 2011, the deceased rented a motor vehicle from Corbin's Car Rentals. The main reason for this was to accommodate the transportation of his ex-wife and children with whom he enjoyed a good relationship, and who were on a visit to the island from the United States of America.

[10] Investigations revealed that the deceased left work around 9.30 p.m. on the evening of 1 July 2011. He drove some of his co-workers home. He arrived home thereafter and transported his cousin to her home. He returned to his home and parked the rental vehicle to the western side of his house.

[11] The physical evidence and the appellant's statement sit somewhat uncomfortably together. We remind ourselves, however, of those situations where the court is not obliged to hear evidence under the principles laid down in **R v Newton 77 Cr. App R. 13**. We are of the view that this is one of those circumstances, as both sides acknowledge that there appear to be unspoken circumstances in this matter, but seemingly agree that these circumstances do not constitute a contradiction of the prosecution's case: see *Archbold Criminal Pleading and Practice 2013 5-101* and *Blackstone's Criminal Practice 2011*

*D 19.9* and *19.18*. In short, there was no dispute between the prosecution and the defence on the facts.

[12] In his statement to the police, when informed that he was suspected of being responsible for the injuries to the deceased and the theft of the rental car, the appellant explained that he went for money owed him after doing some painting for the deceased and the deceased attacked him with a chair. He retaliated by hitting the deceased around the head with a piece of wood. His response to the police officers when asked where this incident occurred, was that it took place outside the house by the door, just as the deceased arrived home.

[13] He confessed to the police officer that the blow knocked out the deceased, so he unlocked the door and dragged him into the house and gave him some ice. He told the police that the condoms found in the house had been placed there by him. He told them further that he took the car keys from the pocket of the deceased and drove the car to a dub that he attended that night. On the following Monday morning he returned the car to Corbin's garage.

[14] The appellant gave the police a written statement in which he admitted to hitting the deceased several times on his head with a piece of wood. He later identified the said piece of wood which he said had broken into two pieces.

[15] The police were summoned to the residence by the daughter and sister of the deceased who became concerned when they were unable to reach him and when they visited found the circumstances around the premises suspicious. The police on their arrival found one of the rear doors unlocked and entered the house through the said door. It was the observation of the deceased's daughter and sister when they entered the house that things were not as they usually were or should have been: the fact that the door was unlocked, mosquito nets were thrown on the ground which would usually have been inserted in the windows, plant pots were broken around the house, one window was unusually ajar.

[16] They found the deceased in the house in unusual and suspicious circumstances: he was alive and sitting in a chair; his head and eyes were swollen; he was wearing a bath towel only around his waist and his daughter described his left face as "hanging"; there was blood under his fingernails and on his chest; furniture in the house was out of position; there was blood in one of the bedrooms on the bedspread in a bathroom and in a toilet bowl; there were condoms found on the floor of the bathroom. It was the opinion of the police officers in their statements that there appeared to have been a struggle in the house. A piece of wood together with a number of other items were taken from the house and handed over to the Forensics Science Centre for

analysis. This piece of wood was later identified by the accused as the one used by him to hit the deceased.

[17] The deceased was incoherent and could offer them no explanation as to what had happened to him. He was transported to the hospital from the scene.

[18] The appellant, age 27 at that time, was charged with the offence of serious bodily harm and later informed on 16 July that the charge had been upgraded to the more serious charge of murder. When informed of Mr. Burnham' death from the injuries inflicted, the appellant replied: "I can't believe he dead just so."

**The Judge's sentencing remarks**

[19] On 19 June 2017, the judge delivered her sentencing remarks in accordance with the law, in particular the **Penal System Reform Act, Cap 139 (Cap 139)**. She began by outlining the offence charged, the offence pleaded to and its penalty and the agreed facts of the case. The judge noted the appellant's three previous convictions including unlawful damage to two panes of glass and a burglary offence. The judge carefully reviewed the appellant's pre-sentence report which was prepared pursuant to **Cap 139** for the purpose of sentencing. It addressed his unstable childhood and his regular interactions with the deceased and his family from the appellant's childhood days, through attendance at the Indian Ground Seventh Day Adventist Church.

[20] The pre-sentence report made negative references to the appellant's alcohol, marijuana and cigarette usage from an early age, disruptive behaviour and absenteeism being key aspects of his school experience. He was assessed as being at high risk of re-offending as a result of his drug use and failed attempts at rehabilitation. All these things negatively affected the appellant's familial relationships.

[21] We pause here to observe that there was some ambiguity created by this report on the issue of the appellant's re-offending. Was the likely re-offending with respect to drug use or with respect to the offences of the nature charged? It is clear and can be seen at page 54 of the record that counsel for the appellant rightly interpreted this reference to re-offending as relating to his drug use.

[22] The judge carefully reviewed the submissions on sentencing of (then) counsel for the appellant in this matter. These submissions centred on the sentencing guidelines to be found in the Court of Appeal case of **Pierre Lorde v R CA B'dos Criminal Appeal No. 11 of 2003 (unreported decision of 24 Feb 2006) (Pierre Lorde)** with respect to appropriate sentencing in manslaughter cases. We note that the aggravating and mitigating factors were discussed in accordance with these guidelines. In that regard, the judge noted that counsel for the appellant directed her to the fact that there was no evidence of planning or premeditation, that the object used to strike the deceased was not a firearm

or an intrinsically dangerous weapon, that whether the force was excessive was not determinable in view of the finding of the pathologist that the force used was moderate. The other aggravating factors mentioned by counsel for the appellant were his three previous convictions. Counsel emphasised the age of these convictions (2002) and the nature of the offences, namely, criminal damage and unlawful entry. The mitigating factors relied upon by counsel for the appellant were the early guilty plea, expressions of remorse, the considerations of provocation and self-defence resulting in the spontaneous actions of the appellant.

[23] Counsel for the appellant argued that these circumstances fell within category four of the **Pierre Lorde** guidelines, that is, a starting point of less than eight years, taking into account the guilty plea. The judge observed that counsel for the appellant made reference to the cases of **R v Alleyne, Criminal Appeal No. 17 of 2003, BB 2004 CA 4 (Alleyne)** and **R v Gittens, Criminal Appeal No. 2 of 2011 BB 2012 CA 4 (Gittens)** in the context of her submissions on what constituted intrinsically dangerous weapons.

[24] The judge next reviewed the submissions made on behalf of the Crown by the (then) Deputy-Director of Prosecutions on the relevant factors to be taken into account in order to assist the court in the determination of an appropriate sentence. These included the seriousness of the act since the object was used

so forcibly that it fractured the skull of the deceased man and broke into two pieces. Counsel for the Crown submitted that while the implement used was not an intrinsically dangerous weapon, it was a dangerous weapon by virtue of its use to cause injury.

[25] Counsel for the Crown agreed that there was no evidence of premeditation and that provocation could be reasonably inferred, but self-defence could not be relied on in view of the fact that the force used in retaliation was excessive. Counsel appropriately noted the appellant's attempts to have the matter dealt with quickly and what she accepted as genuine expressions of remorse. Counsel for the Crown stated, in analyzing the mitigating factors, that the guilty plea should attract a substantial discount. She also highlighted the fact that the pre-sentence report identified a high risk of re-offending.

[26] It was counsel's submission that this matter did not fall squarely within category four of **Pierre Lorde** and the starting point should be at the higher end.

[27] The judge grounded her approach to sentencing in **Cap 139** making special reference to **section 35** and **section 41** which provides:

> "41 (1) Without prejudice to section 33 to 40, a court in sentencing an offender convicted by or before the court shall observe the general guidelines set forth in this section.
>
> (2) Those guidelines are as follows:

> 1. The rehabilitation of the offender is one of the aims of sentencing, except where the penalty is death.
> 2. The gravity of a punishment must be commensurate with the gravity of the offence.
> 3. An offender must not be sentenced except for an offence of which the offender has been convicted or for another offence or other offences which the offender has asked the court to take into consideration in passing sentence.
> 4. Where a fine is imposed, the court in fixing the amount of the fine must take into account, among other relevant considerations, the means of the offender so far as these are known to the court, regardless whether this will increase or reduce the amount of the fine."

[28] The judge next analysed the aggravating and mitigating features of the case against the backdrop of paragraphs 14 to 16 of **Pierre Lorde** which identified some of the aggravating and mitigating factors which ought to be considered by the court where there are relevant and relate to the offence and the offender. The analysis that followed largely covered the same submissions made by both counsel in their analyses of the aggravating and mitigating factors. The judge however disagreed with counsel when she submitted:

> "The piece of wood could however be considered a dangerous weapon and in view of the injury to the deceased, there was excessive use of force in self-defence."

[29] She made reference to the case of **Gittens** and applying the reasoning of **Moore JA**, opined that a piece of wood could be categorized as a "deadly" weapon. She highlighted the fact that the appellant knew the deceased, he was a longstanding friend of the family and the deceased had served as the appellant's mentor through their Church association, that the incident happened in the deceased's home and that he left him there in a very grave condition, "but still had the presence of mind to drive away the car."

[30] The sentencing judge reviewed the **Pierre Lorde** guidelines and concluded that guidelines 1 and 2 were clearly not applicable, and that the circumstances of the case at bar did not fall squarely within guidelines 3 and 4. She concluded that **Pierre Lorde** itself and subsequent cases have recognized the fact that some cases may fall outside the guidelines and that the guidelines should not fetter the discretion of judges but be used as a base for considering sentence. She added "and I have done so in this case".

[31] Against this background the sentencing judge, after having regard to the aggravating and mitigating circumstances, determined that a starting point of 20 years was appropriate. Taking into account the mitigating factors, the early guilty plea, the provocation, co-operation with the police, the appellant's remorse and the mitigation of his counsel, she applied a discount of 5 years.

This resulted in a notional sentence of 15 years and after an allowance for time spent, the appellant was sentenced to 9 years in prison.

## THE GROUND OF APPEAL

[32] One ground of appeal was filed against sentence by counsel for the appellant in the following terms:

> "The learned trial judge having reviewed the guideline decisions for manslaughter, and having regard to the aggravating and mitigating circumstances, could not have reasonably used a starting point of 20 years as appropriate. The sentence was excessive and in all the circumstances of the facts of the case was more in line with a starting point of 15 years."

### The Submissions on Appeal

[33] The written submissions of counsel for the appellant were succinct. On the authority of **Pierre Lorde** and **Andrew Hunte v The Queen B'dos Criminal Appeal No. 6 of 2014 (unreported decision of 24 November 2015) (Andrew Hunte)** Mr. Gordon submitted that where guideline decisions are available, the court should recognise that the guideline decision is not to fetter the sentencing judge's discretion.

[34] Counsel argued that the judge "faltered by not having any clear statement with respect to nor [sic] identified any special and/or exceptional facts which would take the case outside the guidelines as mentioned in **Pierre Lorde** as the

proper basis to deal with the sentence. On this basis the sentencer was required therefore to apply the guideline decision from the Court of Appeal".

[35] Counsel argued that if the sentencing judge had properly assessed the aggravating and mitigating factors regarding the offence and the offender the starting point could not have been 20 years. His view was that the sentencing judge misapplied her discretion and in doing so discounted the *dicta* in the case of **Pierre Lorde**.

[36] He further submitted that the sentencing judge, in departing from the sentencing guideline without proper explanation, erred in her interpretation and application of the guidelines. He therefore urged this Court to quash the sentence and impose a sentence which is appropriate having regard to the facts.

[37] Counsel for the Crown submitted that the sentencing judge, after taking into account all the circumstances of this case, made a determination as to the starting point which was neither manifestly excessive nor unfair. She argued that the sentencing judge clearly stated her rationale for arriving at what, in her view, was an appropriate starting point. In her submission, the court's sentence should be affirmed.

[38] Counsel relied on the approach to sentencing laid out by the **Caribbean Court of Justice** in the case of **Teerath Persaud v The Queen [2018] CCJ 10 (AJ)**

(**Teerath Persaud**). Counsel submitted that at paragraph 46 of the case, the **CCJ** stated that the starting point is in relation to the offence itself, more particularly offence seriousness and the characteristics of the offence "excluding the mitigating and aggravating factors that are relevant to the offender". Counsel submitted that, after arriving at an appropriate starting point, the court ought to consider the aggravating and mitigating factors of the offender in relation to an adjustment either upwards or downwards of the period of imprisonment. Finally, a discount is to be given for the guilty plea.

[39] With respect to the characteristics of the offence, counsel submitted that the Crown contended that the piece of wood used during the incident was an intrinsically dangerous weapon and that the degree of force was excessive. It was counsel's submission that the sentencing judge accepted that the piece of wood was an intrinsically dangerous weapon and that the force used was disproportionate and not supportive of an act of self-defence. It was counsel's submission also that it was these two factors that guided the sentencing judge's starting point.

[40] While acknowledging the *dicta* of this Court in **Andrew Hunte** to the effect that the sentencing court must pay regard to sentencing guidelines, counsel pointed out that this is balanced later in the judgment by the recognition that sentencing is an individualised process "in which the Judge considers the

peculiar circumstances of each case while balancing correct principles in order to determine sentence"; in short, this is the principle of Individualised Sentencing as explicated in the case of **Evanson DeCoursey Armstrong v The Queen, C.A, B'dos Criminal Appeal No.16 of 2013 (unreported decision of 23 May 2017**.

[41] Counsel conceded that the guidelines are not directly applicable to the case at bar when she submitted, at paragraph 6 of her written submissions, that "…there is a gap in the **Pierre Lorde** guidelines in so far as the case does not indicate what would be an appropriate range for imprisonment for manslaughter offences where the accused enters a guilty plea and the offence did not involve the use of a firearm."

**DISCUSSION**

[42] **Section 14** of the **Criminal Appeal Act, Cap. 113A (Cap. 113A)** provides this Court with extensive powers in matters of sentencing and is as follows:

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

[43] However, it is a well established principle that this Court 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.

[44] The determination of what constitutes a sentence commensurate with the gravity of the offence has become a challenging and complex exercise. It is particularly so in matters concerning manslaughter the sentence for which can be as high as life imprisonment at the top of the scale, to a sentence of less than 8 years as prescribed by guideline 4 of **Pierre Lorde** or, in some exceptional circumstances, a non-custodial sentence.

[45] In an effort to assist judges in tackling the task of arriving at an appropriate sentence, this Court in **Bend and Murray v R C.A. B'dos Criminal Appeals Nos. 19 and 20 of 2001, (unreported decision of 27 March 2002)** first approached the task of issuing "guidelines on sentencing for manslaughter" for the stated purpose of indicating the range or scale of sentences in such matters.

[46] In **Pierre Lorde** this Court revisited the guidelines on manslaughter. Guidelines 3 and 4, agreed by the parties as the closest to the case at bar, provide:

> "3. 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 in this type of case will reduce the range of sentence to 10 to 14 years.
>
> 4. In a contested trial where no intrinsically dangerous weapon was used and there are mitigating features, the range of sentence should be 8 to 12 years. An early plea of guilty in this type of case may attract a sentence of less than 8 years."

[47] It bears repeating that guidelines cannot be construed as fettering the discretion of judges to deal with special or exceptional cases and just as importantly, those cases that do not fit squarely within the guidelines.

[48] The persistent criticism of the **Pierre Lorde** guidelines is that they are skewed towards death caused by firearms and are unhelpful in other circumstances. The **CCJ** in **Teerath Persaud** noted the trial judge's critique of the guidelines and stated that the **Pierre Lorde** guidelines "were found to be inapplicable by both sentencing judges and by this Court." They however did not settle the issue of how sentencing should be approached where the circumstances do not fall within the guidelines. The discussion in that case centred on what constituted 'exceptional circumstances' and the exploration of the principle of parity in sentencing. At paragraph 43, their Honours stated:

> "... Sentencing guidelines provide assistance to the sentencing judge, not rules from which departure is prohibited. They may be departed from provided the judge gives cogent reasons for doing so. In this case the judge gave a compelling account of the exceptional and horrendous circumstances in which the deceased had died, presumably in emotional terror and distress, by the callous actions and omissions of the co-accused and the appellant."

[49] At paragraph [57] however, their Honours joined the call for an early review of these guidelines. This leaves one to assume that it is their opinion that this determination should be made by the Barbados Court of Appeal.

[50] The real issue in this appeal, however, is the determination of whether the sentence of the appellant is in all the circumstances of the case so excessive that it should be quashed and/or reduced.

[51] In **Andrew Hunte** this Court, while outlining the principle that a sentencing court must have regard to sentencing guidelines, made the further observation that, in our view, is more applicable to this case. We stated as follows at para [30]:

> "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."

[52] But nonetheless, we do take the position as we did in **Andrew Hunte**, that correlative guidance can be garnered from this source and that guidelines 3 and 4 can provide such guidance in this case.

**THE AUTHORITIES**

[53] A useful approach in the absence of an applicable guideline, is to look at available authorities. **Bend** and **Murray** the guideline case delivered in 2002 is one such authority. The circumstances involved two of four young men

charged with the murder of another youth by beating him unmercifully with rocks and planks of wood. The deceased suffered brain damage, among other injuries, before dying. The appellants pleaded guilty to manslaughter and were sentenced to 12 years respectively. They were unsuccessful in their appeals against sentence.

[54] The circumstances and sentence in **Pierre Lorde [2006] 73 WIR 28** delivered in 2006, also provide guidance. In this case death occurred when the appellant stabbed the deceased with a garden fork. There was evidence of a continuing feud between the two men. The appellant pleaded guilty to manslaughter. This Court found that there were many mitigating factors in the appellant's conduct and his sentence was reduced from 20 to 12 years imprisonment.

[55] The facts in **DPP's Reference No. 1 of 2010, The Queen v Curtis Joel Foster (unreported decision of 11 February 2011** provide an interesting but distinguishable similarity. In this case the Director of Public Prosecutions filed a Reference under **section 36(B)** of the **Criminal Appeal Act** for review of a 10 year sentence of imprisonment for manslaughter on the ground that the sentence was unduly lenient and did not reflect the public's concern about offences of this nature. The deceased was a visitor to this Island who was walking along Long Beach in Christ Church with her daughter-in-law. The appellant who was wearing a scarf over his face asked them for money, they

said they had none and walked away. He appeared to walk away but shortly returned armed with a piece of wood which he used to bludgeon both ladies leaving them unconscious on the beach. The deceased, aged 60, never regained consciousness and died of her injuries. She suffered a fractured skull. The pathologist found that a blow with severe force would have been required to cause the damage that was present.

[56] The appellant was a 24 year old male who sought to rob them with a fake gun but alleged that the two women lunged at him and he grabbed the wood to beat them off him. It appeared that this version of events was not believed by the court. He entered an early guilty plea and expressed remorse. He had eight previous convictions, three for theft, four for robbery and one for possession of cannabis. They were recent convictions being within 3 and 1 year of the offence. He had a history of repeated antisocial behaviour.

[57] This Court quashed the sentence of 10 years imprisonment and substituted a sentence of 15 years. It expressed the view that the circumstances of the killing were horrendous and revolting by the standards of an orderly society.

[58] In **DPP's Reference No. 2 of 2010**, **The Queen v Richard Leon Hurley, (unreported decision of 8 July 2011)**, on a review of a sentence of 12 years imprisonment on a plea of guilty of manslaughter, this Court substituted a sentence of 20 years imprisonment less time already served and one year for

double jeopardy. The significant features of the case were that the respondent did not fully acknowledge the crime, there was a previous conviction for manslaughter and the concealing of evidence by the respondent. Apart from the guilty plea, there were no mitigating factors.

[59] In **DPP's Reference (No.1 of 2003) R v Kirk Skeete (2002) 66 WIR 94**, the respondent pleaded guilty to manslaughter. The victim was a taxi driver who had been shot while the respondent was attempting to rob him in his car. A sentence of 4 years' imprisonment was found to be unduly lenient and this Court substituted a sentence of 13 years finding the offence to be a grave one in keeping with the guidelines in **Bend and Murray.**

[60] In **Wayne Harewood v The Queen, C.A. B'dos Criminal Appeal No. 23 of 2008 (Unreported decision of 21 December 2009)**, the appellant appealed a sentence of 15 years imprisonment for manslaughter. The appellant and the deceased were two homosexuals involved in a volatile and stormy relationship. The appellant became angry when a mutual friend of theirs told him that the deceased was HIV positive. He confronted the deceased and they argued and fought. The appellant admitted that he had made up his mind to kill the deceased and did so the next day by stabbing him 21 times. In rejecting the argument that the sentence was excessive and affirming the sentence, this Court was of the view that the facts of this case were far worse than those in

**Bend and Murray** and that the circumstances took it outside the guidelines in **Pierre Lorde**. This Court ruled that the starting point which the sentencing judge identified as 20 years was reasonable and the sentence was not manifestly excessive. The view was expressed that having regard to the appellant's premeditation, his expressed intent to kill the deceased and the resultant severity of the appellant's attack on the deceased, the sentence was entirely proportionate.

[61] Consideration was given also to the following cases of sentencing in manslaughter and their outcomes: **Shawn Pinder v The Queen C. A. B'dos Criminal Appeal 18 of 2010 (unreported decision of 24 November 2015)** (15 years imprisonment); **Lorenzo Jordan v The Queen, C.A. B'dos Criminal Appeal No. 22 of 2012 (unreported decision of 3 July 2014,** (16 years imprisonment); **Julian Worrell v The Queen C.A. B'dos Criminal Appeal No. 19 of 2010 (unreported decision of 19 June 2014)** (9 years imprisonment); **Jeffrey Adolphus Gittens v The Queen, C.A. B'dos, Criminal Appeal No. 2 of 2011 (unreported decision of 7 March 2014)** (20 years imprisonment); **Sumarra Omar Smith v The Queen C.A. B'dos, Criminal Appeal No. 6 of 2011 (unreported decision of 19 June 2014)** (10 years imprisonment); **Troy Stanford v The Queen, C.A. B'dos Criminal Appeal No. 17 of 2011 (unreported decision of 6 December 2015)** (18 yrs

29 days imprisonment); **Evanson Decourcey Armstrong v The Queen, C.A. B'dos Criminal Appeal No. 16 of 2013 (unreported decision of 23 May 2017** (18 years imprisonment); **Donovan George Barnes v The Queen, C.A. B'dos, Criminal Appeal No. 7 of 2015 (unreported decision of 11 April 2017)** (8 years imprisonment).

**CONCLUSIONS**

[62] We disagree with the submission of counsel for the appellant that the sentencing judge erred in her interpretation and application of the guidelines in **Pierre Lorde** and that she erred in law in departing from those guidelines.

[63] We agree with both the sentencing judge and counsel for the prosecution that grounds 1 and 2 of **Pierre Lorde** were inapplicable and that the circumstances did not fall strictly within grounds 3 and 4. Consequently, it cannot be said that the trial judge departed from the sentencing guideline without proper explanation as argued by counsel for the appellant.

[64] In her sentencing remarks the judge properly identified the punishment prescribed for the offence. She properly considered the relevant sections of **Cap 139**, making special reference to **sections 35** and **41** and the principles of Offence Seriousness and Proportionality. In pursuance of these principles, the sentencing judge conducted a careful analysis of the aggravating and

mitigating factors in the case and stated in conclusion that a starting point of 20 years was appropriate.

[65] A brief word is given here on the legal effect of a plea of guilty to manslaughter. In **Attorney General's Reference No. 49 of 2004 (Kieran James Quinn) [2005] 1 Cr. App. R (S) 72 CA, Keene LJ** spoke directly to the point in this way:

> "First, where a plea is accepted [of guilty] to manslaughter the sentencing judge has to proceed on the footing that there is no intent to kill, or even to cause serious injury to the victim. That is a very important consideration and it is something always to be borne in mind by prosecutors and judges before such a plea in a murder indictment is accepted in the first place. Secondly, [the] sentence ... also reflects the credit to be given for a plea of guilty on the normal principles."

[66] In **Arrundell Adolphus Padmore v The Queen**, **C.A. B'dos, Criminal Appeal No. 18 of 2005, (unreported decision of 30 March 2007** this Court (**Peter Williams JA**) had this to say at para [25] on how a court should approach a guilty plea:

> "[25] We should add that, "generally, a guilty plea is a separate matter from aggravation and mitigation" as stated at para. [27] of **Pierre Lorde**. The appropriate length of sentence should be decided "before calculating the reduction of the guilty plea"... This Court has not found it necessary to give guidelines on the reduction in sentences for guilty pleas, but has left it to the good sense of the judges to make an appropriate reduction in the particular circumstances of each case. As one of the purposes of an early plea of guilty is to shorten "the gap between charge and sentence", the judges should also give due consideration to the length of time between the charge and the sentence."

[67] While we are of the view that the judge took into account the relevant principles and facts, we are nonetheless, in agreement with counsel for the appellant that "in all the circumstances of the facts of the case [*sic*] was more in line with a starting point of 15 years", for the following reasons.

[68] We are of the view that, despite counsel for the Crown's submission to the Court that the aggravating features of the case far outweighed the mitigating factors, the mitigating features of this case dominated the aggravating factors. Early guilty pleas are in the public interest since they avoid the need for a trial and save victims, witnesses and often the family of the victim, from having to give evidence of often traumatic events and the family from reliving the events and achieving closure. It also shortens the time between charge and sentence, and saves the Crown costs. The appellant's early guilty plea, co-operation with the police, sincere expressions of remorse, the acceptance by the court and the parties that there was no evidence of planning or pre-meditation, the fact that the appellant was not armed with a firearm or intrinsically dangerous weapon, but in the face of aggression by the deceased, armed himself with a piece of wood that he found within reach, provide powerful mitigating factors.

[69] The aggravating factor in relation to the appellant of past convictions must be looked at against the backdrop of their age and the age of the appellant when he committed them and the nature of the offences, which differed significantly

from the offence for which he entered his guilty plea. Counsel for the appellant submitted:

> "... they were all summary convictions and they were in the years 2000 and 2002. They would be of some antiquity at this time. And given that he is 32 years old now, those convictions in the context would have been committed when he was a fairly young man."

[70] The issue of the ambiguity of the pre-sentence report on the issue of the risk of re-offending, in the absence of evidence to the contrary, has to be resolved to the benefit of the appellant. A finding that it relates to his drug use must speak to considerations of rehabilitation and not to the length of his sentence.

[71] It appears to this court that while the Crown did not accept self-defence as a complete defence, it was still a consideration in the sentencing as it appears that the Crown accepted on the facts outlined and the analysis of the aggravating and mitigating factors, that the deceased was the aggressor, but their case was, that the force used was disproportionate and excessive. It is noted that at page 59 of the record that counsel for the prosecution is recorded as saying the following:

> "... all this Honourable Court, I respectfully submit, can rely on would be the fact that the then accused went to the home of the deceased asking for his money. And therefore, there was some altercation and confrontation that went on and it seems that the deceased... the deceased seemed to have attacked the then accused with a chair and he subsequently retaliated. But we submit that he used excessive force which resulted in the death of the deceased."

[72] We must add that evidence of self-defence even if rejected by the jury is a mitigating factor. There is no evidence that the trial judge considered self-defence as a mitigating factor even if excessive force was used.

[73] The review of the authorities above has been of assistance in situating the circumstances of this case within the range of sentences visible therein.

[74] It is against the backdrop of all the matters reviewed above, that we are of the opinion that the sentence was excessive and find a starting point of 15 years more acceptable than one of 20 years.

**DISPOSAL**

[75] In view of the premises, the appeal is allowed.

[76] The sentence of 15 years imprisonment imposed on the appellant is set aside. The Court substitutes a sentence of 10 years pursuant to **section 14** of the **Criminal Appeal Act Cap 113A** to run from the date of the original sentence, full credit for time spent of 2,161 days being given in accordance with **Romeo Hall**.

**Justice of Appeal**

**Justice of Appeal (Acting)** **Justice of Appeal (Acting)**