BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 1 of 2018

BETWEEN:

FACHAD SHAQUILLE CADOGAN 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: October 15, November 26

2020: July 24

Mr. Michael Lashley QC, Mrs. Dayna Taylor-Lavine, Mrs. Faith Greaves-Agard, Ms. Khadisha Wickham and Ms. Ronshalee Proverbs for the Appellant

Mr. Alliston Seale for the Respondent

DECISION

GOODRIDGE JA:

INTRODUCTION

[1] The appellant was charged with murdering Tristan Barker on 16 May 2014. At his arraignment on 24 March 2017, he pleaded not guilty to murder, guilty to manslaughter. This plea was accepted by the Crown.

[2] On 20 December 2017, **Cornelius J** sentenced the appellant to a term of 14 years imprisonment. After being credited with the time spent on remand, he

was ordered to serve the remainder of 10 years, 4 months 3 weeks and 5 days. By notice of appeal filed on 2 January 2018, the appellant has appealed that sentence.

THE FACTS

[3] The facts which were placed before the court and accepted by Mr. Andrew Pilgrim QC, then counsel for the appellant, revealed the following.

[4] The appellant and the deceased were friends who had grown up together in the neighbourhood of Wavell Avenue, Black Rock, St. Michael. As time passed, the relationship between the two became strained. This deterioration in their relationship led to confrontations between the two and on occasion, the parents of the appellant made reports to the police about the deceased's conduct. The appellant's parents also visited the home of the deceased where a complaint was made to the mother of the deceased about her son's behaviour towards the appellant.

[5] On the night of 16 May 2014, the deceased was sitting on a step in the company of a young lady in Wavell Avenue. About 9 pm, the appellant was walking up the street. As the appellant got closer he approached the couple and he looked at the deceased who asked him "Wha happen big man?". The appellant replied "If you get up from there, you know wha gine happen." The young lady laughed and got up from the step.

[6] About the same time the deceased attempted to get up from the step. The appellant pulled a knife from a bag which he was carrying and stabbed the deceased in the neck. The deceased got up from the step, stumbled a few feet away and then fell. A neighbour tried to render medical assistance to the deceased but this was to no avail. He died at the scene. The police medical officer visited the scene later that night and pronounced death.

[7] After the incident, the appellant went home and spoke to his parents. Police officers visited his home later that night. They told him that he was being arrested on suspicion of having committed the offence of murder and cautioned him. The appellant replied "Officer Tristan rush at me with a rock and I just juck he with a knife I had in self-defence." He was asked what became of the knife and the appellant replied "I brek it in two, put it in a plastic bag and pelt it over the paling, so it got to be behind there. I will take you for it." The knife was retrieved from the rear of the appellant's home. The appellant was then taken to the police station.

[8] On the next day the appellant gave a written statement to the police. The body of that statement was as follows:

> "Last night 'bout nine I was walking up my gap going home when I see a fellow name Tristan Barker who live in Jackman Road which is a gap above mine. He was sitting down by a girl name Khadija on she step talking to she. Me and Tristan don't 'gree 'cause he always troubling me and my friend Stefan Mandore. When I see he I tell myself that I gine tell he that to see

> me and my friend and leave we alone. When I get near to he I see he looking at me and he start to laugh. I then tell he to leave me and Stefan alone and then I hear Khadija say that all she could do is laugh. Tristan Barker then say to me big man wha happen and then he get up. Khadija get up and walk way too. I then hold up my hand and tell he if he want to do something do what he got to do. He then turn and take up a rock from the ground and I went in my bag and take out a knife I had in there. He then came at me with the rock in he hand and then I turn my face and juck at he with the knife. I ain't know where Khadija was then but I walk way and went home. I went in the yard by the pipe and wash off the knife 'cause it had blood on it. I brek the knife in two and went in the house and tell my mother what happen. She went and tell my father and the two of them come and talk to me. I later put the knife in a plastic bag from Popular Supermarket and throw it over the paling."

[9] On 19 May 2014, the appellant was charged with the murder of the deceased.

[10] Subsequently, a post mortem examination revealed that the deceased suffered a 5.5 x 3.5 cm oval shaped gaping incised wound to the left lateral neck. The knife went through one side of the neck and came out the other side of the neck. Death was attributed to a stab wound to the neck.

[11] The prosecutor also stated that there was some divergence between the appellant's version of events and the evidence on file. He pointed out that the photographs of the scene did not show any stones in the area of the step where the deceased was stabbed and that the witness Ms. Khadija Padmore had stated that the attack on the deceased was unprovoked.

[12] However, the prosecutor acknowledged that the Crown had accepted the appellant's version of the facts and had accepted his plea of guilty of manslaughter on the basis that the appellant believed that he was under attack.

THE JUDGE'S SENTENCING REMARKS

[13] **Cornelius J** began her sentencing remarks by referencing the offence charged, the appellant's plea of guilty of manslaughter, its acceptance by the Crown and the facts underpinning that plea. The judge then dealt with the pre-sentence report in detail. That report indicated that the appellant was raised in a household where his parents tried to instill good morals and values and where disputes were resolved amicably.

[14] The judge noted that the appellant enjoyed a comfortable lifestyle and had a good relationship with his parents. However, the appellant's teenage years were turbulent in that he was subjected to bullying throughout secondary school but managed to avoid confrontation following the advice of his parents. The appellant admitted experimenting with marijuana at the age of 16, in order to deal with stress and would spend time gambling or playing dominoes outdoors.

[15] The pre-sentence report also made reference to the fact that the appellant had many friends in his community because of his generosity and good nature. However, the appellant was threatened from time to time by persons including

the deceased. He complained to the police but the attacks continued and the appellant resorted to seeking alternative routes home in order to avoid conflict. After leaving school, the appellant gained employment and also enrolled at the Samuel Jackman Technical Institute of Technology to pursue carpentry and joinery in an attempt to improve his skills.

[16] The judge observed that the appellant continued to express remorse for the offence, had no history of violence and posed a low risk for reoffending. She next turned to the submissions of (then) counsel for the appellant in mitigation. She outlined the aggravating and mitigating factors which he placed before the court and his submission that this was not a case of the appellant being armed with a knife and brandishing it but one where he was carrying a knife because he felt threatened. The judge noted that counsel considered that the facts of the case did not fall within guideline 3 or 4 of the **Pierre Lorde Guidelines** and that the range of sentence should fall below 8 years.

[17] Similarly, the judge outlined the submissions of counsel for the Crown on sentence. She noted counsel's submission that this case fell within the non-technical definition of provocation. She set out the aggravating and mitigating factors which counsel identified and his suggestion that this case was a borderline case of murder meriting the imposition of a lengthy sentence.

[18] The judge observed that during the allocutus the appellant had apologised for the offence and asked for leniency because at the time of the incident he was 17 years old and his actions were not deliberate.

[19] After adverting to the penalty for manslaughter as set out in **section 6** of the **Offences Against the Person Act, Cap. 141** (**Cap. 141**), the judge turned her attention to **section 35(2)** of the **Penal System Reform Act Cap. 139** (**Cap. 139)**. She observed that the case did not fall neatly within the **Pierre Lorde Guidelines** and that those guidelines were not intended to be a fetter on the discretion of judges in dealing with exceptional cases.

[20] The judge then considered the aggravating and mitigating factors and determined that a starting point of 16 years was appropriate. Taking those factors into account and the appellant's guilty plea, the judge applied a discount of 2 years and arrived at a notional sentence of 14 years. She then deducted the remand time and imposed the sentence which is the subject of this appeal.

THE APPEAL

[21] According to the perfected ground of appeal filed on 9 October 2019, it is the appellant's contention that the sentence imposed was excessive in that the trial judge:

> "(i) failed to place sufficient weight on the defence of provocation and in some instances disregarded the said defence

> and also failed to mention the provocative conduct of the deceased as a mitigating factor in a technical and non-technical sense in accordance with the Penal System Reform Act Cap. 139 (Cap.139);
>
> (ii) failed to take into account any element of self-defence and to treat it as a mitigating factor, although there was evidence of self-defence;
>
> (iii) disregarded her obligation to sentence the appellant on the facts accepted by the Crown, and thus sentenced the appellant on the wrong factual basis:
>
> (iv) 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 16 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 8 to 10 years or otherwise on the lower end of the scale".

POINT NO. 1

Submissions

[22] On the first point, Mr. Lashley QC, counsel for the appellant, submitted that the judge failed to consider provocation in the technical and non-technical sense as a mitigating factor under **Cap. 139**. Counsel argued that implicit in the Crown's acceptance of the manslaughter plea was its acknowledgement that there was some semblance of provocation. He also submitted that the record indicates that the appellant was approached by the deceased who was armed with a rock.

[23] Counsel continued that the judge was therefore duty bound to make certain assumptions in the appellant's favour as reiterated by this Court in its decisions in **Ricardo Devere Griffith v R, Criminal Appeal No. 6 of 2007**, **Andrew Hunte v R, Criminal Appeal No. 6 of 2014** and **Toneal Walrond v R Criminal Appeal No. 15 of 2017**, among others.

[24] That being the case, counsel contended, the comments made by the judge at **p 92 lines 2** to **8** were inconsistent with the facts accepted by the Crown and showed a disregard for or a minimising of the provocative conduct of the deceased.

[25] Mr. Alliston Seale, counsel for the respondent, submitted that the judge gave due consideration to the defence of provocation as this was the basis on which the plea was accepted by the Crown. However, he maintained that the alleged provocative conduct of the deceased could only be analysed within the context of the non-technical sense because it did not fall within the strict or technical definition of provocation as set out in **section 5** of the **Cap. 141**.

Discussion

[26] Prior to making the comments which are the subject of complaint, the judge stated that the Crown considered that "this case was one which would fit within the non-technical definition of provocation within the guidelines,

because the average person would believe that if you trouble me all the time, you provoked me". The judge then stated at **p 92 lines 2** to **8**:

> "However, provocation has a specific definition in the Act and in cases. It speaks to persons losing self-control, a sudden loss, which makes a person no master of his mind. The evidence here (sic) that you were walking up the road, saw the deceased, you were not attacked, he was unarmed, as the evidence suggests, confronted him and then took your knife from the bag and stabbed the deceased."

[27] Importantly, the judge stated at **p 95 lines 10** to **13**:

> "Though varied accounts were given, the Crown chose (sic) accept the plea of manslaughter based on the evidence in their brief which is that the deceased was armed with a rock and coming towards him."

[28] We are of the view that the comments complained of were a clear reference to the evidence of the witness who was present as recounted by the prosecutor during his outline of the facts to the court. Further, despite the reference by the prosecutor to the difference in the version of events as recorded in the file, he made it clear to the court that the basis for the acceptance of the plea was an acceptance of the appellant's story as presented in his written and oral statements. The judge by her comment at **p 95** as set out above at **para [27]** of this decision was also stating the basis on which the plea to the lesser charge was accepted.

[29] We have therefore concluded that there is no substance to this point.

POINTS NO. 2 AND 3

[30] We consider it convenient to discuss these points together as there is some overlap in the arguments which were advanced.

Submissions

[31] On the second point, Mr. Lashley QC complained that the judge failed to take into account any element of self-defence and to treat it as a mitigating factor even though there was evidence of self-defence. He submitted that the judge's comments at **p 98 lines 11** to **12** of the record lead to the inference that the judge treated the killing as having been planned or premeditated.

[32] Counsel also submitted that the Crown, having accepted the appellant's version of events, impliedly accepted the evidence which supported the defence of self-defence. He argued that it was the deceased who approached the appellant with a rock and the appellant defended himself by stabbing the deceased once. Therefore, counsel contended, the comments eliminated the defence of self-defence and provocation.

[33] Mr. Seale's response to this argument was that the judge took into account the issue of self-defence but she could not have placed significant weight on this factor where the appellant's counsel conceded at the sentencing phase that "it would not have reached the level of self-defence before a jury." Counsel noted that there was reference to self-defence in the appellant's written

statement. However, he contended that "a plea must be unequivocal and the appellant could not have pleaded guilty to manslaughter which is a partial defence to murder, whilst arguing that he was acting in self-defence which is a complete defence because the two circumstances are mutually exclusive."

Discussion

[34] In setting out the mitigating factors as outlined by counsel for the appellant, the judge stated at **p 90 lines 14** to **17**: "You were led to believe that the deceased intended you harm as he had threatened you on various occasions before the date of the incident." And at **p 95** she referred to the fact that the Crown chose to accept the lesser plea "based on the evidence in their brief which is that the deceased was armed with a rock and coming towards him." However, the judge did not specifically refer to self-defence when she identified the mitigating factors relative to the appellant.

[35] In **Pierre Lorde v R (2006) 73 WIR 28 (Pierre Lorde)**, this Court stated that a sentencing court can take into account as a mitigating factor some element of self-defence even where rejected by a jury. As we understand Mr. Lashley QC's argument, since the appellant pleaded guilty he should similarly be given the benefit of this factor.

[36] According to the appellant's written statement, it was after the appellant had confronted the deceased by making remarks to him and telling him "if he want

to do something do what he got to do" that the deceased then armed himself with a rock and the appellant took out his knife. It was at this point that the deceased "came at" the appellant with a rock in his hand and the appellant stabbed the deceased with the knife. There was therefore some element of self-defence before the court in the facts which were outlined to the judge.

[37] While we accept that the judge did not mention self-defence during her sentencing remarks, the judge was aware of the facts surrounding the incident and these including her reference to the facts which suggested some element of self-defence formed the basis of her sentencing. We do not agree that this meant that she fell into error. It is clear that the judge, without mentioning self-defence, took into account the facts on which self- defence rose.

Submissions

[38] At point 3 it is alleged that the judge disregarded her obligation to sentence the appellant on the facts accepted by the Crown and sentenced the appellant on the wrong factual basis.

[39] Mr. Lashley QC submitted that the judge fell into error when she took into consideration that the appellant armed himself in advance. He contended that the appellant's possession of a knife ought not to have been treated as an aggravating factor having regard to the fact that he had the knife in his bag even before he knew that the deceased was in the area.

[40] In response, Mr. Seale disagreed with counsel's argument that the appellant had been sentenced on the wrong factual basis.

Discussion

[41] Objection has been taken by the appellant to the judge stating that he armed himself in advance with a weapon.

[42] In **Pierre Lorde**, this Court identified the aggravating and mitigating factors relating to the offence of manslaughter and to the offender. In particular, at para [15] (c), "being armed with a weapon in advance" is listed as an aggravating factor.

[43] There is no dispute that the appellant had a knife in his bag when he confronted/encountered the deceased while on his way home. He said so in his written statement. The judge, quite properly in our view, identified that as an aggravating factor in the case. However, she did not state nor did she imply that the appellant had armed himself with the knife for the purpose of doing harm to the deceased. We therefore find that Mr. Lashley QC's submission that the judge sentenced the appellant on the wrong factual basis is not supported by the record.

[44] There is no merit in this point.

POINT NO. 4

[45] The final point is that the judge, having reviewed the guideline decisions for manslaughter, and having regard to the aggravating and mitigating factors could not reasonably have used 16 years as an appropriate starting point.

Submissions

[46] Mr. Lashley QC submitted that had the judge properly assessed the various factors, she would have selected a starting point of between 8 to 10 years. Counsel contended that this was not a grave case of manslaughter and the facts are that death was caused by a single stab wound inflicted in an effort by the appellant to defend himself from the deceased who was attacking him with a rock.

[47] Counsel acknowledged that this Court does not usually interfere with the discretion of a sentencing judge merely on the ground that it would have passed a different sentence. However, he submitted that the sentence is wrong in principle and should be varied to a lesser term.

[48] Mr. Seale's response to this submission was that the sentence was not excessive for the following reasons. He submitted that the judge properly considered the provisions of **sections 35** to **37** of **Cap. 139** in determining the appropriate sentence. Counsel stressed that the judge took into account that

this case did not fit within the **Pierre Lorde Guidelines** and she was therefore entitled to treat this as a case falling outside those guidelines.

[49] Counsel also submitted that in exercising her discretion to set a starting point of 16 years the judge considered the plea of mitigation, the allocutus, the aggravating and mitigating factors, the pre-sentencing report and the submissions on sentencing. Further, the judge correctly applied the tariff enunciated in **Romeo Hall v R [2011] CCJ 6 (AJ)**.

Discussion

[50] We begin our discussion on this point by reminding ourselves of the comments made by **Simmons CJ** at **para [23]** of **Pierre Lorde** which bear restating:

> "…. 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 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 Watkins LJ observed in R V Hussey (1989) 11 Cr. App. R. (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 individualized sentencing in passing a sentence that would be adequate to protect the public".

[51] The **Pierre Lorde Guidelines** were intended to assist judges in determining sentences for the offence of manslaughter. It is therefore the duty of a sentencing judge to have regard to those guidelines in the exercise of the sentencing function.

[52] However, there is a recognition by all that the guidelines do not and cannot cover every conceivable case of manslaughter. For, as this Court stated at **para [30]** in **Andrew Hunte v R, Criminal Appeal No. 6 of 2014**:

> "The Court 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."

This is not to suggest that a sentencing court is restricted from gleaning some assistance from the Guidelines.

[53] We agree with the sentencing judge's assessment that the facts in this case did not fall within the **Pierre Lorde Guidelines**. The judge was therefore required to determine, after weighing the aggravating and mitigating factors, the appropriate starting point.

[54] Bearing in mind that the calculation of a starting point is not a strictly mathematical calculation, we are of the view that the starting point of 16 years identified by the judge was appropriate.

[55] The judge was next required to make an upward or downward adjustment of that starting point after taking into account the aggravating and mitigating factors relating to the appellant. There were no aggravating factors relating to the appellant but there were mitigating factors. The judge adjusted the starting point downwards by 2 years for the mitigating factors and the guilty plea and arrived at a notional sentence of 14 years. She then credited the appellant with the time spent on remand.

[56] Although not specifically raised by Mr. Lashley QC, this Court asked both counsel to comment on the fact that the judge included the appellant's guilty plea with the mitigating factors when she adjusted the starting point.

[57] This Court has stated in various decisions over the years that a guilty plea should be dealt with separately from other mitigating factors. In **Teerath Persaud v R [2018] CCJ 10 (AJ)**, the CCJ stated that "Best sentencing practice suggests that the discount should be approximately one-third for a guilty plea entered at the earliest opportunity, with a "sliding scale" for later pleas to at least 10% depending on the stage of the trial where the plea is entered." However, we must acknowledge that the judge imposed sentence on 20 December 2017, a date prior to this decision.

[58] There is no suggestion here that the appellant did not plead guilty at the earliest opportunity. That being the case, we are of the view that the appellant

should have received a discount of approximately one-third for his early guilty plea. The inference to be drawn from the judge's sentencing remarks is that the discount of 2 years represented both the guilty plea and the mitigating factors. It would not be unreasonable to conclude that the judge attributed one year deduction for the mitigating factors and one year for the guilty plea. When the appropriate discount is applied to the notional sentence, the result would 10 years. Full credit would then have to be given for the 3 years 7 months and 2 days spent on remand.

CONCLUSION

[59] In light of our determination above, we have concluded that the sentence imposed on the appellant was excessive. According to **section 14** of the **Criminal Appeal Act, Cap. 113A**, this Court has the discretion to alter a sentence if it thinks that a different one should have been passed. We will therefore exercise that discretion to quash the sentence passed by the judge and substitute a lesser sentence.

DISPOSAL

[60] It is hereby ordered as follows:

1. The appeal is allowed.
2. The sentence of 14 years' imprisonment is quashed and a sentence of 10 years is substituted therefor to take effect from 20 December 2017.

3. The appellant shall serve the remainder of 2338 days in prison, having been given full credit for the period of 1312 days spent on remand.

Justice of Appeal

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