IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CR 2 of 2009
BB Criminal Appeal No 10 of 2007

BETWEEN

JEFFREY ADOLPHUS GITTENS **APPELLANT**

AND

THE QUEEN **RESPONDENT**

Before The Right Honourable	**Mr Justice de la Bastide, President**
And The Honourables	**Mr Justice Nelson**
	Mr Justice Pollard
	Mr Justice Saunders
	Mme Justice Bernard
	Mr Justice Wit
	Mr Justice Hayton

Appearances

Mr Ralph A Thorne QC, Mr Bryan L Weekes and Mr Satcha Subhas-Chandra Kissoon for the Appellant

Mr Alliston Seale and Mr Roy Hurley for the Respondent

JUDGMENT
of
The President and Justices Nelson, Pollard, Saunders, Bernard, Wit and Hayton
Delivered jointly by
The Right Honourable Mr Justice Michael de la Bastide
and
The Honourable Mme Justice Bernard
on the 11th day of February 2010

JUDGMENT

[1] On 28th June, 2007 the appellant was convicted in the High Court of Barbados of the murder of Lyndon Weekes arising out of an incident which occurred on 9th October, 2004. He filed an appeal against the conviction and sentence, and on 3rd April, 2009 the Court of Appeal quashed the conviction and substituted a conviction for manslaughter. A sentence of twenty (20) years was imposed.

[2] The appellant sought from this Court special leave to appeal against the conviction and sentence of the Court of Appeal. After considering the oral and written submissions of both counsel for the intended appellant and for the respondent, this Court granted the intended appellant special leave to appeal against the sentence only.

[3] The following issues were identified and formulated by the Court which ordered them to be addressed in the written submissions of the parties:

> "(i) If the Court of Appeal did not comply sufficiently or at all with the Penal System Reform Act, then in what respect did it not so comply, and what, if any, consequences lie for such non-compliance?
>
> (ii) If the Court of Appeal did not comply with the Penal System Reform Act, was the 20 year sentence outside the discretion given to them by the said Act or any other Act?
>
> (iii) Was the sentence handed down by the Court of Appeal consistent with previous decisions of the Court? Why?
>
> (iv) If the sentence was not so consistent, then what, if any, consequences lie?
>
> (v) Any other issue which in the opinion of counsel is relevant to the disposal of the appeal."

[4] After mature consideration of the written and oral submissions of counsel for the appellant and for the respondent, the Court at the conclusion of the hearing of the appeal quashed the sentence of 20 years' imprisonment imposed by the Court of Appeal and remitted the case to the trial judge, Hon. Mr. Justice Worrell, or if he is unavailable, to

another judge of the High Court, for a hearing on sentence. The Court also ordered that a pre-sentence report be prepared and submitted to the sentencing judge. Brief reasons for the decision were given by the President who indicated that full reasons would be given in writing later. These we now provide.

Factual Background

[5] The undisputed facts in this case were that on 9th October, 2004 the deceased, Lyndon Weekes, was waiting with his cricket gear at the "Boss Shop", Four Roads, St. John, for a lift to a cricket match when the appellant arrived on the scene. A confrontation arose between them which resulted in a quarrel and a fight in which the deceased struck the first blow when he hit the appellant with a cricket bat. The appellant pulled a knife from his pocket and a struggle for the knife ensued. While being chased by the deceased the appellant picked up a rock, and turning around struck the deceased in his face thereby causing him serious injury from which he died on 13th October, 2004. The three sources of direct evidence in this case were two eye-witnesses, Lewis Spooner and Keith Walcott, and a statement which the appellant gave to the police and on which he relied in his unsworn statement from the dock.

[6] Some of the areas in which the evidence was contradictory or inconsistent, include the following:

(a) who initiated the confrontation? Was the blow with the cricket bat provoked by the appellant pointing his finger in the deceased's face?

(b) on what part of his body did the deceased strike the appellant with his bat?

(c) did the appellant draw his knife with the intention of stabbing the deceased or just to scare him?

(d) did the deceased also pick up a rock to hit the appellant, and

(e) did the deceased say to the appellant that he was going to kill him?

Decision of the Court of Appeal

[7] The statement of the appellant given to the police and on which he relied in his unsworn statement at the trial raised the issues of self-defence and provocation which counsel in his grounds of appeal against the conviction alleged were not adequately addressed by the trial judge in his directions to the jury. The Court of Appeal approved of the trial judge's directions with regard to the law governing the defences of self-defence, provocation and lack of intention to kill or cause grievous bodily harm. The court, however, concluded that the conviction for murder was unsafe and unsatisfactory because of the judge's failure to review and analyse the evidence fully or adequately. He ought to have assisted the jury in relating the facts to the directions which he had given them on what in law would reduce murder to manslaughter, more particularly in the context of the law relating to "killing by fighting", but he did not do so. As a result the Court of Appeal held that the appellant had not been given a fair chance of a verdict of guilty of manslaughter whether on the basis of provocation or of lack of the necessary intent for murder. From this analysis of the Court of Appeal's judgment it follows that all of the evidence which bore on provocation or lack of intent is relevant for the purpose of sentencing (since none of the evidence on these points is inconsistent with a conviction for manslaughter) and the conflicts in that evidence ought to be resolved before sentence is determined (see [23] and [24] below).

Analysis of the Issues

[8] The appeal was argued on the issues identified by the Court in [3] notwithstanding that the notice of appeal was based on the single ground that the sentence was excessive. No argument was advanced with regard to Issue (ii), and so it is not necessary to comment on it. Having regard to the course which we decided to take i.e. to remit the case for sentence to the trial judge, we consider it unnecessary and inappropriate to address, except tangentially, Issues (iii) and (iv) which relate to the consistency or inconsistency of the sentence imposed with the tariff set for manslaughter by previous cases.

Non-compliance with the Act – First question of Issue (i)

Section 35

[9] Section 35(2) of the Act provides as follows:

> "(2) Subject to subsection (3), the court shall not pass a custodial sentence on the offender unless it is of opinion
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> (a) that the offence, ... was so serious that only such a sentence can be justified for the offence; or
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> (b) where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from the offender."

Subsection (3) is not relevant to the present case, and need not be reproduced here.

[10] The effect of sub-section (2) is that before imposing a custodial sentence the sentencing court must ask itself whether the seriousness of the offence justifies such a sentence and in the case of a violent or sexual offence whether such a sentence is necessary in order to protect the public from serious harm from the offender, and must answer at least one of those questions in the affirmative.

[11] Subsection 35(4) provides:

> "Where a court passes a custodial sentence it is the court's duty
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> (a) ... to state in open court that it is of the opinion that either or both of paragraphs (a) and (b) of subsection (2) apply and why it is of that opinion; and
>
> (b) in any case, to explain to the offender in open court and in ordinary language why it is passing a custodial sentence on the offender."

In effect a sentencing court having formed the opinion required by sub-section (2), must in open court state what that opinion is and give its reasons for reaching it and must also explain to the offender in ordinary language why a custodial sentence is being passed on him.

Further under section 35(5) the court must cause reasons stated by it under subsection (4) to be specified in the warrant of commitment and to be entered in the record of the court.

[12] At paragraph [42] of its judgment the Court of Appeal made this statement:

> "In considering the appropriate sentence, we have taken into account the circumstances of the case, the provisions of the Penal System Reform Act, Cap. 139 and the two guideline judgments on sentencing for manslaughter, ... The courts must be unwavering in their denunciation and punishment of all forms of violence, which is inimical to the good order of society."

The broad statement by the Court of Appeal that it had taken into account "the provisions of the [Act]" may be regarded as some indication that it had adverted to and complied with *all* the provisions of the Act. Accordingly, it can be argued that one should assume in the Court of Appeal's favour that it asked itself the questions which it was required by section 35(2) to address, and answered at least one of them affirmatively.

[13] A similar assumption of compliance, however, cannot be made in relation to the requirements of section 35(4) since the record of the proceedings in the Court of Appeal contains nothing which could be regarded as either the statement or the explanation which was required of the court by section 35(4). Accordingly, while we refrain from making any positive finding of a failure by the Court of Appeal to comply with section 35(2), we are in a position to conclude that the Court of Appeal was clearly in breach of section 35(4).

Section 36

[14] This section of the Act deals with the length of custodial sentences, and sub-section (2) provides as follows:

> "(2) The custodial sentence shall be
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> (a) for such term ... as in the opinion of the court is commensurate with the seriousness of the offence, ... ; or

(b) where the offence is a violent or sexual offence, for such longer term ... as in the opinion of the court is necessary to protect the public from serious harm from the offender."

Sub-section (3) of section 36 is similar to section 35(4) in that it imposes on a sentencing court which forms the opinion that the normal sentence commensurate with the seriousness of the offence should be extended as a necessary protection for the public, an obligation to state that opinion and the reasons for it in open court and to explain to the offender why he has received the sentence passed on him.

[15] The Court of Appeal gave no indication whether it determined that 20 years' imprisonment was the appropriate sentence having regard to the seriousness of the offence pursuant to sub-paragraph (a), or because it considered an extension of the normal sentence was necessary to protect the public from the appellant. The Court of Appeal made no statement and gave no explanation in connection with the length of the sentence but under section 36(3) such a statement and such an explanation are only required if the sentencing court is imposing an extended sentence under sub-paragraph (b) of section 36(2). We cannot assume that the Court of Appeal invoked this provision to extend the sentence passed on the appellant. Therefore, we cannot find that the Court of Appeal was in breach of section 36(3). While we have our doubts as to whether the Court of Appeal addressed and formed an opinion on the two questions which it was required by section 36(2) to answer, there is no sufficient basis for a positive finding that the Court failed to do so.

Effect of Non-Compliance with section 35(4) – Second question of Issue (i)

[16] The first Issue identified by this Court also asks the question: what, if any, consequences lie for non-compliance with the Act? It is noted in this connection that section 37(4) of the Act expressly provides that a custodial sentence is not invalidated by the failure of the sentencing court to obtain and consider a pre-sentence report when such a report is required by section 37(1). There is no similar saving provision in relation to a breach of

section 35(4) and, therefore, it is reasonable to infer that the intended consequence of such a breach is the invalidity of the sentence imposed.

[17] Section 37 of the Act required in this case that the Court of Appeal should have obtained and considered a pre-sentence report before imposing a custodial sentence unless the Court of Appeal was of the opinion that such a report was "in the circumstances of the case" unnecessary. There is nothing in the Court of Appeal's judgment (and no indication from any other source) to suggest that the Court of Appeal considered the question whether a pre-sentence report was necessary and concluded that it was not. In any event, such a conclusion would in our view have been irrational as a pre-sentence report would be expected to provide information that would be helpful, for example, in assessing whether the appellant presented a potential threat to members of the public. We also draw attention to the fact that there was a dearth of information about the appellant available to the Court of Appeal.

[18] We have already referred to section 37(4) which provides that failure to obtain and consider a pre-sentence report in breach of section 37(1) shall not invalidate a custodial sentence. We do not consider that this provision deprives an appellate court of the right to quash a custodial sentence passed in those circumstances; indeed, sub-section (4) goes on to provide that on an appeal from such a sentence the appellate court must itself remedy the omission of the sentencing court by obtaining and considering a pre-sentence report. That is the course we would have followed but for the compelling reasons discussed later (see [23] and [24]) for remitting the matter to the trial judge to deal afresh with the matter of sentence. In the circumstances, we incorporated in our order a direction that a pre-sentence report should be obtained and placed before him.

Issues (iii) and (iv)

[19] We have explained at [8] why we will not deal substantively with the third and fourth issues identified by this Court. The only comment we make has to do with the respective roles of the courts in Barbados and our Court with regard to sentencing. What needs to

be emphasised here is the distinction between the function of fixing the tariff of punishment by establishing the necessary benchmarks and guidelines, and the function of ensuring that sentences in individual cases conform with the tariff, the benchmarks and the guidelines that have been set. We recognise that the first function is more appropriately performed by the judges of the High Court and the Court of Appeal of Barbados who are closer to, and indeed part of, the community whose values and standards are to be vindicated, and whose protection is to be secured, by the sentences imposed. The second function, however, is one for which our Court must accept ultimate responsibility. In fact, the Court of Appeal has already established a tariff of imprisonment for manslaughter.[1] The question which we are remitting to the trial judge is where in that range of punishment does this case fit? Before he answers that question the trial judge will have to make the necessary findings of fact in order to determine whether there are any and if so what, aggravating or mitigating factors (see [23] and [24]). He will also have to consider the pre-sentence report which should provide useful information about the appellant (see [17] above).

Failure of Court of Appeal to Hear Plea in Mitigation – Issue (v)

[20] The fifth issue was an all-embracing one under which any other issue which in the opinion of counsel was relevant to the disposal of the appeal could be addressed. Counsel for the appellant under this head raised a very important issue in paragraphs 35 and 36 of his written submissions. This in fact provided a fundamental reason for quashing the sentence, namely, the failure of the Court of Appeal to hear the defendant or his attorney before sentencing him for manslaughter. There was no objection by Mr. Seale, counsel for the Crown, to the introduction of this ground, and he was given an opportunity to respond to it at the hearing of the appeal. In fact by the end of the hearing he indicated that he had no objection to the order which the Court eventually made.

[1] Bend and Murray v R (Criminal Appeals Nos. 19 & 20 of 2001 unreported); Pierre Lorde v R (Criminal Appeal No. 11 of 2003 unreported)

[21] The right of a convicted person to be heard before being sentenced is a fundamental aspect of due process, and a sentencing court has no discretion to deprive a convicted person of that right. Section 18(1) of the Barbados Constitution provides under the protection of law provisions that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court. In this regard, sentencing of a person charged with an offence is an essential part of the hearing and he ought to be heard before sentence is passed. The coming into force of the Act could not and did not affect this fundamental right which is protected by the Constitution and is not subject to the exercise of any discretion.

[22] We agree with counsel for the appellant who pointed out in his written submissions that an important part of the sentencing procedure is the accused's plea in mitigation without which the Court of Appeal will not always have sufficient information to properly determine sentence as there may be mitigating factors present which do not appear on the record which is used for hearing of the appeal. In this case the Court of Appeal which clearly did not have before it sufficient information about the appellant erred in not inviting the appellant's attorney to address it on sentence. That error is sufficiently grave by itself to invalidate the sentence.

Failure of Court of Appeal to Remit Case to Trial Judge for Sentencing

[23] Another ground not covered by the Issues nor connected with the Act, but on which we based our decision, was that there were disputed issues of fact that:

(a) were relevant for the purpose of sentencing;
(b) were not resolved by the decision of the Court of Appeal to substitute a verdict of guilty of manslaughter for that returned by the jury;
(c) the Court of Appeal was not in a position to resolve, and
(d) the trial judge who heard the evidence was qualified and entitled to resolve.

[24] Earlier at [6] we identified some of these disputed issues of fact. The answers to the questions there posed might constitute either aggravating or mitigating circumstances which would affect the length of the appellant's sentence. It is the right, and indeed the duty, of the judge who presides over a jury trial to resolve issues of fact arising on the evidence which are relevant for sentencing purposes, and are not resolved by the verdict of the jury. This has been affirmed in English courts in numerous cases (See e.g. *R v Byrne*[2]). It was therefore incumbent on the Court of Appeal to have referred the matter to the trial judge for sentence, a course of action which we have ourselves taken. Counsel for the appellant at paragraph 37 of his written submissions under the heading "Other Issues" suggested that the Court of Appeal could have remitted the case to the High Court for sentencing so that further evidence might be taken. The taking of further evidence may be necessary when there is a guilty plea, but not in cases like the present one in which the trial judge is able to make the relevant findings on the basis of the evidence led in the course of the trial. His findings must be consistent with the jury's verdict and must not involve the commission of any offence other than that for which the offender has been convicted.[3] In making his findings, he must apply the criminal standard of proof i.e. proof beyond reasonable doubt (*see Archbold Criminal Pleadings, Evidence and Practice, 2005, p. 55, paras. 5-74*). It was not competent for the Court of Appeal to determine sentence without resolving these disputed questions of fact. On this ground, too, the sentence could not stand.

[25] For all of these reasons we find:

(a) There was a breach of and non-compliance with section 35(4) of the Act.

(b) As a consequence of this breach the sentence imposed by the Court of Appeal was invalid.

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[2] [2003] 1 Cr. App. R. (S.) 68, p. 338

[3] R v Solomon and Triumph [1984] 6 Cr. App. R. (S.) 120 and R v Byrne (supra); R v Stosiek (Andrew) [1982] 4 Cr. App. R. (S.) 205

(c) If the Court of Appeal were dealing with sentence itself it ought to have obtained a pre-sentence report which was necessary in the circumstances of the case.

(d) The failure of the Court of Appeal to afford the appellant an opportunity to be heard on the question of sentence amounted to a denial of due process and rendered the sentence invalid.

(e) In this particular case where there was a need to resolve disputed issues of fact that were relevant in deciding the length of sentence and which were not resolved by the conviction for manslaughter, the Court of Appeal ought to have remitted the matter of sentence to the trial judge.

[26] In the circumstances the appeal was allowed, the sentence of 20 years imposed on the appellant was quashed, and the matter was remitted to Hon. Mr. Justice Worrell or if he is unavailable to another judge of the High Court, for hearing on sentence. It was also ordered that a pre-sentence report be prepared and submitted to the trial judge.

The Rt. Hon. Mr. Justice Michael de la Bastide (President)

The Hon. Mr. Justice R. Nelson

The Hon. Mr. Justice D. Pollard

The Hon. Mr. Justice A. Saunders

The Hon. Mme. Justice D. Bernard

The Hon. Mr. Justice J. Wit

The Hon. Mr. Justice D. Hayton