



# The Court of Appeal for Bermuda

## CRIMINAL APPEAL No 14 of 2012

Between:

**ANTOINE ANDERSON**

Appellant

-v-

**THE QUEEN**

Respondent

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**Before:**    **Zacca, President**  
              **Evans, JA**  
              **Ward, JA**

**Appearances:**    Ms. Gabriella Stewart for the Appellant  
                          Mr. Garrett Byrne for the Respondent

**Date of Hearing & Decision:**                                       **5 November 2013**

**Date of Reasons:**   **25 March 2014**

### **REASONS FOR DECISION**

#### **PRESIDENT**

On November 5, 2013 we dismissed the appellant's appeal against sentence and affirmed the sentence. We promised to put our reasons into writing. This follows:

1. On February 20, 2009, the appellant was convicted on a charge of murder. He was sentenced to life imprisonment with a provision that he would not be eligible for parole until a period of 15 years had elapsed.
2. On 19<sup>th</sup> October 2012, the appellant pleaded guilty to a charge of causing grievous bodily harm to Winston Darrell with intent to do him grievous bodily

harm. On October 22, 2013, he was sentenced to a term of 7 years imprisonment. The sentencing judge ordered that the sentence of 7 years was to run consecutive to his parole eligibility period under the life sentence he was now serving. In effect he was to serve the 7 years consecutive to the period of 15 years.

3. The appellant has now appealed against the sentence of 7 years on two grounds of appeal.
  - i. The learned judge erred in law in imposing a 7 year term of imprisonment to run consecutive to a life sentence which is currently being served.
  - ii. The sentence is manifestly excessive in that it runs consecutive to the life sentence which is currently being served.
4. It is to be observed that the sentence imposed was to run consecutive to his parole eligibility period and not to the life imprisonment.
5. Briefly the facts of the offence are that at the time when he was serving a term of life imprisonment at the Westgate Correctional Facility, the appellant carried out a vicious and a protracted assault on another inmate causing very serious injuries.
6. The injuries alleged to have been inflicted was a fracture to the left eye socket, a broken nose, 8 fractured teeth. The victim suffered from memory loss and for several months had serious difficulties with his sight and speech.

7. Ms Gabriella Stewart for the appellant submitted that the sentence of 7 years should be made concurrent to the life imprisonment because one could not impose a consecutive sentence to one of life imprisonment.
8. The Criminal Code Act 1907 makes the following provisions:

“Section 70J

- (1) Subject to this section a sentence of imprisonment passed by the Supreme Court of Summary Jurisdiction shall unless the Court otherwise directs have effect from and include the day on which it was passed.
- (2) Where a person who is undergoing or has been sentenced to undergo imprisonment for an offence, is convicted of another offence, any sentence of imprisonment imposed on him for that other offence shall unless the Court otherwise directs, take effect from the time where the offender would otherwise be released from prison under the previous sentence of imprisonment.

Section 70P

- (1) Subject to Section 70N where no minimum period of imprisonment is provided before a person can apply for his release on licence a person must serve at least one third of the terms of imprisonment before any application for his release on licence may be entertained or granted by the Parole Board in the absence of an Order made under subsection (3)...
- (3) Notwithstanding subsection (1) where an offender receives a sentence of imprisonment for two years or more on conviction of indictment, the Court may, if satisfied having regard to –
  - a) The circumstance of the commission of the offence;  
and
  - b) The character and circumstance of the offender, that the expression of society’s denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on licence is one half of the sentence or 10 years, whichever is less.”

9. In this case, the learned judge ordered that the appellant should serve 3 ½ years consecutive to his parole eligibility period under the life sentence he was now serving, before he could be released on licence.
  
10. Section 288 (1) of the Criminal Code Act 1907 provides:

“Any person who commits the offence of murder shall be sentenced to imprisonment for life:  
Provided that where any person is sentenced under this section, such person shall before any application for his release on licence may be entertained or granted by the Parole Board established by the Parole Board Act 2001, serve at least fifteen years of the term of his imprisonment.”
  
11. The above section of the Criminal Code is applicable to the appellant’s case.
  
12. In a recent judgment of the Privy Council, the Law Lords held that the period of 15 years was the maximum that could be imposed.

**Pearman v The Queen [2013] U.K.P.C. 29**

13. Appellant’s Counsel, Ms Gabriella Stewart relied on the case of John Patrick Foy [1962] 46 CR. APP. R. 290 for her proposition that the Court cannot impose a sentence to be consecutive to one of life imprisonment.
  
14. In Foy’s case, the appellant appealed against his sentence of 14 years imprisonment on Count one for office breaking and larceny and 14 years imprisonment on Count two for robbery with violence, those two sentences to run concurrently but consecutive to a sentence of imprisonment for life which the appellant was then serving. The Lord Chief Justice noted that the appeal against sentence had been abandoned and there was no jurisdiction in the Court to substitute any sentence.

15. However, the Court went on to state:

“But the Court would like to say that they are quite satisfied what the learned judge purported to pass was not a valid sentence. Life imprisonment means imprisonment for life. No doubt, many people come out from imprisonment while they are still alive, but if such a person does come out, it is only on licence and the sentence of life imprisonment remains on him until he dies. Accordingly, if the Court passes a sentence of any period of years consecutive to life, the sentence is no sentence at all in that it cannot operate until the prisoner dies. The Court feels that, though they cannot substitute any sentence in this case, it is right to say that the sentence passed was wholly invalid, and that the proper sentence would have been one of fourteen years concurrent with the sentence of life imprisonment.”

16. However, the law has moved on since the decision in Foy’s case. At the time Foy was decided there were no statutory provisions providing for periods, when a convicted person serving a life sentence, was eligible to apply for parole at the end of that period. Section 288 (1) of the Criminal Code Act 1907 is one such example. At the end of that period the prisoner became eligible to apply for parole.

17. Mr Garrett Byrne for the Crown has referred the Court to a number of cases which were decided after Foy.

18. In the case of R v Christopher Hills [2008] EWCA Crim 18 71, Lord Justice Latham stated at paragraph 9 and 10:

9) As far as the issue of principle is concerned, it would be extremely unfortunate if, in circumstances such as the present, the Court was not unable to impose a sentence which extended the period before which an offender was to be considered for parole. It would effectively mean that subject always to consideration by the Parole Board, the offender would not have any punishment for what could be a serious offence committed during the course of imprisonment; and it may be that the offence is not so serious that the length of imprisonment available to the

Court is such as to enable a concurrent sentence to extend beyond the end of the maximum period for a sufficient length of time to meet the justice of the case. That is the situation in the present case and that was clearly the reason why the judge took the course that he did.

- 10) In our view, there is no reason in principle why the Court should not impose a sentence structured in the way that this sentence was. Section 154 of the Powers of Criminal Courts (Sentencing) Act 2000 (which closely reflects S70 J of the Bermuda Criminal Code Act 1907) declares:

“A sentence imposed, or other order made by the Crown Court...shall take effect at the beginning of the day on which it was imposed, unless the Court otherwise directs.”

That seems to us to give to the Court the power to direct that a sentence should or could commence at a different date. The sentencing regime which has been created in particular by the Criminal Justice Act 2003 provides for clear dates upon which minimum terms will come to an end which enable a Court to identify with precision the date upon which otherwise an offender could be considered for release on parole. That being the case, there is in our judgment no practical reason why an order should not be made which requires the offender to commence to serve an additional period after the minimum period before he can be considered for parole. The old authorities to the contrary are no longer relevant now that minimum terms are clearly identified.”

19. In *R v Jumah* [2010] EWCA Criminal 2900, the Court of Appeal in England held that a custodial term of imprisonment could be made consecutive to an existing life term.
20. In *R v Taylor* [2011] EWCA CRIM. 2236, the appellant was serving a life term of imprisonment with a minimum term of 23 years when he assaulted a number of prison officers. He received a term of 3 years imprisonment for the assault to run consecutively to the minimum period of life term. The Court of Appeal rejected the submission that it is unlawful to pass these sentences.

21. Lord Justice Moses at paragraph 5 of the judgment states:

5) In order to determine the lawfulness of that sentence it is necessary to consider the relevant statutory regime. The sentence of murder was fixed by law. It is imprisonment for life...the Court is required to specify a minimum term which must be specified before the release provisions set out in Section 28 of the Crime (Sentences) Act 1997 apply.

22. The Court observed that the statutory scheme which applied at the time of Foy was totally different. Lord Justice Moses at paragraph 15 says:

“There is authority which fortifies the view that there is no legal exhibition on passing a determinate sentence to commence at the end of the minimum period. R v Hills [2009] ICR APP. R. 75.”

Lord Justice Moses then refers to the passage at paragraph 10 of Lord Justice Latham judgment as quoted above at paragraph 18 of the judgment.

23. Accordingly, we consider that the learned trial judge was entitled to make the Order that he did. He was entitled to impose a consecutive sentence which extended the period before which the appellant was to be considered for parole.

24. For the above reasons we dismissed the appeal against sentence and affirmed the sentence imposed by the Trial Judge.

Signed

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Zacca, P

Signed

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Evans, JA

Signed

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Ward, JA