The Court of Appeal for Bermuda

CRIMINAL APPEALS Nos. 13 and 13A of 2017

B E T W E E N:

KETHYIO WHITEHURST

Appellant/Respondent

-v-

THE QUEEN

Respondent/Appellant

Before: **Baker, President**
Bell, JA
Clarke, JA

Appearances: Marc Daniels, Marc Geoffrey, Barristers & Attorneys, for the Appellant/Respondent
Carrington Mahoney and Karen King-Deane, Office of the Director for Public Prosecutions, for the Respondent/Appellant

Date of Hearing: **19 March 2018**
Date of Judgment: **23 March 2018**

EX TEMPORE JUDGMENT

Manslaughter – Failure to put lessor offence to jury – Section 38A of the Road Traffic Act 1947 – admissibility of gang expert evidence – misapplication of section 64 of the Criminal Code 1907 – sentence manifestly inadequate – sentence of 10 years substituted with sentence of 15 years – section 70P of the Criminal Code 1907

BAKER, P

Introduction

1. The Appellant was convicted of manslaughter before Simmons J, and a jury on 5 July 2017 and later sentenced to ten years' imprisonment.

2. By his amended grounds of appeal against conviction, he contends his conviction is unsafe on two grounds. First that the judge should have left the alternative offence of causing death by dangerous driving to the jury. Second that gang related evidence was wrongfully put before the jury.

The Crown's Case

3. The facts of the case as alleged by the Crown were as follows. On the 26 July 2016, the Appellant, an affiliate of the Somerset based MOB gang, deliberately rode into the Southampton Rangers area scoping out the area looking for members of the rival 110 Gang to exact revenge for their attack on his friend a month earlier at the Southampton Princess Hotel.

4. The Appellant rode past the Southampton Rangers Club on South Shore Road, did a quick circle of the area, by Khyber Pass, Middle Road and Camp Hill Road. He came upon the deceased, Travis Lowe, a known affiliate of Parkside Gang, who are MOB's arch rivals. Lowe was on his motorbike heading from Heron Bay Supermarket turning on to Camp Hill Road. The Appellant used his motorbike deliberately, relentlessly and dangerously to chase the deceased through the narrow winding roads of Horseshoe Road, a densely populated residential area, before heading east onto South Shore Road. On South Shore Road, travelling in an easterly direction, the Appellant tried to kick Mr Lowe off of his moving bike, before the deceased, took a sharp evasive left turn across the parking area of Southampton Rangers Club, and made his way back onto Horseshoe Bay Road heading east.

5. The Appellant continued to pursue Mr Lowe in a manner that was intimidating and dangerous. At one point, he reached into his left pants pocket and appeared to be armed as he pursued Mr Lowe east on Horseshoe Road. Mr Lowe, out of fear, appeared to crouch down on his motorbike as he sped around a corner and then crashed into a delivery van heading in the opposite direction. The collision took place at considerable impact speed, and Mr Lowe died as a result of the injuries he sustained in the collision.

6. Within seconds of the collision, the Appellant rode pass the unconscious Mr Lowe who was lying in the middle of the road, and as he did so he shouted *"hey mother fucker die bitch ha ha"* and then sped away back to Somerset to share the news with his friends and other MOB gang affiliates on social media.

7. All of this was captured on various CCTV cameras. About 15 minutes after the collision the Appellant was on social media in the form of WhatsApp saying "*made travis go down, fuck Parkside I as chasing his ass, he prolly dead, he hit a truck, ya the bike fucked way up and he was knocked out I just hope he dies 100. One less nigga to worry about even tho he a bitch".*

8. On the day after the incident the Appellant sent a WhatsApp voice note to Damon Swan, a known MOB gang member. The thrust of this was that he was making sure that Swan and his colleagues knew that he was responsible and that he got recognition for it, thus enhancing his status with MOB.

The Respondent's Case

9. The Appellant at the trial did not give evidence. It was common ground that in order to convict of manslaughter the jury had to be sure of six things, and the judge so directed the jury. These were:

    a) That Lowe immediately before he sustained the injuries was in fear of being hurt physically;

b) That his fear was such that it caused him to try to escape
c) That whilst he was trying to escape and because he was trying to escape, Lowe met his death
d) That his fear of being hurt was reasonable and caused by the conduct of the Appellant
e) That the Appellant's conduct that caused the fear was unlawful
f) That the conduct was such that any sober and reasonable person would recognise that it was likely to subject Lowe to at least the risk of some harm resulting from it, although it does not have to be serious harm.

10. The relevant section is section 281 of the Criminal Code 1907 ("the Code") which provides:

> *"281 A person who, by threats or intimidation of any kind, or by deceit, causes another person to do an act or make an omission which results in the death of that other person, is deemed to have killed that other person."*

11. In short, what the Crown said was that the Appellant's unlawful behaviour caused Lowe to fear for his physical safety, and in trying to escape he collided with the van and met his death.

Leaving an Alternative Offence to the Jury

12. Whereas Mr Daniels appeared for the Appellant on this appeal, Ms Mulligan represented him at the trial. The issue of leaving an alternative count to the jury arose in this way. Ms Mulligan said to the judge that she could direct the jury that it was dangerous driving that ultimately caused death and if she did, she would have to leave death by dangerous driving as an alternative verdict.

13. Mr Mahoney said he was not relying on the dangerous driving for forming the basis of a lesser offence, it was a combination of the pursuit, the threats and the intimidation of any kind that mattered and he referred to section 281 of the Code.

14. Mr Mahoney rightly submitted to the judge that if there was evidence on which a lesser charge could be laid, the Court was obliged to leave it to the jury, but he was not relying on the dangerous driving. The judge did not take the view that the lesser charge arose from the evidence and accordingly declined to leave it to jury.

15. There is no doubt that where a lesser offence than the one charged arises as a possibility on the evidence, the judge is obliged to leave it to the jury regardless of the views of counsel for the prosecution or the defence. The topic of leaving an alternative offence was explored extensively by the House of Lords in *R v Coutts* [2006] UKHL 39. The leading judgment was given by Lord Bingham. He said at paragraph 2:

> *"The narrow question raised by the appeal is whether, on the facts of this case, the trial judge should have left an alternative verdict of manslaughter to the jury. The broader question, of more general public importance, concerns the duty and discretion of trial judges to leave alternative verdicts of lesser-included offences to the jury where there is evidence which a rational jury could accept to support such a verdict but neither prosecution nor defence seek it."*

16. The concern about not leaving an alternative offence was described by Lord Bingham at paragraph 12. He said:

> *"The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role*

as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge (Von Starck v The Queen [2000] 1 WLR 1270, 1275; Hunter and Moodie v The Queen [2003] UKPC 69, para 27)"

17. He said at paragraph 15:

"The second principle is that ordinarily, and subject to limited exceptions, a trial judge should leave to the jury the possibility of convicting of lesser-included offences, that is, lesser offences within section 6(3) comprising some but not all the ingredients of the offence charged."

18. Lord Bingham summarised the position thus at paragraph 23:

"The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support. I would not extend the rule to summary proceedings since, for all their potential importance to individuals, they do not engage the public interest to the same degree. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency."

19. Mr Daniels' difficulty is to point to a factual finding that the jury might reach that did not amount in law to manslaughter but did amount to causing death by dangerous driving. He drew our attention to section 38A of the Road Traffic Act 1947 ("the Act") which sets out various offences including death by dangerous driving, of which a defendant may be convicted on an indictment for manslaughter in connection with driving a vehicle and the definition in section 36A of the Act of dangerous driving as driving in a manner far below what would be expected of a competent and careful driver and that it would be obvious to a competent careful driver that driving in that way would be dangerous. But, in my view neither of these two sections takes the solution of this case any further.

20. Essentially, he sought to sever the incidents of threatening with what might have been a firearm, and trying to knock Mr Lowe off his bike, from the factual matrix along with the evidence that there was any gang element to the case, which he argued should not have been admitted anyway. Thus, he argued what was left was the dangerous driving. That was what led to the death rather than any threats or intimidation. Neither the hand nor the kick, he argued, had any causative effect.

21. Manslaughter is an offence that can be committed in many different ways. Its core is the unlawful killing of another human being. Even if the jury was unsure about the kick and the gesticulation, there was still the chase on the bike over a substantial distance with the Appellant's comment as he passed Mr Lowe's prone body. Mr Daniels could not avoid having to accept that in those circumstances all six of the elements the Crown was required to prove for manslaughter were met.

22. Dangerous driving is as much an unlawful act as trying to kick Lowe off his bike or threatening him with a pretend weapon. It is also noted that the Appellant's boastful and obscene messages on WhatsApp fifteen minutes after the collision were unchallenged by him and therefore had to be taken at face value. In short,

there was no evidence to support an alternative offence of death by dangerous driving that did not also support manslaughter.

23. If the manner of the Appellant's riding the bike did not cause Mr Lowe's fear which lead him to trying to escape, what did? The test laid down by Lord Bingham in *Coutts* for requiring a judge to leave an alternative offence to the jury was, in my judgment, not met. Accordingly, the first ground of appeal fails.

Admissibility of Gang Evidence

24. Mr Daniels' second ground is that the evidence of Sgt Alex Rollin relating to gangs, and the Appellant's status as an associate of MOB should not have been admitted. We were told there was an objection by the defence and a ruling by the judge, but it has not been transcribed.

25. There was also an unsuccessful objection in relation to the WhatsApp messages because of the suggestion that they meant that the Appellant was looking for some sort of recognition for what he had done.

26. Sgt Rollin is well known throughout the Bermuda Courts and gives evidence in most, if not all, of the gang-related killings. The admissibility of this evidence was carefully considered by the Privy Council in *Myers v The Queen* [2015] UKPC 40, an appeal from three decisions of this Court. Lord Hughes at paragraph 37 said this:

> *"The starting point is that evidence is not admissible unless it is relevant. It is relevant if, but only if, it contributes something to the resolution of one or more of the issues in the case. It may do so either directly or indirectly."*

27. Sgt Rollin's evidence was both relevant and probative in the present case. It set in context the CCTV footage showing the chase and the WhatsApp messages of

the Appellant. It fell in my judgment within the *Pettman*[1] principle described by Purchas LJ in that case as follows:

> *"…where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence."*

28. As Lord Hughes pointed out in *Myers* at page 52, the *Pettman* principle needs careful handling. He said this:

> *"Claims by prosecutors that the evidence is necessary to understanding of the case, or, as is sometimes asserted, to discourage the jury from wondering about the context in which the events discussed occurred, need to be scrutinised with care. It is only where the evidence truly adds something, beyond mere propensity, which may assist the jury to resolve one or more issues in the case, or is the unavoidable incident of admissible material, as distinct from interesting background or context, that the justification exists for overriding the normal Makin prohibition on proof of bad behaviour."*

29. In short, the evidence showed why the Appellant was in the vicinity of the Rangers Club and why he had a reason for chasing Lowe. It was relevant to motive or intent. Mr Daniels submitted its prejudicial effect outweighed its probative value, but I cannot accept this. What the Appellant was seen and heard to say on CCTV at the scene and in his WhatsApp messages made any prejudicial effect of his being described as an associate of MOB pale into insignificance.

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[1] *R v Pettman* (unreported) in the Court of Appeal (Criminal Division) in England and Wales, 2 May 1985

30. The intent of the Appellant was relevant and the Crown was fully justified in responding to the Appellant's defence to show why he was in the area.

31. In my judgment there is nothing in this ground of appeal either, and I would dismiss the conviction appeal.

The Crown's Cross-Appeal against Sentence

32. The Crown appeals against sentence on the grounds that it was manifestly inadequate. The sentence imposed was ten years' imprisonment. The judge found that the appropriate range of sentence to meet the justice of the case was seven to ten years. In doing so, she accepted the submission of Ms Mulligan for the Appellant, that the Court ought not to sentence on any basis other than the basis on which she directed the jury it could make a finding of guilt (i.e. that the Appellant's conduct was likely to subject Mr Lowe to the risk of some harm). The judge accepted Ms Mulligan's submission that section 64 of the Code applied.

33. This seems to me to be a most surprising proposition. I think it results from a misunderstanding of section 64(6) of the Code which provides:

> *"(6) Where the court is composed of a judge and jury, the court shall accept as proved all facts, express or implied, that are essential to the jury's verdict of guilty."*

34. That subsection does not mean the judge shall only accept as proved all facts that are essential to the jury's verdict. This, so it seems to me, is apparent from s.64(3) of the Code which provides:

> *"(3) In determining the sentence, a court may consider any evidence disclosed at the trial."*

35. The judge should have taken into account the whole horrific conduct of the Appellant including what he was heard to have said on CCTV at the scene and his WhatsApp messages, all of which was unchallenged by evidence from him.

36. The Appellant's conduct seems to me to take the case far beyond the basic requirement for the offence of manslaughter of the risk of some harm from his unlawful conduct.

37. The judge identified as aggravating factors:

i) Gang element
ii) Vocalising at the scene that he wished that Lowe would die
iii) Not stopping to help
iv) Boasting on WhatsApp
v) Previous convictions, which I interpose to say were not of great significance in the context of this case.
vi) Lack of remorse

38. She said these factors took the level of sentence to the top end of the bracket, namely ten years.

39. The only mitigating factors was the Appellant's youth, but this did not operate to bring the sentence down in this particular case. He was apparently 20 years old at the time of the offence. She did, however, appear to conclude that the Appellant's youth was a reason for not invoking section 70P of the Code.

40. The judge rightly identified the aggravating features, to which I would add using a vehicle as a weapon to frighten. This in my judgment was a very bad case and one that came perilously close to murder, which Mr Mahoney said might well have been charged but was not.

41. There is no doubt in my judgment that this sentence was manifestly inadequate. Mr Mahoney submits that the appropriate range was 16 to 20 years.

42. Manslaughter cases cover a greater variety of circumstances and vary in gravity more than perhaps any other offence in the criminal calendar. Sentencing is necessarily fact specific. Great care needs to be taken not to conclude too much from the level of sentence passed in other cases, particularly in other jurisdictions. We were referred to numerous cases. In *Burgess v The Queen,* Criminal Appeal No 5 of 2000, 14 years was upheld by this Court as in no way manifestly excessive. Likewise, a sentence of 12 years in *Lewis v The Queen* [2001] Bda L.R. 37. In *DeSilva v The Queen*, Criminal No 5 of 2011, the defendant pleaded guilty to manslaughter on an indictment for murder and was sentenced to 14 years. All the cases we were referred to were serious but the facts were completely different from those in the present case.

43. In my judgment the appropriate sentence in the present case was one of 15 years.

Section 70P Application

44. One then comes to section 70P of the Code, which Mr Mahoney submits the judge was in error in not applying. Section 70P of the Code provides:

> *"(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 term 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)."*

45. Subsection (3) provides:

> *"(3) Notwithstanding subsection (1), where an offender receives a sentence of imprisonment for two years or more on conviction on indictment, the court, may, if satisfied, having regard to—*
>
> *(a) the circumstances of the commission of the offence; and*

> *(b) the character and circumstances 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."*

46. So the ordinary rule is that a prisoner can apply for parole after he has served one-third of his sentence. Thus, the Appellant would be eligible for consideration for parole, on the sentence passed by the judge, after serving just three and a half years of his 10 year sentence. Most members of the public would find that surprising.

47. But, Parliament has said that the Court can, in the case of two-year sentences and upwards, increase the one-third period to half or 10 years, whichever is the less. But it can only do so if it is satisfied that society's expression of denunciation of the offence or deterrence requires it to do so, and in reaching that conclusion it has to have regard to two things: (1) the circumstances of the commission of the offence; and (2) the character and circumstances of the offender.

48. The circumstances of this offence were truly horrendous and society has a real interest in deterring gang related crime. The Appellant has some previous convictions including for violence, but Mr Daniels submitted he was not irredeemable and that was why the judge did not apply section 70P of the Code. On the other hand, the Appellant's character could not be more clearly displayed than by his behaviour as he passed the scene and on WhatsApp soon after.

49. In my judgment, the criteria in section 70P have been met and I would make an Order accordingly.

Conclusion

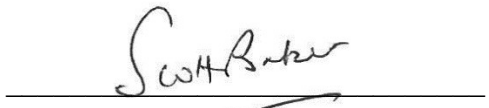
50. I would dismiss the Appellant's appeal against conviction and allow the Crown's appeal against sentence by substituting fifteen years for ten years and include an Order under section 70P of the Code.

BELL, JA

51. I agree.

CLARKE, JA

52. I also agree.



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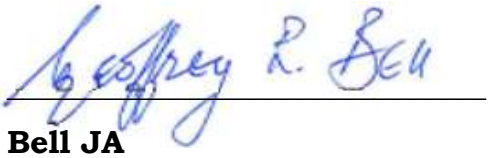

Bell JA

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