The Court of Appeal for Bermuda

CRIMINAL APPEAL
2017 No: 13A

BETWEEN:

THE QUEEN

Applicant

-v-

KEYTHIO WHITEHURST

Respondent

RULING

Application for Leave to Appeal Sentence
Criminal Case Management before the Registrar of the Court of Appeal

Date of Hearing: Monday 22 January 2018
Date of Ruling: Monday 5 February 2018

Mr. Carrington Mahoney (Deputy DPP) for the Applicant
Ms. Susan Mulligan (Christopher's) for the Respondent

Delivered by Registrar Shade Subair Williams:

Introduction

1. The Respondent was tried and convicted by jury on 5 July 2017 for the offence of manslaughter, contrary to section 293 of the Criminal Code. He was sentenced by the learned Justice Charles-Etta Simmons on 12 October 2017 to 10 years' imprisonment.

2. On 13 October 2017, the Crown filed a Notice of Application for leave to appeal against sentence on the sole ground that the sentence imposed was manifestly inadequate. (In appeal

case no. 13A of 2017 Mr. Whitehurst has appealed against conviction only. No leave applications arise in respect of Mr. Whitehurst's appeal against conviction.)

3. Traditionally, the fitness of leave to appeal applications (in respect of conviction) are determined by the trial judge under section 17(1)(b) of the Court of Appeal Act 1964. However, this application for leave to appeal sentence was heard before me on 23 January 2018 in pursuance of Court Circular No 12 of 2017. The said circular was issued under the direction of the President of the Court of Appeal, Sir. Scott Baker, wherein he empowered the Registrar of the Court of Appeal to determine leave applications in respect of conviction and sentence.

4. I reserved my decision which I now deliver with a short summary of reasons.

The Facts

5. The Crown's case was summarized by Deputy Director, Mr. Carrington Mahoney, in the following way. The Respondent, Mr. Whitehurst, was associated with a Bermuda gang known as MOB. The deceased victim, Travis Lowe, was said to be a former associate of the rival Parkside gang. On 2 August 2016 the Respondent rode a motor bike chasing after the deceased who was also riding a motor bike in vicinity of Camp Hill Road, Southampton.

6. At one stage, the Respondent was seen on CCTV footage evidence at trial to attempt to kick at the Mr. Lowe during the pursuit. There was also evidence which implied that the Respondent had an object in his hand which he appeared to be pushing into his pocket as he extended his left leg. It was at this point, that Mr. Lowe took a sharp corner towards the parking area of Southampton Rangers Club and the Respondent continued after him.

7. The chase came to an end when Mr. Lowe collided into an oncoming van, bouncing back some ten feet upon impact, and died. Within seconds of the collision, the Respondent was seen on residential CCTV footage riding past the deceased's motionless body and audibly shouted, "*Hey mother fucker! Die you bitch! Hah! Hah!*".

8. These comments were followed by further explicit remarks in writing by the Respondent on social media (WhatsApp) to another known MOB member. The Respondent expressed his pleasure and desire for Mr. Lowe's death, stating that he had chased the deceased and caused his death.

9. It is against this factual background that Mr. Whitehurst was charged and convicted of manslaughter.

The Sentence Proceedings in the Supreme Court

10. I have carefully listened to the audio record of the sentence proceedings before Simmons J on 12 October 2017. In summary, the Crown sought a sentence range of 16-20 years imprisonment on the basis that the nature of the manslaughter was akin to a case where harm was intended. The Respondent's Counsel, on the other hand, submitted that the learned judge ought not to sentence the Respondent on a basis beyond her direction to the jury which called for a finding on whether the Respondent's conduct subjected Mr. Lowe to a risk of some harm.

11. Mr. Mahoney referred to the passage of Lord Justice Kennedy sitting in the Court of Appeal (Criminal Division) in *R v Latham Halsbury's Laws of England December 1996*, as recited by the then Sir James Astwood, P in *Gregory Dill v The Queen [1997] Bda LR 1* at page 4:

    Astwood P citing Justice Kennedy:

    > "*Their Lordships were persuaded that the tariff sentence of 7 years on conviction in this type of case was too low. Where an offender went out with a knife, carrying it as a weapon, and used it to cause death, even if there was provocation, he should expect to receive on conviction in a contested case as (sic) sentence of 10 to 12 years.*
    > *In the circumstances of the present case, however, it would be inappropriate to increase the offender's sentence*."

12. Astwood P continued:

    > "*We adopt the words of Kennedy L. J. and we are persuaded that the tariff in Bermuda is presently too low and that the sentences for those convicted of manslaughter where knives or other offensive weapons are used to inflict injury, should in future be in the range of 10 to 12 years*."

13. The learned judge also looked at the Court of Appeal's judgment in *Kellan Jeaurreau Lewis v The Queen [2011] Bda L.R.37* where a sentence of 12 years' imprisonment was upheld for manslaughter. In that case the Appellant and others attacked the victim at a party. There were varying eye-witness accounts on the details of the attack. On several versions, helmets and a cane were used as a weapon during the attack. A young female was seen to partake in the attack with the use of a screw driver or like metal object to stab at the victim. On all accounts, the Appellant was a participant in the attack. On one version, the Appellant attacked the deceased with his fists. Another eye witness gave evidence that she saw Mr. Lewis hitting and kicking the deceased and on another version he repeatedly stabbed the deceased in the right

side of his stomach area with a knife which he retrieved from his waist before he ran off with three others.

14. The cause of death in *Lewis*, according to expert pathology evidence, was from a stab wound to the heart. Three stab wounds were discovered: one to the left side of the victim's chest and two other defensive wounds to the left arm. No wounds were consistent with being caused by a screwdriver. Expert DNA evidence disclosed a match from the deceased's blood in the inside pocket of one of Lewis' co-accused and the deceased's DNA was also found on the cane seen to be used by another co-accused. A very weak smear of the deceased's blood (determined not to be spatter) was found on the Appellant's shirt. The jury, at re-trial, accepted that the Appellant caused the fatal wound and he was convicted of manslaughter.

15. In respect of sentence in *Lewis* the Court of Appeal held, "*We have considered the submissions of Counsel for the appellant and the Crown and having regard to the facts of this case, and the guidelines as to sentence with respect to similar cases, we are of the view that the sentence of 12 years is not manifestly excessive. The appeal against sentence is dismissed and the sentence is affirmed*."

16. The Crown effectively asked for the Court to re-examine the range of 10-12 years imprisonment stated in *Gregory Dill v R.* Mr. Mahoney argued that neither of the Bermuda Court of Appeal decisions cited involved the gang element present in this case. The learned sentencing judge acknowledged and accepted the gang evidence distinction in her exchanges with Counsel.

17. Mr. Mahoney further submitted that the Respondent's targeted pursuit of the deceased together with the statements he uttered immediately after the fatal accident would push the sentencing tariff in this case well beyond 12 years imprisonment. Mr. Mahoney also argued that the additional gang evidence in this case brought the nature of the case much closer to murder than the previous cases cited. The Crown clawed its way through these points but fell short in persuading the learned judge to go beyond the established 10-12 year range.

18. While Simmons J rejected the Crown's submissions that there was a basis for a new 16-20 year range she expressly accepted that she had a power of discretion to sentence beyond the scale in cases where warranted. In the end, the learned judge found that it was not open to her to sentence the Respondent on any basis other than within the scope of the directions she gave to the jury upon which they gave their finding of guilt.

19. In her opening sentence remarks, Simmons J stated:

> "*Mr. Whitehurst you were convicted by a jury of your peers of manslaughter in relation to the death of Mr. Travis Lowe. According to the evidence, which the jury accepted in order to make a finding of guilt Mr. Lowe's death arose in circumstances where he was lawfully riding a bike on Horseshoe Road and you pursued him on a bike sometimes at speed, sometimes on the wrong side of the road and otherwise without…regard to the rules of the road. That during the pursuit your conduct amounted to a threat, intimidation or deceit such that put Mr. Lowe in fear of being hurt physically; it was that fear that caused him to try to escape; and while he was trying to escape, and because he was trying to escape, Mr. Lowe met his death.*
>
> *Your conduct was such that any sober and reasonable person would recognize it as likely to subject Mr. Lowe to the risk of some harm resulting from it. You ride bikes on Bermuda's roads so you were well aware of the risk to Mr. Lowe as well as to any other road user present at the time. The result was the death of a young man innocently going about his responsibilities*…."

20. On the gang evidence factor, the learned judge said:

> "*The evidence led in the trial which the court takes impressed upon the jury's mind and appears evident from Sgt Rollins' evidence was that you Mr. Whitehurst were involved in a gang known as MOB, albeit on a low level and that you were seeking upward mobility in the gang, hence your pursuit of Mr. Lowe who you knew was associated with a rival gang. That gang rivalry in the context of this case has great significance for sentencing purposes. The unlawful conduct in the day in issue was your doing and yours alone. You pursued Mr. Lowe travelling on the roads in defiance of the obvious risk to him and others who may have been present. For these reasons the court determines that your blameworthiness falls into the very high culpable level of offence*."

21. The Court expressly restricted the basis upon which it would sentence the Respondent to the facts consistent with its direction to the jury for the elements necessary for a finding of guilt:

> "*Ms Mulligan on your behalf has referred the Court to a number of cases the most relevant the Court finds are the local cases for*

determining an appropriate range of sentencing. The gravamen of her submissions is that the Court ought not to sentence on any basis other than the basis upon which the Court directed the jury it could make a finding of guilt. That is that your conduct was such that it was likely to subject Mr. Lowe to the risk of some harm resulting from it. She referred the Court to section 64 of the Criminal Code in support of her proposition. The Court accepts that she has correctly stated the law in respect to the basis upon which the Court must sentence. It is the risk of some harm to Mr. Lowe from your unlawful conduct."

22. Accordingly, the learned judge set the sentencing range as follows:

> "*The Court finds that the appropriate range of necessity to meet the justice of the case is 7-10 years. That is more than an inadvertent but negligent running down death but less than a knife attack with intent to cause at the minimum GBH*."

The Application for Leave to Appeal Sentence

23. The learned judge's application of the 7-10 year range is the basis of the prosecution's application for leave to appeal sentence. Section 298(1) of the Criminal Code 1907 provides a maximum sentence of life imprisonment for a person convicted of the offence of manslaughter. The Crown maintains that the correct sentence range is 16-20 years imprisonment because the evidence proves that harm was intended.

24. Mr. Mahoney referred me to an extract from the 2016 edition of Archbold at para 19-10 which he previously placed before the sentencing judge. The material portion reads:

> "*To constitute the essential ingredients of a charge of manslaughter, laid upon the basis that a person has sustained fatal injuries while trying to escape from assault by the accused, it must be proved:*
> *(a) that the victim (,)immediately before he sustained the injuries(,) was in fear of being hurt physically;*
> *(b) that this fear was such that it caused him to try to escape;*
> *(c) that while he was trying to escape, and because he was trying to escape, he met his death;*
> *(d) that his fear of being hurt there and then was reasonable and was caused by the conduct of the accused;*

> *(e) that the accused's conduct which caused the fear was unlawful; and*
> *(f) that his conduct was such that any sober and reasonable person would recognise it as likely to subject the victim to at least the risk of some harm resulting from it, albeit not serious harm.*
>
> *It is unnecessary to prove the accused's knowledge that his conduct was unlawful. It is sufficient to prove that the accused's act was intentional, and that it was dangerous on an objective test: DPP (Jamaica) v Daley [1980] A.C. 237, PC, following DPP v Newbury [1977] A.C. 500, HL, and, except on the point of knowledge that the act was unlawful, R v Mackie, 57 Cr. App. R. 453, CA (post, 19-118). Dangerous in this context means "likely to subject the victim to at least the risk of some harm albeit not serious harm".*"

25. Mr. Mahoney argued that the learned judge erred in sentencing the Respondent without regard to the intentional way in which the offence was carried out. Ms. Mulligan, on behalf of the Respondent, submitted that the Crown should not be permitted to sentence the accused on a basis beyond the charge and case on which the Accused was convicted. She argued that the Court could not properly find that the Respondent intended harm in committing the offence because he had been charged and convicted of manslaughter (as opposed to murder) and that the only findings made by the jury was that the Respondent had subjected the deceased to the risk of harm.

26. Mr. Mahoney stated that the Respondent was convicted by the jury on the basis of causing death by threat or intimidation under section 281 of the Criminal Code which provides:

> "*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 person, is deemed to have killed that other person*."

27. On the Crown's case the learned judge failed to distinguish this case from the kind of case where death was caused by an inadvertent accident. Counsel highlighted the gang evidence heard by the jury to further illustrate the intentional element in the commission of the killing.

28. Ms. Mulligan agreed that the evidence of a road traffic pursuit was proved. However, she argued that there was no suggestion that the Respondent had any knowledge that the van was going to be on the scene and that the Respondent's bike remained behind that of the deceased

throughout the chase. She submitted that there was no evidence from which it could be suggested or found as an implied fact that the Respondent, from the outset or at any point prior to the killing, intended harm.

Analysis

29. In a substantive appeal against sentence, the Court of Appeal would have to determine whether the sentence imposed was correct in all circumstances. If it is found that the sentence was not the correct one, the Court would then be left to determine whether the difference between the sentence passed and the correct sentence is significant enough to warrant intervention. Since the Crown has argued that the judge erred on the range of sentence applied and that the sentence was manifestly inadequate by a shortfall of 6-10 years imprisonment, it seems likely to me that the Court would allow the appeal and impose a higher sentence if it determined the sentence originally passed was incorrect.

30. So, to my mind, the real question is whether the learned judge correctly set the appropriate range of sentence. This necessarily brings into question whether the sentencing judge was correct in taking section 64(6) of the Criminal Code to mean that the Court could *only* sentence within the confines of its direction to the jury for a finding of guilt. No doubt, the judge's interpretation of section 64(6) was the deciding factor in the learned judge's determination of the restricted basis upon which the Respondent could be sentenced.

31. Section 64 provides:

> *(1) In determining the sentence, the court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender.*
> *(2) Before determining the sentence the court shall give the prosecutor and the offender an opportunity to make submissions relevant to the sentence to be imposed.*
> *(3) In determining the sentence, a court may consider any evidence disclosed at the trial.*
> *(4) The court may, on its own motion, after hearing argument from the prosecutor and the offender require the production of evidence that would assist it in determining the appropriate sentence.*
> *(5) Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person….*

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

(7) ….

32. If the appeal is to be heard substantively, the Court of Appeal would likely decide whether sub-sections 64(3) and 64(6) did in fact preclude the learned judge from setting a range commensurate to the gravity of the offence as shown by the evidence, even where the facts essential to proof of guilt, represented a lower threshold of seriousness.

33. The sentencing judge found that she was bound to sentence only on the basis of her direction to the jury for a finding of guilt if the Respondent's conduct was likely to subject the victim to risk of some harm. On appeal, it would be for the Court of Appeal to determine whether section 64 is as operationally restrictive, or whether it was open to the learned judge to set a higher range of sentence, if she found that the evidence proved this case to fall in the more serious category of manslaughter where harm was intended. I find that there is sufficient importance in the call for the Court of Appeal to review and clarify the true boundaries of section 64 in this context.

34. If the Court of Appeal finds that it was indeed open to the learned judge to properly consider the range of sentence appropriate for manslaughter cases where harm was intended, the question as to whether the evidence proved such an intention will also arise. I find the evidence of the Respondent's aggressive and dangerous chase of the deceased, coupled with his numerous verbal remarks which started immediately following the fatal collision, to provide a sufficient foundation for an argument that the evidence proved an intent to cause harm.

Conclusion

35. For these reasons, the Crown's application for leave to appeal sentence is granted.

DATED this 5th day of February 2018.

Signed

SHADE SUBAIR WILLIAMS
REGISTRAR OF THE COURT OF APPEAL