SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.7 OF 2005

BETWEEN:

KENNETH SAMUEL

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal

Appearances:

Ms. Nicole Sylvester for the Appellant
Mr. Colin Williams, Director of Public Prosecutions [Ag.] for the Respondent

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2005: October 10;
November 28.

JUDGMENT

[1] BARROW, J.A.: At the conclusion of the hearing we allowed the appeal against the sentence of twenty-five years imprisonment for manslaughter and substituted a sentence of seven years imprisonment to begin to run from the date of the appellant's remand. These are the reasons for that decision.

A $10.00 dispute

[2] The appellant was convicted on his plea of guilty of manslaughter for killing his work mate and good friend, Mwatta Wynne. It is possible to synthesize the different versions, given by the appellant at various times, of what led up to the

homicide. On 22nd April 2004 the deceased sent his girlfriend to borrow $10.00 from the appellant. Later that day the appellant requested repayment and some words were exchanged. On one version of events the appellant said the deceased used a 'whole set of bad words' to the appellant. On another version some bantering occurred and remarks were made about the deceased's girlfriend. The appellant said that while his back was turned the deceased struck him with a pipe. On the version relied on by the appellant the deceased hit him at the back of the neck and the appellant reacted involuntarily by delivering three blows with a cutlass which he had been holding to do some work. The appellant said he did not know where the blows caught the deceased. The appellant ran out of the storeroom, drove to a friend and told him what he had done. He told the friend he was going to the police, which he did and he gave a statement to the police.

[3] A psychiatric evaluation was made of the appellant and a report was furnished. The psychiatrist testified at the sentencing hearing. The psychiatrist reported that the appellant told him that after the sudden blow to the back of the neck he could not recall anything that happened until he could understand that he was in the police station. The prosecution questions the veracity of this account since in the statement the appellant gave to the police shortly after the homicide he was able to state what he had done.

[4] The psychiatrist stated in his report:

> "It may be prudent to mention that any sudden blow with a blunt instrument or even by fist, on the back of the neck or head may cause a nervous reflex to make the person confused suddenly and temporarily. In that temporary confused state, the person may act totally irrationally and may have temporary amnesia about his act.'

[5] In oral testimony the psychiatrist expatiated on how a blow can affect the autonomic nervous system, which is the nervous system that automatically starts working when a person gets angry and makes him lose control. He said:

> "Usually a blow in the back hit the frontal lobe of the brain to the spine and a lot of experiment has proved that frontal lobe is the area which when it is

> irritated in any way or disturbed in any way, it causes a lot of violent and irrational acts which cannot be explained."

The psychiatrist further explained,

> "the appellant may have had a temporary confusional condition, temporary confusional state produced by the impact and at that moment most probably he was not in full control because of the nervous effect that was generated by the impact." [1]

Sentencing in the High Court

[6] The judge stated that what he found "very aggravating" was the viciousness of the appellant's reaction and the fact that the accused did not chop the deceased once; he chopped him three times. The fatal blow, inflicted with very severe force, the judge found, was a 9 cm chop wound to the left lateral aspect of the neck that cut the jugular veins and carotid arteries.

[7] Among the mitigating factors that the judge identified was the appellant's ready plea of guilty to manslaughter. In the judge's view this automatically earns a remission of one third of the maximum sentence. The maximum sentence for this offence is life imprisonment, the judge reminded himself, and for having pleaded guilty the judge remitted one third of a sentence of life imprisonment.

[8] A second mitigating factor on which the judge relied was the fact that the appellant had no previous conviction and had been a person of good character. Evidence was given that the appellant had been of very good character, very caring, loving, friendly, in good employment and a family man with a wife and five children. The judge commented that the appellant had everything going for him. The judge

[1] It does not appear that the psychiatrist was informed that the appellant made a statement to the police in which he told them that he had chopped the deceased with a machete that he had been holding. This is unfortunate because it may have made a difference to the view that the psychiatrist took of the appellant's reported 'total amnesia' which may have helped to persuade the psychiatrist that it had been preceded by the loss of control to which the psychiatrist spoke.

stated that he was remitting another portion of the maximum sentence because of the appellant's good character.

[9] The fact that the appellant cooperated with the police from the outset and never gave any trouble also weighed with the judge. The appellant was accepted by the judge as obviously remorseful, in a state of confusion, and aware that he has killed one of his best friends and a close working mate over a paltry sum of ten dollars.

[10] The judge also considered the fact that the deceased had attacked the appellant. The judge adverted to the discrepancy in the different accounts by the appellant as to where he had been hit; on the back, which could not have resulted in the autonomous nervous response, and on the neck, which could have resulted in the uncontrolled, irrational response. The judge resolved the doubt in favour of the appellant. In doing so the judge was undoubtedly correct as the principle in criminal trials is that the accused must be given the benefit of the doubt. It must therefore be accepted as the fact that the appellant was hit on the back of the neck and suffered the loss of control of which the psychiatrist spoke.

[11] On the appeal against the sentence counsel for the appellant argued that the judge had been driven to imposing an excessive sentence by comments that had been made by a local radio station about the case. The judge began his sentencing remarks by stating:

> "I have also taken into consideration everything contained in the report by [the psychiatrist] and I wish to state here to disabuse the minds of certain persons who have been questioning my asking for a psychiatric report. I wish to say that [the psychiatrist's] report was very necessary and mandatory in the circumstances. The psychiatric report is mandated by the Court of Appeal and the Privy Council in situations such as this. But you see we have been attacked seriously by one radio station all this week. I just wish to point out that what we are doing is mandatory especially counsel pointing out right from the word go that certain situations created certain mental positions in the accused mind before he committed the crime."

Later in his remarks the judge noted:

> "this is one of the crimes that shook this country – the viciousness of it and the fact that it involved two workmates who hitherto had a very good relationship over a paltry sum of $10.00."

Principles of sentencing

[12] Public comment on the performance of the courts is desirable and criticism of judicial decisions is healthy. But criticism must be fair. For criticism to be fair it must be informed. Any criticism of a sentence that is based on supposed facts that were never stated to the court is unfair. So is criticism that ignores facts that were placed before the court. A judge can sentence only on the basis of evidence placed before him in court. What commentators may 'know' or think they know cannot be used to criticize a sentence that a judge has imposed based on what was stated in court.

[13] In addition to getting the facts right before criticising, the public need to know that sentences are imposed by reference to established principles. Retribution, deterrence, prevention and rehabilitation[2] were adopted by Byron C.J. as the classical principles of sentencing in a particularly helpful judgment given by this court in eleven combined appeals against sentences from this very circuit.[3] The Chief Justice's discussion of these principles requires reproducing.

> "Retribution
> "Retribution at first glance tends to reflect the Old Testament biblical concept of an eye for an eye, which is no longer tenable in the law[4]. It is rather a reflection of society's intolerance for criminal conduct. Lawton LJ stated at page 77 that:
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> > "…society through the courts, must show its abhorrence of particular types of crimes, and the only way the courts can show this is by the sentences they pass."

[2] Identified as the classical principles of sentencing by Lawton LJ in R v Sargeant 60 Cr. App. R. 74 at 77.
[3] St. Vincent Criminal Appeal No.8 of 2003, Desmond Baptiste v The Queen
[4] R v Sargeant (Supra)

"Deterrence
"Deterrence is general as well as specific in nature. The former is intended to be a restraint against potential criminal activity by others whereas the latter is a restraint against the particular criminal relapsing into recidivist behaviour. Of what value however are sentences that are grounded in deterrence? Specific deterrence may be an ineffective tool to combat criminal behaviour that is spontaneous or spawned by circumstances such as addictions or necessity. Drug and alcohol addiction as well as need may trigger high rates of recidivism. Experience shows that general deterrence too is of limited effect. These sentences tend to lose their potency with the passage of time.

"Prevention
"The goal here is to protect society from those who persist in high rates of criminality. For some offenders, the sound of the shutting iron cell door may have a deterrent effect. Some however never learn lessons from their incarcerations and the only way of curbing their criminality is through protracted sentences whose objective is to keep them away from society. Such sentences are more suitable for repeat offenders.

"Rehabilitation
"Here the objective is to engage the prisoner in activities that would assist him with reintegration into society after prison. However the success of this aspect of sentencing is influenced by executive policy. Furthermore, rehabilitation has in the past borne mixed results. Of course sentencing ought not to be influenced by executive policy such as the availability of structured activities to facilitate reform."

The application of the sentencing principles

[14] A consideration of these principles shows that they are of limited or no applicability to the case of the appellant. The appellant must be given the benefit of the testimony from the psychiatrist that the blow to the appellant's neck sent him into a confusional state in which he lost his self-control. On this footing there can be no element of prevention in the punishment since prevention is to prevent the particular wrongdoer from repeating his crime. Prevention is an appropriate consideration in the case, for example, of a defendant being sentenced for burglary who has, say, nine previous convictions for burglary and theft. In the case of the appellant his actions were spontaneous, uncontrollable and not likely to be

repeated so there is no need to prevent him from returning to society for fear that he would be likely to commit another offence.

[15] It is unclear to what extent the aim of deterrence can be served in sentencing the appellant. A spontaneous and uncontrollable reaction does not lend itself to being deterred either in the offender or in others. One is left to wonder how far removed the appellant's case is from the usual case of which Shaw LJ spoke in Bancroft[5] in these words:

> "Notwithstanding that a man's reason might be unseated on the basis that the reasonable man would have found himself out of control, there is still in every human being a residual capacity for self-control, which the exigencies of the given situation may call for. That must be the justification for passing a sentence of imprisonment, to recognize that there is still left some degree of culpability …"

In the instant case the evidence of the psychiatrist indicates a clear scientific basis for doubting how much residual capacity for self-control the appellant had in the particular circumstances or, indeed, whether the appellant had any. A person so affected must logically be liable to a lesser sentence of imprisonment because of the lesser degree of culpability. Indeed, the closer to lack of culpability a defendant comes the closer he comes to being considered for a non-custodial sentence.

[16] As regards rehabilitation, one does not get any sense that there is any need to rehabilitate the appellant; the material placed before the judge indicated that he was well placed and adjusted in the society and prison will do nothing positive for him.

[17] Retribution, in the sense of showing society's abhorrence of this killing, seems to be the only meaningful element that can go into punishing the appellant. How much community abhorrence is it reasonable to ascribe to a killing of this type if the community is treated, as it must be treated, as basing its reaction on the facts that were before the court? The community must be given credit for being fair-

[5] (1981) 3 Cr. App. R. (S) 119 at 120.

minded and therefore for appreciating that there are degrees of culpability in criminal wrongs. The community's abhorrence for a killing will necessarily be greater or lesser according to the surrounding circumstances. It is for this reason that there are instances where a non-custodial sentence is handed down for manslaughter: the clear example is manslaughter by negligence, which will generally not attract a sentence of imprisonment. The community's shock at this killing must be separated from its desire for retribution once the facts are known. The community's reaction to the killing must be ascribed based on the facts that were before the court and on that basis I am satisfied that the court must vindicate the community's abhorrence for this killing by imposing a deserved rather than an extreme sentence.

Guidelines for sentencing

[18] In the application of these sentencing principles guidelines have been developed that assist a sentencing judge in arriving at a sentence that is deserved, which is to say a sentence that is fair both to the convicted person and to the community, including the family and friends of the victim. A principal guideline is that there must be consistency in sentences. Where the facts of offences are comparable, sentences ought to be comparable, if rationality is to be served. The objective of consistency has led to the emergence of ranges of sentences. In England, for example, it is established that the range of sentences for manslaughter committed after provocation is between three and seven years imprisonment.[6] The particular facts of a case will determine where in the range the sentencer will come down; thus, an offender who had some time to regain self-control after provocation will attract a heavier sentence than the offender who had no time to regain self-control. An offender who delivers one blow in response will deserve a lesser sentence than one who delivers multiple blows. The weapon used and how likely it was to be lethal may be another factor in determining degrees of culpability and therefore severity of punishment. Similarly, an offender who has a criminal record will not

[6] See Blackstone's Criminal Practice 2005 at B 1.31

get as much of a reduction from the starting sentence as one who has no criminal record and is widely regarded in his community as a good and caring person. These examples are illustrative and not exhaustive.

[19] In St. Lucia, according to Hariprashad-Charles J in R v Trudy Edward[7], there is a benchmark of fifteen years' imprisonment for manslaughter but, the judge noted, circumstances will sometimes require a departure from the benchmark. The judge cited two Saint Lucian cases in both of which sentences of fifteen years' imprisonment had been imposed and this court reduced the sentences to ten years' imprisonment.[8] In the Trudy Edward case the judge imposed a sentence of seven years' imprisonment on a young female offender who fatally stabbed another young woman who had accosted the offender and had challenged the offender to stab her.

[20] The reference to a benchmark underscores the point that the starting point in imposing a sentence is not necessarily or even usually the maximum penalty. As a matter of reasoning the maximum penalty must be appropriate only for the worst cases. However much the instant case may have shocked the public it is clear that this case does not fall into the category of worst cases. The judge, therefore, erred in premising his sentencing exercise on a starting sentence of life imprisonment. The judge, instead, should have started with a sentence of, say, fifteen years' imprisonment and applied the remission that he found appropriate of 1/3 for a guilty plea to that figure. The further reductions that the judge found appropriate - for the appellant cooperating with the police, for his remorse, for his very good character and because he had been provoked - should also have been made from the benchmark sentence instead of from a sentence of life imprisonment.

[7] St. Lucia High Court Criminal Case No. 56 of 2003 at paragraph 7.
[8] St. Lucia Criminal Appeal No 1 of 2000, Frederick Jackson v R (unreported) and St Lucia Criminal Appeal No. 4 of 2002, Janice Hamilton Jones v R (unreported).

[21] It was on the basis of this approach that this court arrived at a sentence of 7 years' imprisonment.

Denys Barrow, SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal